

Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration

Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award

Patrick Abel

Georg-August-Universität Göttingen

patrick.abel@jura.uni-goettingen.de

Abstract

The 2016 ICSID award in *Urbaser v. Argentina* affirmed for the first time the possibility of a counterclaim in investment arbitration based on an international investor obligation under the human right to water. But to denounce a break-through and fundamental change in both international investment and human rights law would be premature. This article deconstructs the award's reasoning and sheds light on its doctrinal fallacies, in particular the award's unclear construction of the integration of a human rights obligation into investment arbitration and its misled argumentation on the existence of an international human rights obligation of private actors under the human right to water. Concluding that the award cannot be sustained under the current state of international law, the article then reflects on the potential of the award's conception of human rights counterclaims for the future of international investment law and international human rights law.

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Keywords

international investment law – international human rights law – international investment arbitration – non-State actors – counterclaims – international responsibility of corporations – international human right to water

1 Introduction

The 2016 ICSID award in *Urbaser v. Argentina*¹ affirmed, for the first time in the history of international investment arbitration, the possibility of a counterclaim by a host State against the investor based on an international investor obligation under the human right to water. The Tribunal found that the investor, operating in the privatized water and sewage services sector in Greater Buenos Aires, was in principle obliged under international law ‘not to engage in activity aimed at destroying’² and ‘to abstain’³ from violating the population’s human right to water. Even though the counterclaim was eventually dismissed on more specific grounds, these fundamental findings could imply profound consequences. Does the award represent a breakthrough for international investment law and human rights law? This article shows that such a conclusion would be premature.

After situating the human rights counterclaim in *Urbaser v. Argentina* within the discussion on the role of human rights in investment law using the example of the human rights to water (Section 2), the main reasoning of the Tribunal on the human rights counterclaim will be reconstructed, focusing on the award’s merits (Section 3). On this basis, the doctrinal fallacies of the award will be pointed out, in particular the flawed conclusion that international human rights law already provides for international obligations of private actors. The realistic scope for human rights counterclaims is currently much narrower (Section 4). Mindful of these reflections on the contemporary state of international law, the potential of the award’s construction of a human rights counterclaim as a model for the future of international investment law and international human rights law will be explored (Section 5).

1 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (hereinafter *Urbaser v. Argentina*).

2 *Ibid.*, para. 1199.

3 *Ibid.*, para. 1210.

2 The Context of the *Urbaser v. Argentina* Award: International Human Rights' Largely Passive Invocation in International Investment Arbitration

The ICSID award in *Urbaser v. Argentina* represents a noteworthy and interesting novelty in light of the preceding arbitral practice on the relation of international human rights and international investment law. The original idea of international investment agreements is to provide foreign investors with an international protection of their property rights in host States. The granting of these rights should create a favorable investment climate for the benefit of the host State's development.⁴ The last years have witnessed a "backlash"⁵ against international investment law that challenges what is perceived as a one-sided privilege of foreign investors' interests. To borrow Koskenniemi's words, international investment law has been criticized as suffering from a particularly marking 'structural bias'⁶: the granting of international rights only to investors

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- 4 On the historical development see the overview by Marc Jacob, 'Investments, Bilateral Treaties' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (June 2014), paras. 8–10; see also the teleological interpretation of the ICSID Convention that '[...] the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries' by *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, 25 September 1983, reproduced in *International Legal Materials* 23/2: 351–383 (1984), para. 23; Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2nd edn. 2009), Preamble paras. 11–12; for a critical view on the emergence of supposedly de-politicized bilateral investment treaties as expression of neo-liberalism and imperialism see Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), p. 120; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015), pp. 10–44.
- 5 See Michael Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2010); for a defense of international investment law see Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', *Chicago Journal of International Law*, 9/2: 471–498 (2009).
- 6 Martti Koskenniemi, *The Politics of International Law* (London: Hart Publishing, 2011), p. 336, there without mentioning international investment law. For a summary of the discussion on the tension between international investment and international human rights law see Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', *International and Comparative Law Quarterly*, 60/3: 573–596 (2011), pp. 574–576; on the process of international investment law 'from Splendid Isolation to centre stage' see Peter-Tobias Stoll and Till P. Holterhus, 'The "Generalization" of International Investment Law in Constitutional

and not to other actors in society,⁷ coupled with the uniquely effective international enforcement mechanism of investment arbitration.⁸ Related is the concern that States have been curtailed too much in their right to regulate for the public interest, including human rights, suffering a regulatory chill even in anticipation of the actual institution of arbitration proceedings.⁹

One of the means to rebalance international investment law has been to reassert the relevance of international human rights law through systemic interpretation as stipulated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).¹⁰ Notwithstanding the merit and the importance of this approach, it is by its concept limited to bring about a largely passive

Perspective' in Steffen Hindelang and Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law* (Oxford: Oxford University Press, 2016), pp. 340–343.

7 Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law' in Pierre-Marie Dupuy and Ernst-Ulrich Petersmann and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), pp. 71–77; Stoll and Holterhus, *supra* note 6, pp. 355–356.

8 See the criticism by Sornarajah, *supra* note 4, pp. 136–190. See also the epistemological problem of the cultural-professional and ideological attitudes of investment arbitrators as observed by Muthucumaraswamy Sornarajah, 'Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law' *Yearbook on International Investment Law & Policy*, 2: 595–642 (2010), pp. 618–635, 638–639.

9 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014).

10 There is a plethora of possible reform approaches, see only the comprehensive study by UNCTAD, 'Investment Policy Framework for Sustainable Development', UNCTAD/DIAE/PCB/2015/5, 2015, http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, accessed 10 April 2018; see also Stephan W. Schill and Vladislav Djanic, 'International Investment Law and Community Interests' in *Society of International Economic Law, Fifth Biennial Global Conference, Working Paper No. 2016/01*, pp. 13–25; Stoll and Holterhus, *supra* note 6, pp. 340–356; Stephan W. Schill, 'Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework', *Journal of International Economic Law*, 20/3: 649–672 (2017). On the use of Art. 31(3)(c) VCLT see Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), pp. 691–706; on the role of 'mega-regional' trade agreements in reforming international investment law on the example of the investment-labour standards linkage see Henner Gött and Till P. Holterhus, 'Mainstreaming Investment-Labour Linkage through "Mega-Regional" Trade Agreements' in Henner Gött (ed.), *Labour Standards in International Economic Law* (Heidelberg: Springer, forthcoming).

role of international human rights in the practice of international investment arbitration.¹¹

This is reflected in the arbitral jurisprudence related to the human right to water which preceded the ICSID award in *Urbaser v. Argentina*. Especially since the 1990s, a number of developing countries decided to privatize their water and sewage services in order to foster their development with the help of foreign investment.¹² Problems in the planning and operation of these foreign investments prompted States in a variety of cases to take measures under domestic law against the investors or to renationalize water and sewage services. These led to a substantial number of investment arbitrations in which the investor claimed the violation of investor rights, most prominently the protection against expropriation and the right to fair and equitable treatment.

However, at the same time, it is largely accepted that access to water is an international human right which States have to respect, protect and fulfill, covered, for instance, under the right to respect for private and family life under Article 8(1) of the European Convention on Human Rights (ECHR), the right to life under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and the right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and explicitly enshrined for example in Article 24(2) of the Convention on the Rights of the Child (CRC) or Article 14(2) of the Convention

11 For a comprehensive analysis on the role of international human rights for international investment arbitration see Ursula Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration', *Journal of World Investment & Trade*, 10/5: 653–677 (2009). A rare exception to the passive role of international human rights are investor claims based on international human rights, see i.e., rejecting jurisdiction to hear a human rights claim, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, reproduced in *International Law Reports* 95: 183–211 (1994), p. 203; see generally Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy and Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), p. 88. But in this instance, only those few human rights which safeguard the private interest of the foreign investor are activated. The rest of human rights' potential to protect private interests of other actors and the public interest remains untouched.

