The UN guiding principles on business and human rights as an evolving regime: their contribution to international investment law and arbitration

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INTRODUCTION

For some years, while working at the European Inter-University Center for Human Rights and Democratisation (EIUC, today Global Campus of Human Rights) in Venice, Italy, the author of this essay has had the honour of discussing with Professor Florence Benoît-Rohmer the complex relationship between Transnational Business and Human rights. This topic has been inspired by her (including her critical views) and entered my research agenda since the year 2000, well before the drafting of the UN Guiding Principles on Business and Human Rights (hereinafter UNGPs) leading me to some publications including the course that I delivered at The Hague Academy of International Law[1] by invitation of its Curatorium President,

(1) See F. Marrella, "Protection internationale des droits de l'homme et activités des sociétés transnationales", *RCADI*, t. 385, 2017, pp. 33-435.

Boutros Ghali. For many decades, the issue of regulation of multinational business has been in the research agenda of International Economic Law scholars especially in the aftermath of Second World War.(2) At the same time, scholars of International Human Rights Law showed, until recently, little or no interest on the matter. Even in Europe, conflicting policies, lobbying, dogmas and ideologies have not helped to solve this puzzle and a proper regulation mix is still under discussion.(3)

Indeed, the UNGPs are a turning point in the history of Business and Human Rights even if they have some strengths and weaknesses. When, during a symposium in Brussels, I asked prof. John Ruggie, the UNGPs main drafter,(4) why there was a gap on international investment law and arbitration, he told me that the UNGPs as an "evolving framework" would ultimately have an impact on that. But what kind of impact can a soft law instrument such as that of the UNGPs have on the actual practice of International Investment Law?

Before answering to that question, I will anticipate at this stage that Professor Benoît-Rohmer's vision of the progressive development of the international legal system as a peaceful and democratic process where human rights are placed at its zenith is the key for understanding a peculiar aspect of contemporary International Law.(5)

International Investment Law and International Human Rights Law share a long common history.(6) Suffice it to say that Article 2 of the *Déclaration des Droits de l'Homme et du Citoyen de 1789:*

> "*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression*."

At the same time, at Article 17, the French Declaration indicates that:

> "*La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité*."

(2) See *e.g.* D. Carreau, P. Juillard, A. Hamann and R. Bismuth, *Droit international économique*, 6th ed., Paris, Dalloz, 2017.

(3) F. Marrella, "International Investment Arbitration and EU reform projects for appellate mechanisms: some critical remarks", in F. Marrella and N. Soldati (eds), *Arbitrato, Contratti e Diritto Del Commercio Internazionale/Arbitration, Contracts And International Trade Law. Essays in honour of Giorgio Bernini*, Milan, Giuffrè-FLV, 2021, pp. 511 ff.

(4) See his views on the matter in J. Ruggie, *Just Business*, New York, Norton, 2013.

(5) On which see D. Carreau, A. Hamann and F. Marrella, *Droit international*, 13rd ed., Paris, Pedone, 2021.

(6) See *e.g.* F. Marrella, "Protection internationale des droits de l'homme et activités des sociétés transnationales", *op. cit.*, pp. 33-435 ; R. Dolzer, Ch. Schreuer and U. Kriebaum, *Principles of International Investment Law*, 3rd ed., Oxford, OUP, 2022, Ch. 1.

I could end my essay here since all has already been said in those two articles of the *Déclaration*. Yet, even today, the entire debate about the relationship between International Investment Law and International Human Rights still rotates around those two key issues. Notwithstanding a common intellectual root, International Investment Law(7) and International Human Rights(8) have historically developed mostly in isolation and with separate legal tools.

International Investment Law has developed mostly for the protection of (foreign) property, "*il terribile diritto*" as Stefano Rodotà used to call it,(9) a right which is listed among human rights even in the 1948 Universal Declaration of Human Rights:

> "Everyone has the right to own property alone as well as in association with others.
>
> No one shall be arbitrarily deprived of his property."(10)

Rather, it cannot be overlooked that, thanks to the development of specific treaties for the treatment and protection of investors and investments, some host States policies have been challenged as far as they infringed legitimate property rights of a treaty-protected foreign investor, prompting investor-state proceedings. Hence if the dimension of Article 2 of the *Déclaration des Droits de l'Homme et du Citoyen de 1789* has been effectively realised in International Law, the dimension of Article 17 is still evolving and it is irrigated by International Human Rights Law.

As recently as the late 1990s, "there was no recognition that companies had human rights responsibilities."(11) Therefore, the UNGPs are the point of arrival of a debate spanning almost a century.

Human rights often will be engaged in the context of investment disputes, especially when disputes concern issues like equitable land reform, aboriginal rights, access to water or access to a clean environment. Hence,

(7) See *e.g.* D. Carreau, *V°Investissement*, in *Enc. Jur. Dalloz*; Ch. Leben (dir.), *Droit international des investissements et de l'arbitrage transnational*, Paris, Pedone, 2015, *Introduction* ; A. De Nanteuil, *Droit international de l'investissement*, 3rd ed., Paris, Pedone, 2020, p. 15.

(8) See *e.g.* F. Gomez Isa and K. de Feyter (eds), *International protection of human rights: achievements and challenges*, Deusto, 2006 ; H.J. Steiner, Ph. Alston and R. Goodman, *International Human Rights in Context : Law, Politics, Morals*, Cambridge, CUP, 2008, Ch. 1 ; R. Pisillo Mazzeschi, *Diritto internazionale dei diritti umani. Teoria e Prassi*, Torino, Giappichelli, 2020, Ch. 1.

(9) S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni*, 3rd ed., Bologna, Il Mulino, 2013.

(10) Art. 17 of the UDHR. See also the Preamble and Art. 2.

