I. INTRODUCTION

Despite the apparent opposition between the two concepts, human rights protection and international investment law in fact share many common features, the most important being the weak or vulnerable position of both individuals and foreign investors in relation to the state, which can take decisions affecting their rights and obligations without their participation. This reality has been one of the main justifications behind the grant of rights and protection to both individuals and foreign investors.

The protection of foreign investment is a relatively old concept in international law and relations but has in the past decades evolved and developed rapidly. Globalisation of the world economy and the weakening of the barriers traditionally faced by investors in broadening their field of activity in foreign states has resulted in an expansion of foreign commercial activity in states. At the same time, states have privatised many areas of the public sector, such as such water, sewage, gas and the management of (hazardous) waste sites. This privatization has often been done by relying on foreign investors, and has thus led to the involvement of non-state entities in functions usually exercised by state organs or entities. Privatisation is of course not problematic in se, since it can improve public health and human rights generally, but it can also result in a decreased respect for human rights.1

The involvement of foreign investors has only been possible by giving them far-reaching protection from unilateral interference by the host

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state. Such protection is often materialized through the signature of an investment treaty between the host state and the home state of the investor. The protection offered to investors in investment law is done via different ‘standards’, and most often includes the direct access of the foreign investor to international arbitration. As a result of privatization and the involvement of foreign investor in public sectors however, host states which are bound by international human rights norms, and obligations under international investment agreements can be faced with a conflict of obligations. Indeed, respecting the investment agreements between the host state and the foreign investor can amount to violation of the obligation for the host state to protect or to ensure the protection of the human rights within its territory, especially when the privatization has resulted in the endangerment of human rights relating to health. Any action by the host state to remedy this violation might then be considered as a breach of the state’s obligation under international investment agreements and/or investment contracts.

In this chapter I will assess the rules relating to the conflict between human rights and investment obligations, and the way in which human rights considerations, raised as defences to ‘justify’ alleged breaches of international investment treaties could be and have been dealt with by investment tribunals. I will particularly zoom in on human rights considerations invoked by the host state and third non-disputing parties.2 The first section will briefly depict the specificities of international investment arbitration, in order to better grasp the reasoning of investment tribunals with respect to human rights considerations. I will next address the human rights obligations of foreign corporations and host states. This responsibility will be addressed both from the perspective of the host state and from the perspective of the corporation. I will then discuss the potential conflict between those human rights responsibilities and the responsibility of states with reference to their obligations under investment treaties, and the way in which investment tribunals have dealt with human rights considerations raised by the host state. Finally, I will discuss the role played by NGOs in bringing human rights considerations before investment dispute settlement proceedings as ‘friends of the court’.