12 On the privatization of water as a public good and a human right see Violeta Petrova, 'At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water', *Brooklyn Journal of International Law*, 31/2: 577–613 (2005–2006); Khulekani Moyo, 'Privatisation of the Commons: Water as a Right; Water as a Commodity', *Stellenbosch Law Review*, 22/3: 804–822 (2011).

on the Elimination of all Forms of Discrimination against Women (CEDAW).¹³ This tension between international investment and human rights obligations is reflected in investment arbitration cases such as *Aguas del Tunari v. Bolivia*,¹⁴ *Vivendi v. Argentina*,¹⁵ *Suez v. Argentina*,¹⁶ *SAUR v. Argentina*,¹⁷ *Biwater Gauff v. Tanzania*¹⁸ and *Azurix v. Argentina*.¹⁹ In these cases, the human right to water is invoked as a passive defense against an investment claim, and conversely, investment arbitration claims operated as a challenge to the capacity of the host State to live up to its human rights obligation.²⁰

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- 13 On the international human right to water see Pierre Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (Heidelberg: Springer, 2014), pp. 56–88.
- 14 *Aguas del Tunari, s.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado to the Arbitral Tribunal, 29 August 2002, paras. 25–27, an *amicus curiae* submission which invoked the human right to water before the arbitral tribunal, eventually rejected in *Aguas del Tunari, s.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003.
- 15 *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 6.5.1, reflecting in a functional perspective a human rights defence by the respondent that was however not explicitly framed in human rights terms.
- 16 *Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 262, in which the Tribunal found that in the case the investment and human rights obligations of Argentina ‘are not inconsistent, contradictory or mutually exclusive’.
- 17 *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decisión sobre jurisdicción y sobre responsabilidad, 6 June 2012, paras. 330–331, accepting the relevance of the international human right to water but observing that they must be balanced with investor rights.
- 18 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 434, intimating that the human right to water influenced the Tribunal’s decision.
- 19 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 261, rejecting the invocation of the human right to water as a defence because the host state had not sufficiently substantiated the argument.
- 20 Simma, *supra* note 6, pp. 579–580 and suggesting on pp. 594–596 a more proactive role for international human rights in the form of human rights audits. For a more detailed analysis on the relation of the human right to water and investment arbitration see the systematization by Ursula Kriebaum, ‘The Right to Water Before Investment Tribunals’ in this special issue; Tamar Meshel, ‘Human Rights in Investor-State Arbitration: The

3 Key Findings of the *Urbaser v. Argentina* Award on Argentina's Novel Active Invocation of Human Rights in an Investment Arbitration Counterclaim

Departing from this pattern, Argentina in the *Urbaser v. Argentina* proceedings for the first time brought about a more offensive invocation of the right to water in investment arbitration. The case concerned the operation of water and sewage services in the Province of Greater Buenos Aires through an Argentinian company in which the claimants Urbaser and CABB held shares.²¹ The investors filed an investment claim against Argentina and asserted the violation of obligations under the Argentina-Spain BIT. They argued that Argentina had breached the prohibition of unjustified or discriminatory measures as well as of illegal and discriminatory expropriation, and had violated the obligation to FET. The basis of the claim were Argentina's emergency measures and handling of concession renegotiation efforts between the parties in the aftermath of the 2001 Argentinian economic crisis.²²

In the course of the proceedings, Argentina filed a counterclaim against the investors based on Article 46 of the ICSID Convention and Article X of the Spain-Argentina BIT, contending that the claimants violated their international human rights obligation to provide access to water to the local population. Argentina argued that the claimants undertook obligations to invest in water and sewage services under the concession contract and the applicable regulatory framework. However, the Tribunal's jurisdiction did not cover the violation of Argentinean domestic law by the investors.²³ As Argentina thus could not directly base its counterclaim on the violation of the concession contract, it put forward that the investors were under an international obligation to observe human rights. By failing to guarantee the promised water and sanitary supply, the investors had violated these international obligations, namely the right to health, to environment and to water and sanitation. For that alleged breach, Argentina demanded the payment of USD 404.34 million damages excluding interest. A comparison to the USD 316.42 million of damages claimed

Human Right to Water and Beyond', *Journal of International Dispute Settlement*, 6/2: 277–307 (2015), pp. 287–306.

21 *Urbaser v. Argentina*, *supra* note 1, paras. 41–64.

22 *Ibid.*, paras. 34–35.

23 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 9 December 2012, paras. 251–254.

by the claimants well illustrates that Argentina essentially aimed not only for neutralizing the investors' claim, but went even beyond that.²⁴

The Tribunal eventually rejected Argentina's counterclaim, together with the investors' claim. This rejection notwithstanding, the arbitral tribunal came to a number of significant and novel legal conclusions of general relevance. Not only did it find that the BIT's investment law nature does not foreclose the application of provisions from other branches of international law, including human rights,²⁵ it also affirmed that corporations can be subjects of international law.²⁶ Furthermore, it held in one passage that companies do have an international negative 'obligation to abstain'²⁷ from interfering with human rights of third persons, while formulating differently in another passage that they were 'not to engage in activity aimed at destroying'²⁸ the human right to water of third persons, stemming from international human rights law, and that this obligation formed part of the applicable law under the Spain-Argentina BIT.²⁹ The counterclaim eventually failed because a breach of this negative obligation was not regarded sufficient to prove Argentina's case. Instead, the Tribunal found that Argentina suggested a breach of a positive 'obligation to perform'³⁰ access to water by the claimants under international human rights. The Tribunal held that such a positive investor obligation was not established under international human rights law but could only follow from domestic contractual obligations not covered by its jurisdiction.³¹

It is important to underline the novelty of the award: The possibility of holding investors accountable for a breach of an international human rights obligation is an entirely new approach to the role of human rights in the international investment law regime.

4 The Tribunal's Concept of Counterclaims Based on Direct International Human Rights Obligations of Investors in *Urbaser* and its Flaws

In light of this novelty's potential importance, the award warrants a close examination of its reasoning. Only brief remarks will be dedicated to the

24 *Urbaser v. Argentina*, *supra* note 1, paras. 35, 1156–1166.

25 *Ibid.*, paras. 1143, 1182–1184.

26 *Ibid.*, paras. 35, 1193–1195.

27 *Ibid.*, para. 1210.

28 *Ibid.*, para. 1199.

29 *Ibid.*, paras. 35, 1200–1203.

30 *Ibid.*, para. 1210.

31 *Ibid.*, paras. 1206–1209.

jurisdictional requirements (Section 4.1). The article will focus on the award's merits. First, the substantive mechanism that the Tribunal chose for allowing the active invocation of human rights will be clarified: the application of an international human rights obligation existing outside of international investment law (Section 4.2). This integration of an external international obligation is the reason why the Tribunal's reasoning cannot be sustained. The Tribunal is mistaken in arguing that obligations of private actors under international human rights law already exist (Section 4.3). What remains is a narrower scope *de lege lata* for human rights counterclaims in international arbitration through other doctrinal mechanisms than indicated by the award (Section 4.4).