(11) J.G. Ruggie, "The Social Construction of the UN Guiding Principles on Business & Human Rights", HKS Faculty Research Working Paper Series RWP17-030, 12 June 2017 at https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights.

the Investor-State Dispute Settlement system has often been viewed by its critics as an advantage only for big corporate investors, being characterized by a structural imbalance between the rights of host States and investors.(12) But even this statement is an oversimplification of the economic reality where hundreds of SMEs may become hostage of authoritarian or corrupted regimes once established in the host country: that is why we need International Investment Agreements (hereinafter IIAs). Big corporations can live well without most investment treaties since they can enter State contract directly with the host State Government and threaten it to abandon the country leaving thousands of workers unemployed and destroy its investment-friendly reputation.

All in all, the current regime is gradually evolving by fine tuning both the protection of investors' rights and the regulatory space of States, in view of a common achievement of sustainable development objectives.(13) And this is a big improvement.

The UNGPs have emerged as a critical framework to regulate both States and investor accountability for business-related human rights harm.

To this end, this essay will begin by considering the UNGPs as a dynamic regulatory regime affecting investments in Section I. Section II will highlight the different gateways through which International Human rights Law interacts with International Investment law as evidenced by arbitration practice. Section III will consider the evolving regime.

I. THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AS AN EVOLVING REGULATORY REGIME

The UNGPs, unanimously endorsed both at the intergovernmental level by the UN Human Rights Council in 2011 as well as at the transnational business level at the International Chamber of Commerce (ICC), are a set of principles seeking to offer a global standard for preventing and remedying the adverse human rights impacts arising from business activities.

(12) See among others, H. Muir Watt, "The contested legitimacy of investment arbitration and the human rights ordeal", in *International arbitration and global governance: contending theories and evidence*, Oxford, OUP, 2014, pp. 214-239.

(13) See *e.g.* J.E. Alvarez, *The Boundaries of Investment Arbitration – The Use of Trade and European Human Rights Law in Investor State Disputes*, JurisNet LLC, 2018; B. Beaumont, A. Foucard and F. Brodlija (eds), *International Arbitration: Quo Vadis?*, Kluwer Law International, 2022.

The new framework offered by the UNGPs goes beyond the business practice of corporate philanthropy or even Corporate Social Responsibility (CSR).(14) The difference is that, while CSR emphasizes responsible behaviour through self-regulation,(15) the UNGPs focus on a more structured commitment and a "smart" regulatory mix in the area of human rights.(16) The UNGPs offer a logical and structured framework for corporate operations, including CSR, and they even demand business to offer remedies for human rights victims.(17)

While CSR relies on corporate initiative and often is linked to a personal credo of the CEO, the UNGP strive for the imposition of a new mix of legal requirements, where business self-imposed voluntary measures become a part of a bigger regulatory package in fine tuning with the home State control and the host State Law of the investment.

The UNGPs comprise three pillars each one containing core principles. Pillar I focuses on the State and its duty to protect human rights both at the vertical and at the horizontal level.(18) Pillar II focuses on the corporate responsibility to respect human rights and Pillar III focuses on access to remedies for business-related human rights harms. Pillar II provides that:

> "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impact with which they are involved."(19)

The UNGPs are soft law(20) and therefore do not impose directly specific legal obligations on corporations. Nor, under their Pillar II, they directly provide the basis for corporations' liability: as Prof. John Ruggie – a political scientist, not a lawyer himself – the UNGPs key drafter explained, the "responsibility to protect" is intended to be a societal expectation rather than a legal liability.

(14) A. Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights : Bridging the Gap Between Responsibility and Accountability", *Journal of Human Rights*, 2015, p. 237.

(15) See for a critical view A. Supiot, *L'entreprise dans un monde sans frontières: perspectives économiques et juridiques*, Paris, Dalloz, 2015.

(16) J. Ruggie, "The Evolving Regulatory Ecosystem for Business and Human Rights", in *OECD Guidelines for Multinational Enterprises: a glass half full: a liber amicorum for Dr. Roel Nieuwenkamp*, OECD, Paris, https://www.oecd.org/investment/mne/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.pdf.

(17) See, *inter alios*, DG for External Policies, Access to legal remedies for victims of corporate human rights abuses in third countries (European Parliament 2019).

(18) On this distinction see *e.g.* F. Sudre, *Droit européen et international des droits de l'homme*, 16th ed., Paris, PUF, 2023.

(19) Guiding Principles on Business and Human Rights, Art. 11, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

(20) D. Carreau, A. Hamann and F. Marrella, *Droit international*, 13rd ed., Paris, Pedone, 2021, p. 247.

Nevertheless, being a "global authoritative standard on business and human rights" the UNGPs have already been transformed into hard law into the domestic law of some States.

And that is a concrete contribution since in many countries, adequate human rights, environmental concerns and legal protections are absent. Other States are simply unwilling or unable to enforce human rights because there is a competition of legal systems to attract foreign investors and prescribing human rights obligations does not look like as an incentive if the market is unregulated at the global level(21)

Herein lies the practical importance of UNGPs Pillar II's prescription of an unconditional "duty to respect" human rights – one that is independent of State behaviour.

The Business and Human Rights landscape continues to evolve rapidly, driven largely by the range of measures aimed at enforcement of the UNGPs. Since their endorsement, there has been a progressive governmental implementation of the UNGPs by calling for the development of National action plans (NAPs)(22) while, in parallel, the International Chamber of Commerce (ICC) has actively supported economic operators in scaling up business implementation of the UNGPs. As I sat for a number of years in the relevant ICC Policy Commission, I have witnessed the success of the UNGPs among business operators.

