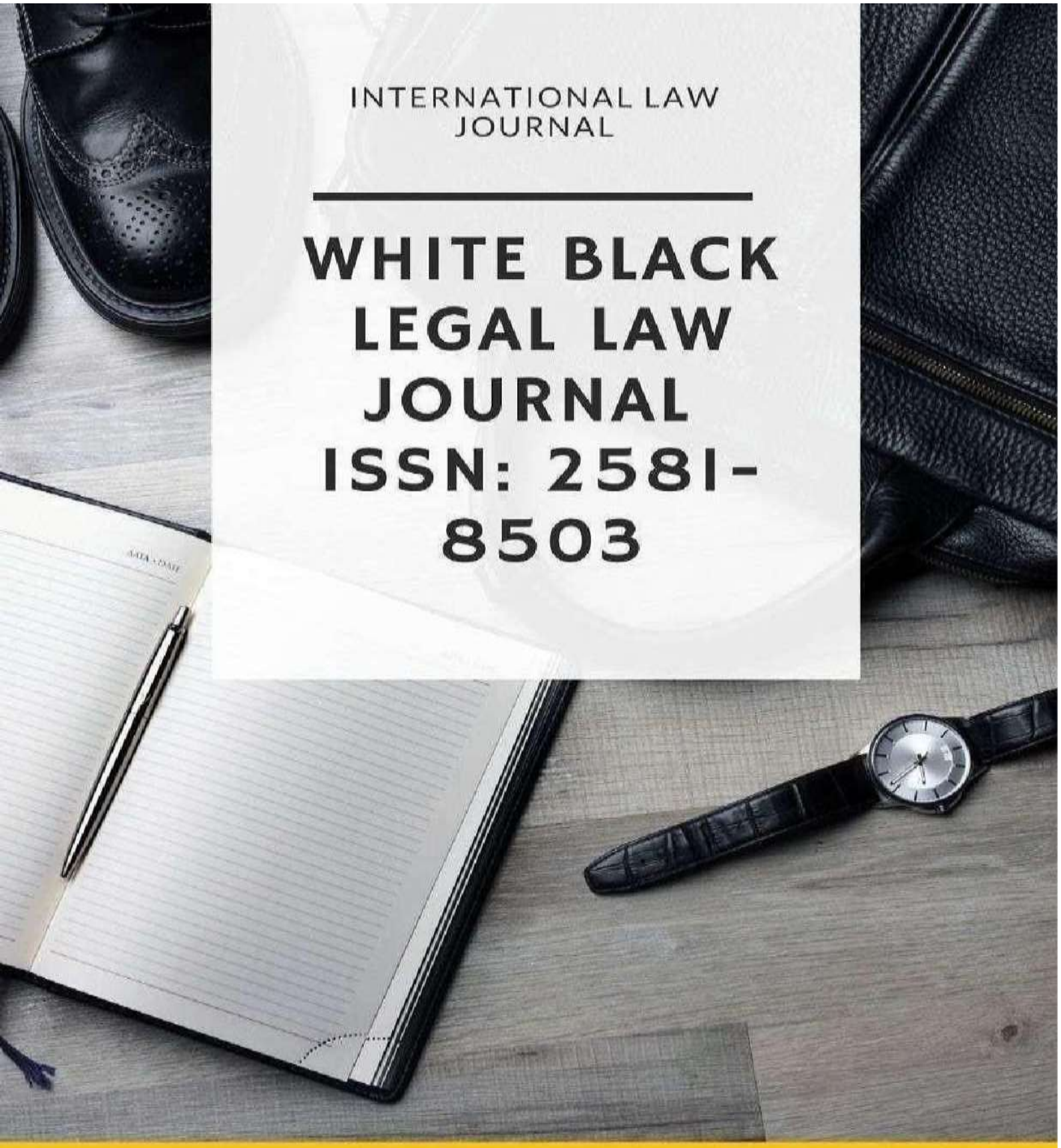

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INTERSECTION OF HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW

AUTHORED BY - NEHA SHREE BHATNAGAR[1]

Abstract

At first glance, Human Rights and International Investment Law would appear to be two separate and different fields of international law. For the most part, majority of international investment treaties didn't include anything on human rights and major multilateral investment treaties, such as, the North American Fair-Trade Agreement (NAFTA),[2] and the Energy Charter Treaty (ECT),[3] don't have any mention of human rights. However, there is a recent change in trends, since some states have started including human rights clauses in their bilateral investment treaties (BITs). This paper tries to study and analyse the situation and ways in which human rights interact with international investment law. It would enquire whether foreign investors can be subjects under international human rights law, and as such can rights and obligation be attributed to them. Then it would delve into the jurisdiction challenge of arbitral tribunals being limited to addressing matters arising just out of the investment treaty, and thus not being able to decide on issues which have human rights implications. Then, the paper would explore the entry points of human rights in investment law, including human rights obligations in the domestic law being 'internationalised' and thus, failling under the jurisdiction of arbitral tribunals.