4.1 *Jurisdiction and Admissibility*

Briefly, the award's reasoning on the requirements of jurisdiction and admissibility will be analyzed. Article 46 of the ICSID Convention provides for the possibility of raising a counterclaim. It must meet three jurisdiction and admissibility requirements:

1. It must be covered by the scope of the parties' consent to arbitration.
2. It must arise directly out of the dispute's subject-matter.
3. It must otherwise be in line with the Tribunal's jurisdictional requirements as stipulated in Article 25(1) of the ICSID Convention and by the respective BIT.

The Tribunal in *Urbaser v. Argentina* affirmed the first requirement on the basis of the wording of the arbitration clause in Article X of the Spain-Argentina BIT. The clause does not specify that it is the investor who can raise a claim, a formulation that is present in many other BITs and may rule out the possibility of counterclaims.³² Instead it indifferently gives 'either party' the possibility to submit the dispute relating to an investment within the meaning of the BIT to ICSID arbitration. The Tribunal concluded that the investors, by accepting Argentina's standing offer to arbitrate in the BIT, had also accepted the therein implied jurisdiction for counterclaims. It seems plausible that it rejected the investors' objection that they had implicitly ruled out this jurisdiction in filing their claim, given that there was no explicit trace of such a will.³³ But notably, the Tribunal in addition expressed a more general reluctance against an investor's power to narrow the acceptance of the offer to arbitrate to the exclusion

32 Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration', *Journal of International Dispute Settlement*, 1/1: 97–122 (2010), p. 106.

33 *Urbaser v. Argentina*, *supra* note 1, paras. 1145–1146, 1148.

of counterclaims. Therein it saw an undue limitation of the conditions and modalities of investment protection that are defined by the State parties of the BIT in the jurisdictional clause and thus are not left at the mercy of the investor's unilateral disposition.³⁴ This indicates an inclination towards a public law – rather than a commercial arbitration – model of investment arbitration favorable to human rights counterclaims.³⁵ The Tribunal adopts a similar counterclaims-friendly approach also in its interpretation of the second requirement, accepting the existence of a sufficient connection of the counterclaim to the investors' claim on the basis that it related to the same investment in relation to the same concession which had the purpose of providing the population access to water.³⁶

But the most fundamental obstacle to the Tribunal's jurisdiction is dealt with by the Tribunal only on the merits. Do violations of *human rights* obligations by the investor represent a dispute in connection with an investment within the meaning of the Spain-Argentina BIT and Article 25(1) of the ICSID Convention? That presupposes the question: Do the investors have international human rights obligations and do they form part of the Tribunal's jurisdiction? In *Biloune v. Ghana* the Tribunal answered this to the negative precisely because it considered questions of human rights to be outside of its jurisdiction.³⁷ In contrast, the Tribunal in *Urbaser v. Argentina* affirmed that the Spain-Argentina BIT related to human rights obligations of investors on a *prima facie* basis and addressed the underlying questions only on the merits.³⁸ These interesting fundamental issues shall now be analyzed in detail.

As to the other requirements of jurisdiction and admissibility, it suffices to sum up that the Tribunal adopted a counterclaims-friendly interpretation of Article 46 of the ICSID Convention in applying the arbitration clause of Article x of the Spain-Argentina BIT – a clause which is counterclaims-friendly itself in that it is indifferent as to which party may raise claims.

34 *Ibid.*, paras. 1144, 1147.

35 On the different origins of investment arbitration see Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', *British Yearbook of International Law*, 74/1: 151–289; on a public law model of international investment law see Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', *European Journal of International Law* 17/1: 121–150 (2006).

36 *Ibid.*, para. 1151.

37 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, reproduced in *International Law Reports*, 95: 183–211 (1994), p. 203.

38 *Urbaser v. Argentina*, *supra* note 1, para. 1153.

4.2 *The Award's Mechanics on the Integration of International Human Rights Obligations of Investors into Investment Arbitration*

Having pointed out that the Tribunal had good reason to affirm its jurisdiction in light of the Spain-Argentina BIT's broad arbitration clause, its reasoning on the side of the merits warrants a more critical assessment. The award generally lacks clarity which doctrinal institutions and arguments were precisely applied. In a step by step approach, this section will deconstruct, clarify and criticize the Tribunal's line of argument on the merits.

The starting point must be the normative basis for a counterclaim contending a human rights violation by the investor. Because a counterclaim is in essence nothing but a normal claim before an arbitral tribunal connected with another preceding primary claim for the benefit of judicial economy, that cause of action must be an existing obligation, here more precisely an obligation under the international human right to water. That raises a preliminary question on the systemic relation between human rights and investment law. How can a human rights obligation be integrated into investment arbitration?

4.2.1 The Integration of International Human Rights Law External to the Investment Treaty

To answer this question, a closer look at the Tribunal's search for a human rights obligation is warranted. The Tribunal first looks for a basis of such an obligation in the Spain-Argentina BIT. It observes at the outset that 'there is no provision [in the Spain-Argentina BIT] stating that the investment's host State would not have any right under the BIT'.³⁹ However, it can find positive examples for such concrete host State rights against the investor only in the form of *procedural* rights in Articles IX and X.⁴⁰ These articles contain *inter alia* a cooling-off period of six months in which the investor must try to settle the dispute with the host State by negotiations.

Then, the Tribunal rejects the argument that Article I(2) of the Spain-Argentina BIT – the only possible reasonable basis for an obligation in the BIT's provisions – could be understood as an international investor obligation. The article provides a definition of "investments" protected by the BIT and requires that the assets in question must have been 'acquired or effected in accordance with the legislation' of the host State. The Tribunal convincingly finds that because it only defines the BIT's scope of protection, it 'does not in itself contain an investor's obligation'.⁴¹ The provision defines the conditions

39 *Ibid.*, para. 1183.

40 *Ibid.*, para. 1184.

41 *Ibid.*, para. 1185.

for the triggering of investment protection and as such does not impose a substantive obligation on investors.

In consequence, because the Tribunal cannot find any basis for a substantive human rights obligation of investors in the Spain-Argentina BIT, the Tribunal resorts to sources of international law external to the BIT, namely international human rights treaties and declarations such as the Universal Declaration of Human Rights (UDHR) and the ICESCR.⁴²

4.2.2 The Tribunal's Confusion on the Appropriate Mechanism to Integrate External Sources of Law

But the Tribunal's path to the integration of these external human rights norms into investment arbitration is obscure. It brings forward a series of different doctrinal conceptions in an attempt to prove international investment law's general inclusiveness, without deciding which one it applied to the case. These approaches include: Article 31(3)(c) of the VCLT; the BIT's applicable law clause Article X(5) which covers 'other treaties in force between the Parties' and 'general principles of international law'; Article 42(1) of the ICSID Convention which allows for international law to be applicable substantive law in ICSID proceedings; and the effects of *ius cogens* as stipulated in Article 53 of the VCLT.⁴³ Despite all of their integrative importance for international investment law, it is necessary to identify with precision which approach exactly serves to make applicable an obligation from general human rights law as a basis for a counterclaim in investment arbitration.

4.2.2.1 *Inadequacy of ius cogens as a Human Rights-Integrative Mechanism with a Broad Material Scope*

The first mechanism lacking this integrative capacity is the concept of *ius cogens*. First, because the range of norms that qualify as *ius cogens* is very narrow. Although the scope of norms qualifying as *ius cogens* is still subject to debate, it is clear that it comprises only the most fundamental values agreed by the international community of States as a whole, the human right to water not being one of them.⁴⁴ Moreover, the status of *ius cogens* does not mean

42 *Ibid.*, paras. 1196–1197.