The proposed "smart mix" of mandatory and voluntary measures, is growing in a number of jurisdictions (such as the UK, Australia and the Netherlands, and in Canada and Switzerland). The German Act on Due Diligence in Supply Chains (*Lieferkettensorgfaltspflichtengesetz*, «LkSG») came into force on 1st January 2023 and imposes new obligations for supply chain due diligence. The France's Duty of Vigilance Law,(23) requires French companies of a certain size to prepare annual vigilance plans detailing the steps taken to safeguard against human rights and environmental violations.

At the same time, SMEs have expressed concerns about the burden of additional regulatory requirements and the extent of liability. More regulation sometimes is a subtle policy tool helping big companies who

(21) Columbia Center on Sustainable Investment (CCSI), "Investment Arbitration and Human Rights" (CCSI), http://ccsi.columbia.edu/work/projects/investment-arbitration-and-human-rights/.

(22) See a global compilation at https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights.

(23) Loi No. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

have the resources to navigate in the new scenario while at the same time putting competing SMEs out of business. Hence, while fine tuning the Business&Human Rights regime, Governments should keep in mind that one size does not fits all and that in sharing global best practice, support (including training) for SMEs is required.

The European Union has worked intensively to table legislation making environmental and human rights due diligence mandatory. On 23 February 2022, the European Commission presented a legislative proposal for a Directive on Corporate Sustainability Due Diligence Directive.(24) In essence, the Directive requires certain companies to meet due diligence standards with respect to human rights and environment and provides for an enforcement mechanism with possible sanctions and civil liabilities for non-compliance. On 1st December 2022, the European Council formally adopted its negotiating position ("Council's General Approach") on this act. The Directive will apply to both to large EU companies and to non-EU companies active in the EU. The European Parliament is due to adopt its final position in May 2023 and it is expected that a final text will be agreed between the three Institutions later in 2023. The Directive will help the EU to transition towards a more climate-neutral and green economy as described in the European Green Deal and the UN Sustainable Development Goals.

On the global level, while we are writing, negotiations also continue towards a global *UN treaty on business and human rights* that would require Contracting Parties to impose legally binding obligations on corporations in the human rights arena. But it remains to be seen if such rules are part of the applicable law in an investment arbitration.

All in all business corporations are well advised to fully integrate human rights issues into their policies, investment decisions and operations. By now, human rights issues have entered into the realm of Investment arbitration.

(24) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

II. THE CONTRIBUTION OF INVESTMENT ARBITRATION TO REALIZING THE UNGP: MAPPING THE ISSUES

Investment arbitration is a transnational form of justice.[25] The introduction in that setting of a public set of norms – human rights – may seem *revolutionary* in International Law.[26] International human rights laws aspire to provide human beings within alienable rights beyond the rights traditionally associated with citizenship – a feature that makes human rights capable of protecting the individual against their own State.

Yet, if one looks at the *Metalclad case*,[27] the result achieved by a distinguished set of arbitrators may be quite disappointing. In this case, the arbitration tribunal held in favour of the investor against the Mexican government that blocked its project to build a hazardous waste landfill, despite the series of potentially ensuing environmental and human rights damage.[28]

Metalclad is, however, a stepping stone in the thinking about human rights issues in the investment arbitration context and there is no doubt that in recent years, a better and more developed global awareness of human rights issues has prevailed. Hence, investment tribunals and legal scholars have increasingly grappled with references to human rights principles.

Such a trend has clearly emerged in the famous *Philip Morris v. Uruguay*[29] which is among the prime examples of cases that has provoked significant public debate over the critical implications of investor-state dispute settlement and investment treaties. In this case, Uruguay anti-smoking policy measures were challenged through an investment arbitration

(25) See IDI, *Resolution adopted by the Institute at its Tokyo Session 13 September 2013: Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties*, Rapporteur: Andrea Giardina.

(26) A. Cassese, *Diritto internazionale*, a cura di M. Frulli, Bologna, Il Mulino, 2021, pp. 201 ff. ; P.M. Dupuy, F. Francioni and E.U. Petersmann, *Human Rights in International Investment Law and Arbitration*, Oxford, OUP, 2009.

(27) ICSID, 30 August 2000, *Metalclad Corporation v. United Mexican States*, Case No. ARB(AF)/97/1, Award. The arbitrators were: Prof. Sir Elihu Lauterpacht, QC, CBE (President); Mr. Benjamin Civiletti (claimant appointee) and Mr. Jose Luis Siqueiros (respondent appointee).

(28) There were two separate Government measures. The first was a denial of permit to operate a hazardous waste disposal facility in the village of La Pedrera, Municipality of Guadalcazar, in the Mexican state of San Luis Potosi. The second measure was a State-level act that essentially converted the property into an ecological reserve, taking all private use rights away from Metalclad, i.e. the claimant.

(29) ICSID, *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Case No. ARB/10/7.

by the multinational Philip Morris, asking for compensation of damages. In a majority decision, the arbitration tribunal[30] dismissed all the claims made by Philip Morris and upheld the legality of the two tobacco control measures enacted by Uruguay for the purpose of protecting public health. The tribunal accordingly ordered Philip Morris to bear all arbitral costs and to pay Uruguay USD 7 million as partial reimbursement of the country's legal expenses.

Therefore, even if criticism about IIAs is always welcome[31] one should be careful not to throw the baby out with the bath water. Because, especially today, the voice of anti globalists is growing bigger and bigger together with conspiracy theories that produce a push towards nationalism. But nationalism has never been a friend both of International Human Rights and, of Investment arbitration.

In current practice, another turning point from the *Metalclad* approach is offered by *Phoenix v. Czech Republic*[32] where the arbitrators articulated a limit to investor protection where "the most fundamental rules of protection of human rights," are at stake, like investments made "in pursuance of torture or genocide or in support of slavery or trafficking of human organs."