Keywords: International Investment Law, Human Rights Law, Intersection

Introduction

The interaction between international investment law and human rights is one of the most contentious topics in contemporary international investment arbitration. At a first peripheral glance, they would appear to be two separate and different fields of international law. For the most part, the majority of international investment treaties didn't include anything on human rights. Similarly, major multilateral investment treaties, such as, the North American Fair-

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[2] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993).
[3] Energy Charter Treaty, ECT 1994, 2080 UNTS 100, 10 ICSID Rev—Foreign Investment L J 258.

Trade Agreement (NAFTA),[4] and the Energy Charter Treaty (ECT),[5] don't have any mention of human rights.

However, there is a recent change in trends, since some states have started including human rights clauses in their bilateral investment treaties (BITs),[6] but the general picture remains that majority of contemporary BITs are silent on human rights. This is not to say that both fields work in isolation and do not intersect with each other. This paper tries to study and analyse the situation and ways in which human rights interact with international investment law.

The paper would delve into the various intersections of human rights and investment laws. It would enquire whether foreign investors can be subjects under international human rights law, and as such can rights and obligation be attributed to them. Then it would delve into the jurisdiction challenge of arbitral tribunals being limited to addressing matters arising just out of the investment treaty, and thus have not been able to decide on issues of which have human rights implications. Then, the paper would explore the entry points of human rights in investment law. Recently, investors are bound by certain domestic human rights laws operating in the host state, since certain agreements include the 'legality requirements' which mean that the human rights obligations in the domestic law are 'internationalised' and thus, claims regarding their violations can be brought forth an arbitral tribunal. Another way is through using human rights as a part of applicable law by the host state and using human rights as a defence to get away with causing breach of its investment obligations.

The Intersection of Human Rights and International Investment Law

Foreign investors "subjects" under international human rights law Usually, the State has been the sole bearer of protecting human rights of its subjects and human rights obligations have traditionally been to control the relationship between individuals and their state. It is the state which not only bears a duty to respect the human rights of its subjects, but the state also has a duty to ensure these rights are not violated by any private actors which includes foreign

[4] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993).
[5] Energy Charter Treaty, ECT 1994, 2080 UNTS 100, 10 ICSID Rev—Foreign Investment L J 258.
[6] Ionel Zamfir, "Human Rights in EU Trade Agreements: The Human Rights Clause and Its Application", European Parliament Think Tank, accessed on December 21, 2020, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf

investors as well.[7]

Recently, there has been emergence of the trend of holding multinational corporations responsible for the human rights violations. It is in this line that a variety of international instruments (non-binding) such as International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (TDP),[8] the OECD Guidelines for Multinational Enterprises,[9] and the UN Guiding Principles on Business and Human Rights (UNGP)'s 'Protect, Respect and Remedy' framework.[10] Thus, we see that attributing human rights responsibilities to private actors under international law framework is at a very nascent stage. However, that does not mean that arbitral tribunal have shied away from using this existing legal framework.

The arbitral tribunal in *Urbaser v. Argentina*,[11] mulled over the questions that whether foreign investors (corporations) can be treated as subjects of international law and if yes, then whether these corporation have any human rights responsibilities under international law. The crux of the dispute was that a foreign investor was granted a concession of water distribution and sewage contract in Argentina. The investor failed to make necessary investments, as a result of which right to water was denied to the people of the region. The investor-arbitration clause was quite broad and stated that Argentina could bring any claim as long as it is "in connection with the investment",[12] thus, the tribunal accepted jurisdiction. The tribunal stated that if foreign corporations can invoke general international law when it comes to enjoying certain rights, then the same can be relied upon while attribution obligations to these corporations. It then went on to discuss that these obligations find their place in a plethora of international instruments such as the UDHR, ICESCR, TDP etc. However, then the tribunal noted that

[7] Kenneth Paul Kinyua, *The Accountability of Multinational Corporations for Human Rights Violations: A Critical Analysis of Select Mechanisms and Their Potential to Protect Economic, Social and Cultural Rights in Developing Countries*, SSRN JOURNAL (2009), http://www.ssrn.com/abstract=1599842 (last visited May 17, 2021).
[8] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) - 5th Edition (2017) (ENTERPRISES), https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm (last visited May 17, 2021).
[9] OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 2011 EDITION (2011), https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en (last visited May 17, 2021).
[10] UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5.
[11] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 Dec 2016.
[12] *Id* at para 1143.