43 *Ibid.*, paras. 1200–1203.

44 The ILC's suggestion of the 'most frequently cited candidates for the status of *jus cogens*' in its Final Report on Fragmentation of International Law may be taken as a good point of reference: the prohibition of aggressive use of force, the right to self-defence, the prohibition of genocide, the prohibition of torture, crimes against humanity, the prohibition of slavery and slave trade, the prohibition of piracy, the prohibition of racial discrimination

that the respective norm automatically produces international obligations for natural persons, let alone private legal persons. These questions must be distinguished. After all, there are examples of norms discussed to have *ius cogens* status which cannot oblige natural persons or private corporations, such as the prohibition of the use of force which primarily addresses States and the right to self-determination only held by peoples.⁴⁵ The existence of direct international obligations of private legal persons is all the more problematic. Even the established international crimes with *ius cogens* character, acknowledged to produce direct obligations for natural persons under international law,⁴⁶ have so far not been universally acknowledged to extend to private legal persons.⁴⁷

and apartheid and the basic rules of international humanitarian law, see ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, para. 374.

- 45 On the *ius cogens* status of both these principles see James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 8th edn. 2012), pp. 595–596. For a different opinion that equates *ius cogens* with an internationally binding character also for corporations see Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can be Raised in Investor-State Arbitration', *Journal of World Investment & Trade*, 13/3: 349–372 (2012), p. 356; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), p. 101.
- 46 *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring et al.*, International Military Tribunal, reproduced in *Trial of the Major War Criminals Before the International Military Tribunal Vol. XXII* (Nuremberg: Secretariat of the International Military Tribunal, 1948), p. 466 (hereinafter *Wilhelm Göring et al. case*); *Prosecutor v. Duško Tadić*, ICTY, Appeals Chamber, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 128–137; *Prosecutor v. Duško Tadić*, ICTY, Trial Chamber, IT-94-I-T, Judgment, 7 May 1997, paras. 661–669; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 79–80; Kai Ambos, *Treatise on International Criminal Law* (Oxford: Oxford University Press, 2013), p. 103.
- 47 See already the statement that '[c]rimes against International Law are committed by men not by abstract entities [...]' in *Wilhelm Göring et al. case*, *supra* note 46, p. 466; see the restriction of the jurisdiction *ratione personae* to natural persons in Art. 6 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, S/RES/808, 25 May 1993; Art. 5 of the Statute of the International Tribunal for Rwanda, S/RES/955, 8 November 1994; Art. 1(1) of the Statute of the International Residual Mechanism for Criminal Tribunals, S/RES/1966, 22 December 2010; Arts. 25 and 26 of the 1998 Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002), UNTS 2187: 3; from the literature see Crawford, *supra* note 46, pp. 80–81.

Even if one could find a *ius cogens* norm directly binding a claimant in an investment arbitration, that would as such not yet explain how this obligation then is made applicable in investment arbitration. It is true that *ius cogens* operates as a mechanism which allows to penetrate obligations of all branches of international law, of course including international investment law.⁴⁸ This effect follows from the status of *ius cogens* as an international norm of superior hierarchy as stipulated in Article 53 of the VCLT: If a treaty between States conflicts with a peremptory norm of general international law, the treaty is void. This is complemented by Article 64 of the VCLT according to which any existing treaty terminates if it is in conflict with a newly emerged peremptory norm of general international law. The provisions reflect the rule of customary international law that States may not derogate from a peremptory rule of international law, be it through a treaty, customary law or general principles of law, except if that norm is itself a peremptory norm.⁴⁹ In addition, *ius cogens* plays an important role in the interpretation of treaty provisions, for example through the interpretive presumption that a treaty provision should not be understood in a manner that violates *ius cogens*.⁵⁰

But these are effects unsuited to produce grounds for a counterclaim. The limitation of States' capacity to create international law cannot possibly bring about the integration of a norm of one source of international law into another source as envisaged by the Tribunal in *Urbaser v. Argentina*. It renders norms *inapplicable*, in contrast to the need for making a norm *applicable* as a basis for a counterclaim. The Tribunal did not seek for a solution of normative conflicts, but for a norm integration mechanism.

48 On the relevance of *ius cogens* for norm conflicts arising in international investment law see Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?', *Journal of World Investment & Trade*, 15/3-4: 612-644 (2014), p. 625; see also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78, which alludes to the supremacy of *ius cogens* without explicit mentioning the term.

49 *Prosecutor v. Anto Furundžija*, ICTY, Trial Chamber, IT-95-17/1-T, Judgement, 10 December 1998, para. 153; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker & Humblot, 1984), para. 526; Crawford, *supra* note 45, pp. 389-390, 594-595.

50 See *Phoenix Action, Ltd. v. Czech Republic*, *supra* note 48, para. 78; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge: Cambridge University Press, 2017), pp. 82-87.

4.2.2.2 *Inadequacy of Article 31(3)(c) VCLT as a Human Rights-Integrative Mechanism without a Textual Basis in the BIT*

Neither does Article 31(3)(c) of the VCLT represent a sufficient means to realise the integration of a human rights obligation as basis for a counterclaim into investment arbitration in the present case. The provision stipulates that in interpreting an international treaty, one shall take into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties'. The provision is of pivotal importance for aligning investment treaties with the protection of public goods and interests reflected in international obligations of the parties, especially through interpreting investor rights and justification clauses in light of the international human rights obligations of States.⁵¹

As a corollary, the point of departure for the application of Article 31(3)(c) of the VCLT must always be a provision of the treaty to be interpreted, in the present context a provision of the Spain-Argentina BIT. Such a provision would then have to be interpreted *inter alia* taking into account external international law applicable to the parties, such as possibly the ICESCR. But as already pointed out above, it is clear from the reasoning of the Tribunal that such an anchor in the Spain-Argentina BIT for an investor obligation is precisely what is missing. If the Spain-Argentina BIT does not provide for any basis for a substantive investor obligation, it is hardly possible that such a basis could be created in the first place by systemic interpretation under Article 31(3)(c) of the VCLT. If the BIT does not provide any indication that the parties wanted to create obligations for investors, it is not convincing to read such an obligation into the BIT merely because it (allegedly) exists under a human rights treaty.

4.2.2.3 *The Applicable Law-Clause as the Relevant Mechanism to Integrate Obligations from External Sources of International Law*

The only viable concept or mechanism for an integration of an external international human rights obligation into the Spain-Argentina BIT is the determination of the arbitral tribunal's applicable substantive law.

51 The literature is extensive on this matter, see, for instance, Pierre-Marie Dupuy and Jorge E. Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in Marc Bungenberg *et al.* (eds.), *International Investment Law* (Baden-Baden: Nomos Verlagsgesellschaft, 2015), pp. 1739–1767, paras. 46–53; Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Oxford: Hart Publishing, 2016), pp. 210–239. See also *Case Concerning Oil Platforms (Iran v. USA)*, Judgment, ICJ Rep. 2003, 161, para. 41 interpreting in accordance with Art. 31(3)(c) VCLT the 1955 Treaty of Amity, Economic Relations and Consular Rights between USA and Iran in the light of the international law on the use of force.