Accordingly, and in light of recent cases, International Investment litigation reveals that human rights issues may intervene today at different stages of the arbitration proceedings.

First, human rights issues may arise at the *admissibility stage* (A), forcing the arbitrators to define the scope of their jurisdiction. Secondly, after the arbitration has started, one of the parties, typically the State, may invoke human rights violations of the investor as a counterclaim (B).

Third, there should be no doubt that procedural human rights are also part of the applicable law to arbitration procedure, the *lex arbitri* (C). Hence, it is fashionable to speak today about a due process paranoia to highlight the risk of annulment of the arbitration award.

(30) The arbitrators were : Prof. Piero Bernardini (President), Prof. James Crawford (respondent appointee) and Mr. Gary Born (claimant appointee). Born issued a dissenting opinion.

(31) See for a critical analysis of corporate powers: J. Bakan, *The Corporation: The Pathological Pursuit of Profit and Power*, Free Press, 2004 : *Id.*, *The New Corporation: How "Good" Corporations are Bad for Democracy*, Vintage, 2020.

(32) ICSID, 15 April 2009, *Phoenix Action Ltd v. The Czech Republic*, Case No. ARB/06/5, Award, p. 78.

These features add on to more classic Human rights gateways in Investment arbitration proceedings such as *amicus curiae* participation (D) or contributory negligence in calculation of damages (G). And further gateways for human rights analysis have become the interpretation of "in accordance with Host State Law" clause (E), as well as denial of benefits clauses (F) in IIAs.

A. Admissibility of claims

The first gateway between international investment law and human rights, may be found in objections to a tribunal's jurisdiction or the admissibility of claims. Investment arbitration tribunals like all international tribunals must decide issues for which they have jurisdiction. Such a short and obvious statement explains why investment arbitrators have rarely considered the investor's liability for human rights harm: investment arbitrators are not, simply put, Human Rights Courts. Nor they have general jurisdiction. The dominant view of practitioners and many scholars is that investment tribunals are entitled to decide exclusively claims of breaches of the legal instrument over which they have jurisdiction.(33)

But it is equally true that an Arbitration Tribunal's competence to consider human rights arguments is legally grounded if the applicable law to the specific investment agreement allows for that and as far as the parties raise legal arguments based on human rights. Since International Law is the applicable law in most investment arbitrations, it is clear that the door is wide open, including for *jus cogens* considerations as part of International Customary Law.

Arbitration Tribunals have nonetheless recently accepted jurisdiction over human-rights based counterclaims, through allegations of investor's infringements of human rights or through state defences based on its sovereign right to regulate in the protection of human rights even to the detriment of foreign investors.

(33) See for an overview: B. Simma, "Foreign Investment Arbitration: A Place for Human Rights?", *ICLQ*, 2011, p. 573. In *Rompetrol v. Romania* (ICSID, 6 May 2013, Case No. ARB/06/3, Award, § 172), the arbitrators rightly held that: "much of the detailed argument about the application of specific provisions of the ECHR in the jurisprudence of the European Court of Human Rights, interesting and illuminating as it has been, is beside the point when it comes to the issues under the Netherlands-Romania BIT which form the subject of the dispute before the Tribunal."

B. Counterclaims

So far States as respondents in arbitral proceedings can file, treaty-permitting, counterclaims in response to a primary claim filed by the private investor. Counterclaims allow host States to respond to legal action against them by challenging the investor's wrongful conduct for alleged breaches of human rights standards such as gross violations of environmental rights and social rights.

However, the integrity of the arbitral process demands that, when advancing a human rights counterclaim, the defendant State's prospects of success should be clearly assessed. Such a counterclaim still faces significant hurdles in relation to jurisdiction and admissibility depending on the applicable IIA and in a worst-case scenario, it might be used as a subtle guerrilla arbitration tactic(34) and recognized as such by arbitrators.

In a number of so-called Argentina cases, the State claimed that it acted to protect its citizens' human rights, which were allegedly imperilled by economic crisis, in defending against investors' claims and relied specifically on the *human right to water* for its defence.(35) The response by different arbitration tribunals has been inconsistent and rather confused but this experience opened up new avenues for better understanding how to frame in practice the relationship between international investment law and human rights.(36) Of course, the trend towards human rights does not amount to rubber stamp any argument allegedly based on them.

In the leading case *Urbaser v. Argentina*,(37) the Arbitration tribunal accepted jurisdiction over Argentina's counterclaim that Urbaser had breached the human right to water, dismissing the investor's argument that the observation of its human rights responsibilities fell outside the scope of the tribunal's jurisdiction. The scenario here was that of a

(34) See in general G.J. Horvath and S. Wilske (eds), *Guerrilla Tactics in International Arbitration*, Kluwer Law International, 2013.

(35) See F. Marrella, "On the Changing Structure of International Investment Law: the Human Right to Water and ICSID Arbitration", in *International Community Law Review*, 2010, pp. 335-359 as well as P. Mayer, "Les arbitrages CIRDI en matière d'eau", in SFDI, *L'eau en droit international*, Paris, Pedone, 2011, pp. 163-183. See ICSID, *Sempra Energy International v. Argentine Republic*, Case No. ARB/02/16, and ICSID, *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8. More specific on the human right to water is the award ICSID, *Azurix Corp. v. The Argentine Republic* (I), Case No. ARB/01/12.

(36) See *e.g.* J. Alvarez, *The Public International Law Regime Governing International Investment*, The Hague, Pocketbooks, 2011, pp. 260 ff.

(37) ICSID, *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Case No. ARB/07/26.

corporation which was a shareholder in a concessionaire for the distribution of water and servicing of sewage treatment in Buenos Aires as part of the country's water privatisation plans.