Argentina's claim that the investor corporation had the obligation to provide right to water was based on concession contract and not international law, and the said concession contract didn't contain any obligation on part of the investor to provide right to water.[13] The case is interesting for the reason that although it didn't attribute the obligation of right to water to the investor, the tribunal did open gates for future discourse, on whether foreign corporations are "subjects" in investment law bearing rights and obligations.

Jurisdictional Limitation of Arbitral Tribunals

One of the major challenges in attributing human rights obligations to foreign investors is the limited jurisdiction challenge. The jurisdiction of arbitral tribunals is limited only to claims that arise out of the investment, and hence the scope of authority of the tribunal is limited to the instrument only and cannot go beyond it to attribute human rights obligations to the investor. In *Channel Tunnel v. France and United Kingdom,* the claimant brought forth the argument that France and UK have violated the terms of concessional agreement which should be read with international obligations of the states under the ECHR.[14] However, this argument was rejected by the tribunal by giving the reasoning that claims of violation of human rights should be raised before appropriate human rights forum and thus, the tribunal restricted itself in adjudicating on disputes as per the concessional agreement only.

The same line of reasoning was followed in *Biloune v. Ghana*, wherein the claimant was detained for 13 days. The tribunal reasoned that the tribunal does not have the jurisdiction to deal with human rights violations of the claimant, except for when such violations adversely affect the investment, for then it becomes an investment dispute, falling within the jurisdiction of the tribunal.[15] Similar observations were made in *Bernhard von Pezold and Others v. Zimbabwe*[16] and more recently in *Rompetrol v. Romania*[17], wherein tribunals observed the principle that tribunals are competent to deal with disputes arising out of the an investment and ruling on human rights is beyond its limited scope.

[13] *Id* at para 1211-20.
[14] Channel Tunnel Group v France and United Kingdom, Partial Arbitral Award, 30 January 2007.
[15] Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, (1994) 95 International Law Reports 184.
[16] Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15, and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012, para 60.
[17] Rompetrol Group N.V. v Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013.

Reading these cases, along with *Urbaser v. Argentina*, gives the understanding that tribunals have accepted jurisdiction over claims of human rights only in cases where there is a broad arbitration clause, which encompasses any and all breaches of any nature. However, just accepting a conjunctive claim of human rights does not turn the dispute into a human rights one, as has been evidenced by the reasoning of tribunals in the above mentioned discussion.

Human Rights as Applicable Law

The fact that the jurisdictional scope of the tribunal is limited does not mean that human rights issues cannot be considered as a part of applicable law. If an investment treaty includes references to human rights, then tribunal can certainly delve into human rights issues, but generally such clauses or references are absent in investment treaties.[18] Keeping the aforementioned discussion in mind, there are two ways in which human rights can be considered as a part of applicable law. One, in case of conflict between host state's human rights obligations and its investment obligation. In these cases, either VCLT can be interpreted to resolve the conflict or the tribunals end up considering the state's human rights obligations, giving rise to the principle of systemic integration. Second, the host state can make an argument that since it was complying with its international human rights obligation, it resulted in causing breach of treaty obligations under the investment treaty.

Tackling with the first situation, whenever a state enters an investment treaty, it is still bound by its prior commitments in previously signed international treaties and conventions.[19] Thus, there may very well arise a case in which there can be a conflict between its international human rights commitment and its commitments under the investment treaty. Recourse can be taken to Article 30 and 31 (3)(c) of the VCLT in order to come to a 'systemic integration' of the treaties.[20] In *Suez v. Argentina*, Argentina argued that since it was going through an economic crisis which affected the human rights of all of the state's citizens, the terms stipulated in the investment treaty could not triumph over the emergency measures imposed by the state to secure the human rights of its individuals.[21] However, the tribunal held that Argentina's human