The possibility of applying in investment arbitration sources of international law other than BIT provisions, in particular international human rights, through the parties' choice of applicable law is widely accepted in literature⁵² and in arbitral decisions,⁵³ despite the apparent occasional presence of a certain reluctance by investment arbitrators to resort to such "alien" sources.⁵⁴ Parties have almost unbound freedom of contract⁵⁵ to select the applicable substantive law in investment arbitration and can include international law in general or specific parts of it. Investment tribunals in the past have in principle accepted the possibility of an investor claim against the host State based on international human rights law under an investment treaty or contract, provided that the jurisdictional clause is broad enough.⁵⁶ There is no reason why the same should, conversely, not be true under the same conditions for basing a counterclaim on an external source of law like international

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- 52 See for example Reiner and Schreuer, *supra* note 11, pp. 84–85; Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interest in International Investment Law' in Ulrich Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011), pp. 1093–1094; Vid Prislán, 'Non-investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?' in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013), pp. 453–464; Dupuy and Viñuales, *supra* note 51, paras. 66–74.
- 53 See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 21; *Phoenix Action, Ltd. v. Czech Republic*, *supra* note 48, para. 78.
- 54 On this reluctance, described as reticence or *Berührungangst*, see Simma, *supra* note 6, pp. 454–455; see also the empirical analysis suggesting 'significant potential for ICSID tribunals to broaden their perspective by selecting arguments from materials that are related to other areas of international law' by Ole K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', *European Journal of International Law*, 19/2: 301–364 (2008), p. 358.
- 55 On the limitations, see above Section 4.2.2.1 on *ius cogens*. Freedom of contract is here understood as the capacity to create valid international law.
- 56 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, reproduced in *International Law Reports*, 95: 183–211 (1994), p. 203; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Ecuador*, UNCITRAL, Interim Award, 1 December 2008, paras. 209–210; *Toto Costruzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras. 154–168; see also Dupuy and Viñuales, *supra* note 51, paras. 60–65.

human rights. Hence, generally, this includes the possibility of integrating directly applicable international human rights obligations of natural persons or private legal persons to the extent that they exist in the source external to international investment law, for example in an international human rights treaty.

To the extent that the parties have left the applicable substantive law open, in ICSID arbitrations, Article 42(1) of the ICSID Convention provides as a residual rule that 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”. In the particular case of *Urbaser vs. Argentina*, the Tribunal was in no need of invoking it, because Article X(5) of the Spain-Argentina BIT included a sufficiently broad clause which encompassed the application of ‘other treaties in force between the Parties’ and ‘general principles of international law’. This applicable law clause was the only adequate integration mechanism for the type of counterclaim accepted by the *Urbaser* Tribunal which is based on the integration and application of a source of international law external to the applied BIT.

4.2.3 Interim Conclusion

In sum, faced with the challenge of adjudicating on the integration of a human rights obligation into the arbitration proceedings as the basis for a counterclaim, the Tribunal resorted to international human rights law as a source ‘external’ to the Spain-Argentina BIT. Such an integration is possible in investment arbitration. However, the Tribunal failed to provide a precise argument on how such an integration can take place. The only viable mechanism in this context is a sufficiently broad applicable law clause which was present in the case in the form of Article X(5) of the Spain-Argentina BIT.

4.3 *The Tribunal’s Fallacy in Constructing Substantive International Obligations of Corporations under Contemporary International Human Rights Law*

The precondition for integrating in an investment arbitration a source external to the Spain-Argentina BIT as a basis for a human rights counterclaim was thus fulfilled. However, naturally, this external source would then also have to provide for the required obligation for the counterclaim to succeed. The Tribunal’s reasoning rests on the existence of human rights obligations of corporations in international law. The Tribunal fails to appreciate that this premise is presently not fulfilled – thus causing the collapse of the award’s argumentation.

4.3.1 The Mediatization of Human Rights Obligations of Private Actors in the Current State of International Law

In the present state of international law, States as its original subjects have the capacity to create other derivative subjects of international law and accord them rights and obligations. The creation of directly applicable individual human rights through human rights treaties is one of international law's greatest success stories in this regard. However, the same process of individualization and de-mediatization has yet to be fulfilled in the case of international obligations.⁵⁷ International human rights obligations so far exist only in rare instances such as the notable human rights duties under the 1981 Banjul Charter for Human's and Peoples Rights, and even their status as international obligations of individuals is often rejected.⁵⁸ On the universal level, the creation of legally binding international human rights obligations of transnational corporations is so far only discussed in the UN Human Rights Council's Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights that has not yet come to a tangible result.⁵⁹ Accordingly, the 2011 UN Principles on Business and Human Rights ('Ruggie Principles') have pointed out that it is only States which have legally binding international human rights obligations, in particular an obligation to protect persons against infringements on their human rights by other private actors such as corporations. In contrast, corporations have only non-binding 'responsibilities', in essence amounting to moral appeals, which serve as an important source of voluntary standards for corporation and as a point of reference for public pressure.⁶⁰ This framework was recently confirmed for

57 See the comprehensive analysis on the limited direct international criminal and civil responsibility of the individual in Peters, *supra* note 45, pp. 115–165 and more specifically on corporations in pp. 85–105.

58 Art. 27–29 of the 1981 African Charter on Human and Peoples' Rights (adopted 27 June 1981; entered into force 21 October 1986), *UNTS* 1520: 217; on the Banjul Charter more generally see Manisuli Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Leiden: Martinus Nijhoff publishers, 2012); and in the relation to the European and American regional human rights regimes see Patrick Abel, 'Menschenrechtsschutz durch Individualbeschwerdeverfahren: Ein regionaler Vergleich aus historischer, normativer und faktischer Perspektive', *Archiv des Völkerrechts*, 51/3: 369–392 (2013).

59 The Working Group was established by the UN Human Rights Council in A/HRC/RES/26/9, 14 July 2014; on the relation between the legally binding and non-binding approaches see Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', *Journal of Human Rights*, 14/2: 237–259 (2015).

60 See United Nations, *Guiding Principles on Business and Human Rights*, A/HRC/17/31, 21 March 2011 and their First and Second Pillars.

the ICESCR by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 24 in 2017.⁶¹

The Tribunal fails to acknowledge this present state of international law in its analysis. In contrast, it argues that States indeed have already created legally binding international human rights obligations. But this reasoning is based on two fallacies.

4.3.2 Conflation of Legally Binding and Non-binding Human Rights Norms in the Award

First, the Tribunal resorts to non-binding sources of human rights norms (so called soft law) to prove a legally binding international human rights obligation of investors, namely to the 1948 Universal Declaration of Human Rights and the 1977 ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy as amended in 2006, and more generally corporate social responsibility initiatives on the international level.⁶² The Tribunal disregards that States in creating these norms have expressly intended not to produce *legally binding* norms. Hence, given the lack of status as sources of international law as reflected in Article 38(1) of the ICJ Statute, they cannot establish by themselves an international obligation of investors. Likewise, the Tribunal has not presented any argument how these non-binding norms could have acquired a binding status, or could reflect binding international law – a matter controversially discussed on a general level in scholarly writing.⁶³

4.3.3 Misinterpretation of the Abuse of Rights-clause in Article 5(1) of the ICESCR by the Award

Second, to the extent the Tribunal refers in its reasoning to binding international human rights obligations, namely Articles 11(1) and 12 of the ICESCR, it comes to inadequate results due to a misinterpretation of ICESCR provisions. More precisely, it misreads Article 5(1) of the ICESCR to bring about a direct binding effect to non-State actors of all ICESCR rights. This provision stipulates:

61 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, E/C.12/GC/24, 10 August 2017, which carefully adopts the framework developed in the UN Guiding Principles on Business and Human Rights and elaborates on states' duties towards corporations.

62 *Urbaser v. Argentina*, *supra* note 1, paras. 1195–1198.