In the course of an investment claim brought by Urbaser in response to tariff changes imposed by Argentina, the defendant State maintained that Urbaser had failed to respect human rights by failing to provide the necessary minimum level of investment to ensure that the operations were successful and ensured the respect for the human right to water[38]. Argentina, thus, argued that the *concessionaire* in charge of the supply of water and sewerage services, to which Urbaser was a shareholder, failed to invest seriously in the supply of water but increasing its prices.

The arbitration tribunal,[39] presided by a Swiss Professor, Andreas Bucher, found itself competent to decide on the host State's counterclaim, having concluded that it was sufficiently linked to the facts of Urbaser's main claim to establish its jurisdiction.[40] In the Tribunal's view, Article X of the 1991 Spanish-Argentine BIT was sufficiently broad so as to include counterclaims by Argentina, even though the basis for its counterclaims was Human Rights Law, including the 1948 Universal Declaration of Human Rights. In particular, the Urbaser Tribunal observed that it is "to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."[41]

Then it stated that:

> "[T]he Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of May 23, 1969, and that Article 31 § 3 (c) of that Treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.' The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules

(38) ICSID, 8 December 2016, *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Case No. ARB/07/26, Award.

(39) The composition of the arbitral tribunal was the following: Pr. A. Bucher (President); P.J. Martínez-Fraga, (Appointed by claimant); Pr. I. Brownlie (designated by respondent) then replaced by C.A. McLachlan.

(40) §§ 1151-1155.

(41) *Ibid*., § 1199.

> of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights[42]."[43]

Even more interestingly, the Tribunal, in line with our International Law approach,[44] maintained that investors are granted rights under bilateral investments treaties (BITs) and, therefore, could be deemed subjects of international law.[45] At the same time, the Urbaser tribunal held that BIT-based investor-state arbitrations do not exist exclusively for the benefit of investors and disagreed that guaranteeing the human right to water is a duty that may be borne solely by the State.[46] It maintained that the principle "according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations" had "lost its impact and relevance."[47]

The tribunal consequently admitted "that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."[48]

The Urbaser award demonstrates that human rights-based counterclaims can potentially fall within the jurisdiction of investment tribunals and contribute to the fine tuning of treaty-based investment arbitration.[49]

At the same time, if human-rights based counterclaims are admissible in International Investment Arbitration, they can even act as a deterrent for human rights abuses as well as the abuse of the arbitration process.

(42) *Cf*. ICSID, Decision on Annulment of 30 December 2015, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID/ARB/11/28, §§ 86-92, where the *ad hoc* Committee refers to the "principle of systemic integration," stating that resort to authorities stemming from the field of human rights is a "legitimate method of treaty interpretation."

(43) Award *Urbaser*, cited above, § 1200.

(44) D. Carreau, A. Hamann and F. Marrella, *Droit international*, *op. cit*.

(45) *Ibid*., § 1193: "On a preliminary level, the Tribunal is reluctant to share Claimants' principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States' charge exclusively."

(46) *Ibid.*, §1189–1191.

(47) *Ibid.*, § 1194.

(48) *Ibid*., § 1199.

(49) E. Gaillard, "L'avenir des traités de protection des investissements", in C. Leben (ed.), *Droit international des investissements et de l'arbitrage international*, *op. cit*., p. 1040.

C. An investment "in accordance with host state law"

Many investment treaties contain provisions limiting the scope of the State's *offer of arbitration* to situations where the investment has been made "in accordance with host state law", and some tribunals have found that, absent such wording, there is even an implicit obligation upon investors to conduct their affairs lawfully – according to domestic law – in order to qualify for international investment substantive protections. An objection commonly raised by Governments is that the claimant procured the investment through corruption, or the investment was otherwise linked to corrupt activities.(50)

Be that as it may, there is today new wine in the bottle. For instance, in *Aven v. Costa Rica,* the applicable Free Trade Agreement required investors to comply with environmental measures taken by the host state (UNGPs Pillar I), which the tribunal considered as a sufficient legal ground for counterclaims for breaches of national measures. It follows that those national laws imposing requirements for businesses operating in the jurisdiction to respect human rights may well increase the scope for counterclaims.

As a result of UNGPs-inspired National Action Plans, the promulgation of national legislation requiring corporate compliance with human rights standards increases the potential for jurisdictional or admissibility-related arguments based on adverse human rights impacts associated with an investment. This is why host States should be guided by the UNGPs and guide investors throughout the life of investment projects since the investor's conduct has to be in line with respect for human rights applicable in the Host State. On a practical level, this topic has become so important that developing countries are well advised to adopt a National Action Plan and ensure that any issues are well documented. In this way, should a dispute arise, the necessary evidence can be used as a basis for a counterclaim.

(50) See, *inter multos*, A. Crivellaro, "Arbitrato internazionale e corruzione", *Rivista dell'arbitrato*, 2019, pp. 663-707.

D. Human rights in the Investment arbitration procedure

Human rights apply to arbitral proceedings *per se*, for example in relation to due process, the impartiality and independence of the tribunal. Since the choice of "voluntary arbitration"(51) represents a waiver of certain rights such as the right to a public hearing – for example under the European Convention of Human Rights – it is equally clear that to waive one's right to access to court in favour of private arbitral proceedings should not equate a waiver of the right to due process.

Human rights Courts, such as the European Court of Human Rights (ECtHR), exercise some supervision of the arbitrations related to their territorial jurisdiction and will ultimately enforce human rights that arise within the conduct of proceedings. Recently, in *BEG SpA v. Italy*,(52) the ECtHR found that one of the parties to an arbitration between two Italian power companies had suffered an infringement of its right to fair trial as guaranteed under art.6 of the European Convention on Human Rights (ECHR), because of a lack of objective impartiality of an arbitrator, Professor Natalino Irti, Emeritus of Private Law at the University Sapienza of Rome.(53) Since he had been top official and counsel of the parent entity of the applicant's opponent company, he had failed to disclose such old ties in the course of the arbitration proceedings, thus affecting his impartiality and independence.