63 See Andrea K. Bjorklund and August Reinisch (eds.), *International Investment Law and Soft Law* (Cheltenham: Edward Elgar, 2012).

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

The mentioning of non-State actors in the provision misled the Tribunal to the conclusion that ICESCR rights produce a direct horizontal effect and that therefore the right to water covered by Article 11(1) of the ICESCR, read in conjunction with Article 5(1) of the ICESCR, could be understood as an international obligation of corporations under the human right to water.⁶⁴ However, the clause has a different meaning: it is a provision on the abuse of rights.⁶⁵ The clause is present both in Article 5(1) of the ICCPR and Article 5(1) of the ICESCR as well as in Article 17 of the ECHR and Article 29(a) of the American Convention on Human Rights (ACHR), sharing a common origin in Article 30 of the UDHR. The declaration's and treaties' preparatory work show that the parties aimed to foreclose groups and individuals *as rights-holders* to invoke a human right with the sole purpose of destroying the human right of another right-holder. Any invocation of a human right which bases its interpretation on extremist, in particular totalitarian ideologies should not be permitted. Thus, the clauses essentially provide an interpretative guidance, embodying and generalizing the result of a balancing exercise that an intentionally abusive invocation of human rights should not be protected.⁶⁶

64 *Urbaser v. Argentina*, *supra* note 1, paras. 1196–1197. And even if the horizontal effect were established, the Tribunal would have had to elaborate on whether the obligation is owed to the home state, host state or other private actors, or all cumulatively, see on this different constructions Peters, *supra* note 45, pp. 110–113.

65 See also Edward Guntrip, 'Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?', *EJIL:Talk!*, 10 February 2017, <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/#more-14978>, accessed 10 April 2018.

66 On the UDHR and the ICCPR see Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 86–89; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCRP Commentary* (Kehl: Norbert Paul Engel Verlag, 2nd edn. 2005), Article 5 paras. 1, 5–10; on the ICESCR see Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9: 156–229 (1987), p. 208; Manisuli Ssenyonko, *Economic, Social and Cultural Rights in International Law* (Oxford: Hart Publishing 2009), para. 3.36; Ben Saul and David Kinley and Jacqueline Mowbray, *The International Covenant on Economic,*

The Human Rights Committee (HRC) supported this interpretation for the identical clause in Article 5(1) of the ICCPR for example in Communication No. 117/1981 of *MA v. Italy*. In this case, the petitioners contended the violation of ICCPR rights by Italy for a criminal conviction for the reorganization of the dissolved fascist party in Italy. The HRC dismissed the communication as inadmissible, *inter alia* because the acts leading to the conviction appeared to the HRC to be ‘of a kind which are removed from the protection of the Covenant by article 5 thereof’,⁶⁷ and thus the possibility of a ICCPR violation could not be shown. In the same vein, Christian Tomuschat in his individual opinions in *López Burgos v. Uruguay* and *Celiberti v. Uruguay* highlighted the meaning of Article 5(1) of the ICCPR as a clause prohibiting individuals ‘from availing themselves of the same rights and freedoms with a view to overthrowing the régime of the rule of law which constitutes the basic philosophy’⁶⁸ of the ICCPR. Article 17 of the ECHR was equally interpreted and applied by the European Court of Human Rights (ECtHR) already from its first judgment in *Lawless v. Ireland*⁶⁹ onwards in cases relating to abusive interpretations of ECHR rights, for example for the promotion of racist ideologies, terrorism and the overthrow of democracy.⁷⁰ The Inter-American Court of Human Right

Social and Cultural Rights: Commentary, Cases, and Materials (Oxford: Oxford University Press, 2014), pp. 262–267; for a contrary interpretation albeit without detailed argumentation see Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002), p. 146.

- 67 *M.A. v. Italy*, Human Rights Committee, Comm. No. 117/1981, 10 April 1984, para. 13.3.
- 68 *Sergio Euben Lopez Burgos v. Uruguay*, Human Rights Committee, Comm. No. R.12/52, 29 July 1981, Individual Opinion by Christian Tomuschat; *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, 29 July 1981, Individual Opinion by Christian Tomuschat.
- 69 *Case of Lawless v. Ireland (No. 3)*, European Court of Human Rights, Appl. No. 332/57, Judgment, 1 July 1961, para. 7.
- 70 Jochen A. Frowein, ‘Artikel 17’ in Jochen A. Frowein and Wolfgang Peukert (eds.), *Europäische Menschenrechtskonvention: EMRK-Kommentar* (Kehl: N.P. Engel Verlag, 2nd edn. 1996), Artikel 17 paras. 1–4; William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), pp. 611–620. From the extensive case law see *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, Appl. No. 133/1996/752/951, Judgment, 30 January 1998, para. 60; *Refah Partisi (the Welfare Party) and Others v. Turkey*, European Court of Human Rights, Appl. Nos. 41340/98, 41342/98, 41343/98, 41344/98, Judgment, 13 February 2003, para. 99; *Leroy v. France*, European Court of Human Rights, Appl. No. 36109/03, Judgment, 2 October 2008, para. 26; *Paksas v. Lithuania*, European Court of Human Rights, Grand Chamber, Appl. No. 34932/04, Judgment, 6 January 2011, para. 87; *Kasymakhunov and Saybatalov v. Russia*, European Court of Human Rights, Appl. No. 26261/05, 26377/06, 14 March 2013, paras. 103–104.

(IACtHR) in an advisory opinion in 1985 briefly affirmed the same understanding for Article 29(a) of the ACHR.⁷¹

In sum, neither Article 5(1) of the ICESCR (nor Article 30 of the UDHR) can be interpreted as creating international human rights obligations. Therefore, the Tribunal has not presented a compelling argument why binding international human rights treaties currently create such a direct horizontal effect. The award rests on the precondition of a more progressively developed individualized international legal system yet to be established.

4.4 *The Realistic Scope for Counterclaims Based on Direct Human Rights Obligations under the Current State of International Law*

Pending the development of international law towards international human rights obligations of natural and private legal persons, counterclaims in investment arbitration must and can be based on other sources of substantive investor obligations for the protection of public interest such as the right to water. Potential sources in the current state of international law are essentially two.

First, the application of public interest obligations of investors under the host State's domestic law. In treaty cases, this requires an applicable law clause in the BIT which encompasses domestic law. Absent such a choice of law, ICSID arbitration under Article 42(1) of the ICSID Convention provides for the applicability of the host State's domestic law as a residual rule. Contract cases usually involve manifold contract obligations of the investor that may be pleaded before the investment tribunal under the same requirements of jurisdiction and applicable substantive law. Notably, to the extent that the host State transforms or makes applicable international law into domestic law and establishes therein the missing directly applicable obligation of investors, investors could well face a counterclaim which is indirectly based on international human rights law.⁷²

71 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Inter-American Court of Human Rights, Advisory Opinion, OC-5/85, 13 November 1985, para. 67.

72 Dupuy and Viñuales, *supra* note 51, para. 72; on the adoption of a 'duty of vigilance' of corporations for human rights violations in France see Robert McCorquodale *et al.*, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises', *Business and Human Rights Journal*, 2/2: 195–224 (2017), p. 202. Cf. the application of domestic environmental obligations of investors in counterclaims in *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, paras. 317–611; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7.2.2017, paras. 59–1086.

Second, States could create directly applicable international human rights obligations of foreign investors through special BIT provisions.⁷³ These obligations would then originate in the BIT itself, not in a source external to the BIT in need of integration. Notwithstanding this origin in the BIT, the BIT could in the relevant provision resort to external sources such as international human rights law (and even soft law instruments) to define the content of the BIT investor obligation. Crucial for the applicability of such an obligation is that the provision can be interpreted as imposing a *binding, directly applicable* obligation in contrast to a moral responsibility as understood by the Second Pillar of the 2011 UN Guiding Principles on Business and Human Rights. Examples for such clauses can be found, for instance, in Articles 9–12, 14(11) of the 2015 India Model BIT⁷⁴ or Articles 10–18, 19(2) of the 2012 SADC Model BIT Template.⁷⁵

5 The Potentials of the Tribunal's *Urbaser v. Argentina* Award as a Model for the Future

It has been shown that the Tribunal's line of argument in the *Urbaser v. Argentina* cannot be sustained under the current state of international law. On the other hand, it has also been suggested that there is a narrow scope for human rights counterclaims under certain circumstances even today. This prompts the question if lessons could be learned from the award for international law's future development. Taking the Tribunal's approach to human rights counterclaims in investment arbitration as a model for the future, would it be a feasible and desirable step forward for international investment law and investment arbitration (Section 5.1) and for international human rights law and its international enforcement (Section 5.2)? Without the possibility of an exhaustive analysis, a few thoughts will be dedicated on these potentials underlying the *Urbaser v. Argentina* award.

5.1 *A Model for International Investment Law and Investment Arbitration?*

For international investment law, established human rights counterclaims in investment arbitration would in the first place signify a substantial recalibration

73 On the possibility of such an approach see Peters, *supra* note 45, pp. 85–90, 101–102.

74 2015 India Model BIT, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>, accessed 10 April 2018.

75 South African Development Community, 'SADC Model Bilateral Investment Treaty Template with Commentary', 2012, <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>, accessed 10 April 2018.

of its functioning by leveling the procedural playing field between investors and the State. The initiation of investment arbitration would incur a liability risk of the investor in the form of damages payable for human rights violations. Not only can the award of damages to the host State set off a justified claim of the investor against the host State under the BIT. Also, the former could potentially exceed the latter in sum. In addition, awards against the investor qualify in principle for the far-reaching and efficient recognition and enforcement regimes under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the ICSID Convention. Both Conventions do not require that the award be rendered against a State. Quite the contrary, the wording of Article I of the New York Convention and Article 54 of the ICSID Convention is neutral as to the disputing parties' nature. Hence, States that are parties to these conventions are, subject to the fulfilling of all other requirements, under an international obligation to recognize and enforce awards against the investor that follow from counterclaims. That means that a host State can enforce an award against the respective investor's assets in its home State and in respective third countries under the favorable conditions of the two Conventions.⁷⁶ Limitations follow from the fact that enforcement is only possible against assets of the same natural or legal person that was the complainant in the investment arbitration and against which the award on the basis of a counterclaim was reached. This can prove difficult in the case of investors forming part of complex international corporate structures, which leads to the problem of the piercing of the corporate veil that is outside this article's scope. Nevertheless, what can be said is that human rights counterclaims have the potential of turning the investment arbitration machinery – with all its sometimes criticized, sometimes applauded aspects of efficiency – against the investor.

Such a change to investment arbitration could probably ease to a certain extent the regulatory chill-effect, assuming here for the sake of the argument its still controversially debated existence. After all, the chilling effect is largely perceived to stem from the danger of arbitral awards granting disproportionately high damages, then being effectively enforceable in many third States.⁷⁷ The described liability risk of the investor provides a disincentive for any premature use of investment arbitration. Less willingness to raise investment claims means less cause for States to fear investment arbitration overall.

76 For Art. I of the New York Convention see Bernd Ehle, 'Article 1' in: Reinmar Wolff (ed.), *New York Convention: A Commentary* (Munich: C.H. Beck, 2012), Article I paras. 138–139; for Art. 54 of the ICSID Convention see Schreuer *et al.*, *supra* note 4, Art. 54 para. 7.

77 On the regulatory chill-effect see Simma, *supra* note 6, p. 580; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), pp. 606–628.

On the other hand, if the possibility of human rights counterclaims deterred investors too much to invoke their international investor rights, international investment law could lose much of its relevance as an international tool for the protection of legitimate investor interests. In turn, the hope for attracting foreign investment through the granting of such additional protection would diminish. That would frustrate to a certain extent the very purpose of international investment law to foster host States' development which often depends on foreign investment. A result, which would not be in the interest of international human rights either, especially taking into account international economic, social and cultural rights.⁷⁸

It follows that due care must be given to keep the re-balancing of international investment law and investment arbitration through human rights counterclaims balanced itself. A balance consisting in leaving meaningful space for international investment law to protect investors in the interest of their attraction to the host State, while at the same time holding accountable those investors which operate in breach of the public interest reflected in international human rights law. Such investment arbitration would operate as a dispute settlement forum which holistically adjudicates on foreign economic activity, instead of an instance for the protection and enforcement of foreign investors' private interests only. It would more strongly reflect scholarly voices who emphasize international investment law's telos to further an international rule of law and a sustainable development of States.⁷⁹

Still, this observation on a rebalancing effect warrants a caveat: In the *Urbaser* award's model, the connection of international human rights and investment law takes place only on the level of enforcement, is realized through dispute settlement before the arbitral tribunal. There is no merging or interplay of the two bodies of law on the substantive level prior to arbitration. Herein, it stands in contrast to the already mentioned rebalancing approach through systemic interpretation under Article 31(3)(c) of the VCLT of a BIT. Rather, the emergence of a dispute over rights and obligations under the BIT and its settlement before an investment tribunal are conditions for realizing the interaction of a human rights duty and a right arising under a BIT of a foreign investor. Generalizing from this assessment, human rights counterclaims more precisely represent a re-balancing of investment arbitration than of international investment law as a whole, because they would for example not be operational for BITs without arbitration clause.

78 On the relation between international economic, social and cultural rights and international investment law see Diane Desierto, *Public Policy in International Economic Law* (Oxford: Oxford University Press, 2015), pp. 308–379.

79 Simma, *supra* note 6, p. 577.

5.2 *A Model for International Human Rights Law and Its International Enforcement?*

To allow for human rights counterclaims in investment arbitration would have notable consequences for the role of international human rights within the international investment law system as well as more generally for the international enforcement of human rights.

International human rights' largely passive role in investment arbitration in the past has already been pointed out.⁸⁰ In contrast, in counterclaims, international human rights and the public interests reflected therein would play an active role including the possibility of enforcing damages for human rights breaches – a substantial improvement compared to the *status quo* of their only passive use for justifying host State measures and the invocation in the legally often-precarious *amicus curiae*-briefs.⁸¹ This would alleviate investment arbitration's asymmetry in the comparison of the host State's and the investors positions. It would overall further international investment law's integration in general international law. However, because natural persons and civil society have no say in the initiation of counterclaims under the *Urbaser* model, but only the host State, the important call for a level playing field between the investor and other private actors of society would remain unanswered.⁸²

From the external perspective of international human rights law, human rights counterclaims would offer a new international forum for litigating human rights violations. Investment tribunals in a sense would overtake the function of trustees of international human rights law.⁸³ The *Urbaser v. Argentina* award itself serves as an illustration. The Tribunal fulfilled a human

80 See *supra* Section 2.

81 See the rejection of *amicus curiae* submissions in *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003 and the first admission of *amicus curiae* submissions in *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, para. 47; from the literature see James Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?' in Pierre-Marie Dupuy and Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), pp. 396–421, who criticizes arbitral tribunal's lack of engagement with *amicus curiae* submissions.