The European Court held that "[a]rbitration clauses, which have undeniable advantages for the individuals concerned as well as for the administration of justice, do not in principle offend against the Convention"(54). However, a waiver of an ECHR right must be made "in a free, lawful and unequivocal manner." and attract "minimum safeguards commensurate with its importance."(55)

(51) The fact that resorting to arbitration implies a waiver of rights under Art. 6 has also led the ECtHR to distinguish between 'voluntary' and 'compulsory' submission to arbitration. In the latter case, there must be all the procedural guarantees of national courts.

(52) ECtHR, 20 May 2021, *BEG SpA v. Italy*, No. 5312/11, §§ 144-154.

(53) GAR, 21 May 2021 at https://globalarbitrationreview-com.peacepalace.idm.oclc.org/arbitrator-conflict-leads-human-rights-ruling. However, the Court of Human Rights declined to order the reopening of proceedings in Italy or to award BEG €1.2 billion in compensation, only granting the company €50,000 in non-pecuniary damages and costs.

(54) *BEG SpA v. Italy*, § 126. More generally see Ch. Jarrosson, "L'arbitrage et la Convention européenne des droits de l'homme", *Rev. arb.*, 1989, p. 573. See also IDI, *The Hague Resolution on the "Equality of Parties before International Investment Tribunals"*, 2019.

(55) § 127.

E. Human rights references in IIAs interpretation

The 2018 OECD Report on Societal Benefits and Costs of IIAs refers to an earlier 2014 OECD study which found that a mere 0.5 percent of 2,107 investment treaties contained human rights elements.(56) Moreover, these human rights references have been limited to treaty preambles.(57) Such a disappointing result should push Governments committed to the UNGPs to do more in the drafting of IIAs. Yet, one should not underestimate the potential of treaty interpretation as well as of *iura novit curia*. A case may thus be made to interpret such open-ended clauses(58) by taking into account such instruments as the UNGPs and the OECD Guidelines for Multinational Enterprises.

Tribunals have frequently drawn on international human rights treaties and jurisprudence when interpreting International Investment Law standards of treatment since there is a certain convergence at least for the facts at issue.(59)

In the famous *Yukos v. Russia* cases, for example, the tribunal underlined that it was not a human rights court but that it was "within the scope of the Tribunal's jurisdiction to consider allegations of harassment and intimidation as they form part of the factual matrix of Claimant's complaints that the Russian Federation violated its obligations under Part III of the ECT,"(60) in particular whether Russia in any way impaired by unreasonable or discriminatory measures the claimant's maintenance, use, enjoyment or disposal of its investment, or subjected the claimant's investment to measures having the effect equivalent to an expropriation.

In a similar vein, the tribunal in *Tecmed v. Mexico* drew on the jurisprudence of the ECtHR for its analysis of the proportionality between "the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."(61)

(56) K. Gordon, J. Pohl and M. Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD, 2014, p. 24.

(57) S. Steininger, "What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration", *Leiden Journal of International Law*, 2018, p. 33.

(58) Suffice it here to refer to the enlightning work by Ch. Perelmans and R. Vander Elst, *Les notions à contenu variable en droit*, Brussels, Bruylant, 1984.

(59) ICSID, *Mondev International Ltd. v. United States of America*, Case No. ARB(AF)/99/2; ICSID, *Saipem S.p.A. v. People's Republic of Bangladesh*, Case No. ARB/05/7; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, *ad hoc*, according to UNCITRAL Rules.

(60) PCA, 18 July 2014, *Yukos Universal Limited (Isle of Man) v. Russia*, Case No. 2005-04/AA227, Final Award, § 765.

(61) See ICSID, 29 May 2003, *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, Case No. ARB (AF)/00/2, Award, § 122 ; see also ICSID, 14 July 2006, *Azurix Corp v. Argentine Republic*, Case No. ARB/01/12, Award, §§ 311-312.

Tribunals have also drawn on International Human Rights Law in interpreting and applying norms invoked by states, such as the proportionality principle, the police powers doctrine, denial of justice and other public interest or regulatory-based exceptions and defences. The same can be seen at the crossroad between International Investment Arbitration and International Humanitarian Law.(62)

This means that, IIAs which formulate CSR provisions are less effective in driving investor's legal accountability for business-related human rights harms, given their reliance on corporate voluntarism by contrast to the stronger thrust of UNGPs inspired Business and Human Rights provisions.

F. Denial of benefits

Some Investment treaties are designed to limit the scope of investor's protection by means of treaty clauses making the treaty benefits conditional to certain facts. For example, such a clause would typically exclude mere "letterbox" or "shell" companies that do not make any contribution to their home State's economy from the protective scope of the relevant treaty. While tribunals have held that respondent States bear the burden of proving that the elements of a "denial of benefits" clause(63) have been satisfied, it is equally true that there is no standard content of such a clause. Therefore, States may insert denial of benefits clauses in their IIAs specifically tailored for human rights protection.(64) In this way, a conduct in violation of human rights by the investor may receive the sanction of the same treaty which is invoked.

Indeed, a number of States have terminated their existing treaties and are seeking to negotiate agreements with express provisions aimed at securing investors' respect for environmental, social and human rights norms in order to secure protection.

(62) See F. Marrella, *L'arbitrage d'investissement et les guerres*, IHEI-Paris II, Paris, Pedone, (in print) 2023.
(63) See L. Mistelis and C. Baltag, "Denial of Benefits Clause", in *Max Planck Encyclopedia of International Procedural Law*, Oxford, OUP, 2019.
(64) See *e.g.* Art. 35 of the 2022 Italian Model Bit.

G. Amicus curiae submissions

Amicus curiae briefs are the traditional gateway for human rights defenders to introduce in any International dispute settlement mechanism issues such as sustainable development, the environment, human rights and governmental policy.(65)

Today, *amici curiae* submissions are often made by NGOs, by individuals, and even international organizations such as the European Union. Amicus briefs on human rights must, however, relate concretely to the dispute. One of the key goals of amicus intervention for NGOs has been to ensure that tribunal decisions take into account human rights law obligations and/or take into account the perspective of rights holders impacted by the decision.

After long discussions,(66) the capacity for a third party to participate in an Investment Arbitration as *amicus curiae* has been recognized. Since 2006, this is already the rule under the ICSID Rules of Procedure for Arbitration Proceedings (in the current 2022 version see art.67 on Submission of Non-Disputing Parties) as well as in the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

As the tribunal in *Biwater v. Tanzania* made clear, the ICSID Arbitration Rules expressly regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (ICSID Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Therefore, participating in ICISD proceedings as amicus curiae involves two steps: first, the party seeking to participate as amicus must petition the Tribunal for leave to intervene as a "non-disputing party" ; and second, if the Tribunal grants the leave application, the amicus may file written submissions. Rule 37(2) of ICSID's Rules and Regulations governs both steps of the process.

Prior to examining whether or not an amicus submission fulfils the requirements as set out in Rule 37(2)(a) through (c), the Tribunal must consult both disputing parties involved in the proceeding. Rule 37(2) provides disputing parties with the opportunity to comment on a proposed amicus

(65) H. Ascensio, "L'amicus curiae devant les juridictions internationales", *RGDIP*, 2001, pp. 897-930; H. Ruiz Fabri and J.-M. Sorel, *Le tiers à l'instance devant les juridictions internationals*, Paris, Pedone, 2005.

(66) B. Stern, "Un petit pas de plus: l'installation de la société civile dans l'arbitrage CIRDI entre État et investisseur", *Rev. arb.*, 2007, pp. 3-43; G. Born, "Amicus Curiae Participation in Investment Arbitration", *ICSID Rev*., 2019, pp. 626-665.

curiae's request for leave to file a written submission; however, neither party has a veto right with respect to the granting of such an application. For example, *amicus* requests for leave to file submissions were granted in both the cases of *Biwater v. Tanzania*(67) as well as *Suez v. Argentina*(68) in spite of objections by the investor.

This is why ICSID regulations balance well *amicus curiae* with due process of parties.

The tribunal in *Eco OroMinerals v. Colombia* confirmed that "relevance to the actual scope of the dispute is a fundamental requirement for admission as *amicus curiae*."(69) However, it rejected the *amicus* submission as the petitioners had not "sought to show how generalized issues of human rights, and particularly the right to live in a healthy environment" related to the scope of the specificities to the dispute.

H. Human rights considerations on calculation of damages

Other arbitration tribunals have limited the damages recoverable by investors due to failures in relation to environmental or human rights standards. In other words, arbitrators have considered human rights issues to better assess the value of compensatory damages claimed by investors. This was the case, for example, in *Bear Creek Mining Corporation v. Peru*.(70)

Here, Peru had revoked a decree which awarded Canadian investor Bear Creek a concession to construct a silver mine. Bear Creek initiated arbitration proceedings under the Canada-Peru Free Trade Agreement.(71) While the tribunal found that Peru indirectly expropriated the land promised to Bear Creek, contrary to the Canada-Peru Free Trade agreement, in delivering an arbitral award, the tribunal reduced recoverable damages claimed by Bear Creek from US$522m to just US$18m. The tribunal recognised that the prospect of obtaining a social license from the indigenous communities to operate the mining project was small. In particular, the

(67) See also ICSID, 2 February 2007, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Case No. ARB/05/22, Procedural Order No. 5 on *amicus curiae*, § 64.

(68) https://www.italaw.com/cases/1057.

(69) ICSID, 18 February 2019, *Eco Oro Minerals Corp v. Republic of Colombia*, Case No. ARB/16/41, Procedural Order No. 6 Decision on Non-Disputing Parties Application, § 28.

(70) ICSID, 30 November 2017, *Bear Creek Mining Corporation v. Republic of Peru*, Case No. ARB/14/21, Award.

(71) Canada-Peru Free Trade Agreement, signed 29 May 2008, entered into force 1st August 2019.

partially dissenting opinion of co-arbitrator Philippe Sands on the point of recoverable damages suggested that the amount of recoverable damage should be reduced in respect of Bear Creek's *contributory fault* to the social unrest and the resulting predicament faced by Peru. The decision is significant in that the threat of a possible reduction of an award may dissuade investors from committing human rights violations lest they are precluded from claiming the entirety of compensatory damages.

All in all, under the damage perspective, human rights may play a crucial role as allocation of damages and mitigating factors that involve an assessment of the investors' conduct in light of human rights protection standards. Arbitration tribunals may then use this gateway to reduce damages eventually adjudicated in favour of the investor as a result of a human rights impact assessment where there is causation.

III. THE EVOLVING REGIME

If old generation IIAs did not typically envisage human rights obligations on investors, leaving arbitrators ill-equipped to address human rights arguments, the UNGPs have inspired a new generation of IIAs (A) as well as a peculiar form of Business & Human Rights Arbitration (B).

A. A new generation of International Investment Agreements

Today, the current negotiations are multifaceted. At one end of the spectrum, we find a new push for a general multilateral treaty fixing corporate human rights obligations.

In 2019, the Government of Ecuador put forward a proposal for a binding treaty on Business and Human Rights. The United Nations Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights was established to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." While the draft has been revised several times and this work continues at the UN, significant concerns remain for many countries, as well as for business. Thus, as it happened with similar instruments in the past, it is hard to see if and when such a treaty will ever enter into force.