82 On international investment law's asymmetry comparing individuals and civil society on the one hand, and foreign investors on the other hand, see *supra* note 7.

83 Compare to the role of national courts 'as faithful trustees' of the ECHR as advocated by Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015).

rights-trustee function by reinforcing the, sometimes contested, legally binding character and the justiciability of the right to water in international human rights law,⁸⁴ reflecting the possibility that investment tribunals could thereby contribute to the progressive development of human rights.

In addition to contributions to international human rights' substantive development, investment tribunals as one of the most efficient international enforcement fora⁸⁵ would offer potent possibilities to internationally enforce human rights. The already mentioned coverage of awards against investors by the ICSID Convention or New York Convention may enable host States to take advantage of these enforcement networks and enforce damages against investors' assets in third countries. Even more, in case that the investors in the same dispute is awarded damages for their original investment claim against the host State, the enforcement of the human rights counter-claim could automatically operate through a set-off and thus prove to be particularly effective. Thereby, host States would be provided with an international enforcement tool which may complement regular national enforcement. This may prove especially valuable to developing States which are willing but lack the resources or administrative infrastructure to enforce human rights domestically *vis-à-vis* a sometimes economically more potent foreign investor. And even before it comes to litigation, the danger of being subject to an international counter-claim might incentivize investors to honor local population's human rights obligations in the first place – exerting what we might describe in terminological tradition as a 'human rights infringement chill' on investors.

However, international investment arbitration as an avenue for international human rights enforcement would also raise a series of problems. To these, one must count the already mentioned exclusion of the actually injured individuals and civil society from any control over the initiation of human rights counterclaims and of how they are processed. Victims of human rights violations caused by a foreign investor would depend on the host State's exercise of discretion to take up their case and initiate a counterclaim – a constellation that in this specific regard of the individual's procedural powerlessness is reminiscent of diplomatic protection.⁸⁶ Such a procedural mediatization of

84 See on the controversy over the status and sources of the international human right to water Thielbörger, *supra* note 13, pp. 56–88.

85 See the assessment by Simma, *supra* note 6, p. 574.

86 See the acknowledgment of a state's full discretion to apply diplomatic protection on behalf of one of its nationals by *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Preliminary Objections, ICJ Rep. 1970, 3, paras. 78–80.

the human rights position of third parties by a State falls considerably short of one of human right's paramount achievements: their status as individual rights which any right bearer can invoke him-/herself. While human rights counterclaims thus may produce a progressive internationalization of human rights obligations and accountability of private actors,⁸⁷ they would at the same time represent a setback by re-mediating, in a sense, the individualized assertion of human rights claims established today. This raises follow-up questions, in particular whether it is adequate to frame the enforcement of a State's legal position against private actors in the emancipatory language of human rights which has long been discussed in the discourse on fundamental duties of individuals.⁸⁸

Furthermore, in an institutional perspective, the creation of a new human rights forum bears the risk of causing fragmentation of human rights through conflicts of jurisdictions with other universal and regional human rights fora and a heterogeneous interpretation and application of human rights. This concern has been extensively discussed in other instances under the notion of the 'proliferation of courts and tribunals' in international law.⁸⁹ For the present purpose, it may suffice to highlight that the increase of international fora competent to hear human rights claims can also be regarded as raising the chances for the highly desirable international justiciability of human rights violations.⁹⁰ Nevertheless, surely, investment tribunals should pay attention to apply due care for achieving an interpretive and jurisdictional harmony with other competent human rights courts and tribunals through the available legal techniques and non-legal practices such as judicial comity.⁹¹

87 See generally on the individualization of international law, especially also on the aspect of obligations, Peters, *supra* note 45, pp. 60–166 and on international investment law in pp. 282–347.

88 For an overview on the problem in the context of the individualization of international law see Peters, *supra* note 45, pp. 110–113 and in more detail Christian Tomuschat, 'Grundpflichten des Individuums', *Archiv des Völkerrechts*, 21/3: 289–315 (1983).

89 See, for instance, the dispute over the newly established court and tribunals under Part xv of United Nations Convention on the Law of the Sea in relation to the role of the ICJ by Gilbert Guillaume, 'The Future of International Judicial Institutions', *International and Comparative Law Quarterly*, 44/4: 848–862 (1995), pp. 861–862 and the reply by Jonathan I. Charney, 'Is International Law Threatened By Multiple International Tribunals?', *Recueil des Cours* 271: 101–373 (1998), pp. 351–352, 354, 356, 362.

90 See, for instance, Charney, *supra* note 88, pp. 351–352, 354, 356, 362.

91 On this range of instruments for judicial interactions favourable to prevent fragmentation through a plurality of courts and tribunals see Laurence B. de Chazournes, 'Plurality in

6 Conclusion

Faced with a case with favorable conditions for counterclaims in the Spain-Argentina BIT's arbitration clause, the ICSID Tribunal in its 2016 award in *Urbaser v. Argentina* affirmed the possibility of a human rights counterclaim by the host State against the investor. At the same time, it affirmed the existence of (negative) international obligations of private actors under international human rights law. But to denounce a break-through and fundamental change in both international investment and human rights law would be premature.

The Tribunal's reasoning is not only unclear in the precise way it perceives the integration of human rights obligations as a source of international law external to the Spain-Argentina BIT into investment arbitration – an undertaking for which only the BIT's applicable law clause is the adequate doctrinal mechanism. Much more, the award rests on the existence of international obligations of private actors in international human rights law which are yet to be created. The Tribunal's reasoning comes to an opposite conclusion based on two fallacies. First, the conflation of legally binding and non-binding human rights norms. Second, a misinterpretation of Article 5(1) of the ICESCR, a provision which does not create international obligations of private actors but provides a safeguard against the abuse of ICESCR rights. Hence, until such creation of directly applicable international human rights obligations in general international law, the currently realistic scope for human rights counterclaims in investment arbitration is narrower than indicated in the award. It requires either to make domestic human rights obligations directly applicable to foreign investors (including international human rights law transformed into corresponding domestic law) the applicable substantive law in investment arbitration or the original creation of international human rights obligations in international investment agreements. For both alternatives, there are nascent practical examples in arbitral jurisprudence or model BITs. In light of this, the *Urbaser v. Argentina* award can only be taken as an indication of the generally increasing relevance of counterclaims for human rights protection, and as an important occasion for clarifying and reflecting on this tool.

Shifting the view to the possible future of human rights counterclaims in the spirit of such reflection, the *Urbaser v. Argentina* award outlines a model with potential for both international investment law and international human rights law. This potential is in both cases ambivalent. For international investment arbitration, human rights counterclaims as envisioned by the Tribunal

the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', *European Journal of International Law*, 28/1: 13–72 (2017), pp. 36–70.

would provide a means to rebalance the protection of private and public interests, perceived today as too asymmetrical in favor of investors and to the detriment of host States' right to regulate – at least for those international investment agreements with arbitration clauses. Yet, a careful recalibration would be warranted to keep the desired incentive to attract foreign investment for the benefit of the host State's development. International human rights may profit from a new and potentially efficient international enforcement tool against infringements by multinational enterprises. Therein may lie an opportunity especially for situations in which the host State does not have the capacity to enforce its human rights obligation to protect in its domestic jurisdiction in a different way. However, human rights counterclaims leave people who have suffered a human rights violation and civil society out of control of this enforcement means and therein establishes a problematic mediatization of human rights enforcement.