At the other end of the spectrum, we find a different regulatory solution. Here, some Governments are negotiating new IIAs with more carefully drafted Human Rights clauses to concretely rebalance the rights and obligations set out in modern investment treaties. These BITs of a new generation more expressly require investors to respect environmental, social and human rights norms, and make investment protection conditional on investor conduct in this respect. For example, the 2019 Netherlands Model BIT includes a specific requirement that "[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws."(72) Such a formula would certainly make it difficult for investors to avoid human rights protection or even argue that human rights issues do not fall within the tribunal's jurisdiction (whether as the main claim or any counterclaim).

Canada, for example, from 2010 onwards, has attempted to include sustainable development objectives in its BITs with both developed and developing states (with the exception of the Canada-Tanzania BIT (2013)). Canada's investment treaties provide that 'each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of CSR in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the parties. These principles address issues such as labour, the environment, human rights, community relations, and anti-corruption.

The opportunity for reducing damages does appear to offer a viable way to increase the impact of human rights in investment arbitration. This feature is included in certain treaties. For example, the India Model BIT directs tribunals to reduce damages to reflect mitigating factors, including "unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor."(73)

A softer version of investment treaties, also termed "new-generation," are explicitly prescribing CSR obligations.

As we have pointed out above the lack of reference to the UNGP in favour of a generic reference to CSR risks to diminish the power of such treaties avoiding once again to fully address the regulation dilemmas

(72) Art. 7(1), 2019 Netherlands Model BIT.
(73) India Model BIT, Art. 26.3 and fn 4 s.

highlighted hereinabove. CSR obligations are typically referred to in aspirational language. For instance, Article 12 of the Argentina-Qatar bilateral investment treaty (BIT)[74] provides that investors should 'make efforts to voluntarily incorporate internationally recognised standards of corporate social responsibility into their business policies and practices. It seems very difficult, with such weak wording, that arbitrators may tackle CSR issues related to the investment treaty at issue.

On the other extreme, one finds the Morocco-Nigeria BIT[75] where Article 18 stipulates that investors "shall uphold human rights in the host state", "shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work", and that investors and investments "shall not manage or operate the investment in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are parties". Further, Article 20 provides for investor liability, stipulating that in the event of a violation of an investor obligation, the investor is liable before the host State domestic courts.

These clauses could potentially discourage foreign investment and transform IIAs into legal tools to hold corporations accountable depriving them even of the right to solve investment disputes via arbitration.

B. The Hague Rules on Business and Human Rights Arbitration

The UNGPs Pillar III deal with access to remedy and business and human rights arbitration are a potential mechanism to increase access to remedies for victims and investors' accountability.

Arbitration offers a neutral forum for the resolution of disputes with awards which are enforceable in over 150 jurisdictions. It is typically characterized as being swift, procedurally flexible and offering parties the autonomy to choose the laws governing their dispute.

(74) Art. 12, The Reciprocal Promotion and Protection of Investments between The Argentine Republic and The State of Qatar, signed 6 November 2016.

(75) Art. 18, Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016.

In February 2017, a Working Group of international law, arbitration and human rights specialists within The Hague Institute for Global Justice has elaborated The Hague Rules on Business and Human Rights Arbitration to advance some of the aims and objectives of the UNGPs.(76) They were launched on 12 December 2019, and they establish a procedural framework for the proper regulation of business and human rights arbitration between victims and corporations, between business partners, and between third party beneficiaries and corporations.

When they are chosen as the body of rules governing the arbitration, they provide tailored provisions on evidence gathering (see for example Article 32), different from the UNCITRAL Arbitration Rules. Moreover, taking into account the problem of victims' lack of financial resources, arbitration allows parties to select the "seat" of the proceedings, which is of particular value if victims have small financial possibilities and cannot afford court litigation in London or New York. These rules also address the potential inequality of arms by allowing especially the victim of human rights abuse, to access information via requests launched to the arbitral tribunal. In this framework, the provision allows the arbitral tribunal to order the production of documents to the extent necessary to enable each party to have a reasonable opportunity of presenting its case. However, for The Hague Rules to have the effect of increasing investor accountability, investing companies must voluntarily submit themselves to the arbitration and this is part of the evolving regime led by the UNGPs.

CONCLUSION

The UNGPs have produced an evolution of the International Investment regime. Today, we can see an evolution of the Investment arbitration practice, the spreading of UNGPs inspired National Action Plans shaping domestic law of both home States and host States of investors as well as the development of a specific arbitration framework for Business & Human Rights disputes.

(76) See F.D. Donovan and R. Zamour, "Arbitrating Business and Human Rights disputes: consent to arbitrate and applicable law", in F. Marrella and N. Soldati (eds), *Studies in honor of Giorgio Bernini*, *op. cit.*, pp. 387 ff.

All in all, after many years of fragmentation of International Law, we are facing a progressive convergence between the International Investment Law regime and the International Human Rights regime.

This also means that corporations cannot afford anymore to overlook International Human Rights Law.

Finally, this essay has welcomed business and human rights arbitration under The Hague Rules as a potential mechanism to increase access to remedies. Of course, as for any arbitration, the old adage "*tant vaut l'arbitre, tant vaut l'arbitrage*" and many commercial arbitrators without academic credentials in International Law should get more and more out of business.

Despite all odds, looking at International Law as a Transnational Law process going beyond "Public" International Law,(77) the UNGPs are certainly a transformational and inspirational roadmap to embedding respect for human rights into corporate supply chains and International Investment Law as a whole.

(77) On this approach see D. Carreau, A. Hamann and F. Marrella, *Droit international*, *op. cit.*, Ch. I.