[18] Bruno Simma, 'Foreign Investment Arbitration: a Place for Human Rights?', (2011) 60(3) International and Comparative Law Quarterly 573, 581.
[19] Jan B Mus, 'Conflicts between Treaties in International Law', (1998) 45(3) Netherlands International Law Review 208, 227.
[20] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', (2011) 60(3) International and Comparative Law Quarterly 573, 581.
[21] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

rights and investment obligations were not contradictory or inconsistent with each other and hence it is bound to fulfill both sets of obligations.[22]

In *Azurix v Argentine Republic*, an argument of conflict between BIT and human rights, on the issue of consumer rights, was raised by Argentina. One of the experts on behalf of Argentina opined that in case of such a conflict human rights should be given precedence since public rights of consumers must triumph over private rights of service provider.[23]

This brings us to the second situation, where human rights obligations are invoked as a defense against international responsibility by the host state. One of the most recurring form of dispute which has elements of human rights as well as investment law are cases where certain services such as water, sewage etc are privatized to foreign investors.[24] As mentioned above, state not only has the obligation to respect human rights, it also has the obligation to prevent private actors from violating them. So, the question arises whether a state can take defense of its human rights obligation to justify breach of its investment treaty obligations.

In *Sempra v. Argentina*, the arbitral tribunal seemed open to taking into account human rights considerations as valid defences to avoid responsibility, and in fact, even recognized the scope for potential conflict between human rights and investment obligations.[25] The crux of Argentina's argument was that steps taken by were out of 'necessity' to preserve its constitutional order, which included taking steps to respect the provisions of American Convention of Human Rights, justified violations of the rights of investors.[26] While adjudicating this case, the tribunal referred to the case of *Biwater Gauff*, wherein Tanzania claimed that since water and sanitation services are important services, state has the right and legal obligation to protect such services in a situation of crisis and that the investor had created a situation of public health and welfare crisis.[27] The tribunals in both the cases while hearing the human rights defenses, held that there was no dire necessity or emergency to warrant breaches of the investment agreement.

[22] *Id.* at para 262.
[23] Azurix v Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 254.
[24] Pierre Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo- Conflict?' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), Human Rights in International Investment Law and Arbitration (OUP 2009) 487.
[25] Sempra v Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007.
[26] *Id.* at para 331.
[27] Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, para 434 and 436.

The tribunal reached a different conclusion in *LG&E v Argentina*, where it held that steps taken by Argentina were "necessary to maintain public order and protect its essential security interests".[28] Even though the arbitral tribunal did not make any explicit reference to human rights, it remarked that Argentina's response to the crisis was to ensure that its population has access to basic health care and services.[29] A similar line of reasoning was followed in *Continental v. Argentina*, where in the arbitral tribunal noted that the steps taken by Argentina were undertaken to protect constitutional guarantees and fundamental liberties and hence were justified. The tribunal also held that a significant margin of appreciation must be accorded to the states in deciding the types of measure to be undertaken.[30] However, in this case also the tribunal did not make explicit reference to the h uman rights obligations of Argentina.

In the recent case of *Urbaser v. Argentina*, the arbitral tribunal acknowledged and accepted that there existed a situation of necessity, even though it did not make explicit reference to the human rights. The tribunal took note of the fact that, in order to consider whether other means were available to the state in order to meet the 'state of necessity' requirement, it was essential to take into consideration the needs of Argentina and its population.[31] However, the tribunal noted that the situation of necessity had come to an end, and thus there was a need for re-inspection of the measures undertaken. The tribunal noted that Argentina cannot forsake its investment obligations to guarantee access to water to its citizens and it needs to balance and fulfill both the obligations simultaneously.[32]

Conclusion

As evidenced from above, the interaction between human rights and international investment-arbitration law is complex. Globalization has led to an expansion of economic activity by private actors in foreign states. These states often have privatised many areas of the public sector and service and the management and control of these services falls in the hands foreign investors. These investors are usually offered protection by ensuring different and ofttimes beneficial standards of treatment in order to encourage such foreign investments. This has resulted in an increased impact of private foreign investors on the public health and human

[28] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para 226.
[29] *Id* at para 234.
[30] Continental Casualty Company v Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008.
[31] Urbaser v Argentina, supra note 8, para 716.
[32] *Id* at para 720.

rights of the people of the host-state.

The essay started by noting that the host state has the primary and main responsibility for protecting human rights and for ensuring that businesses also respect human rights of the people in the territory. Currently, there are no binding international law instruments that provide for directly attributing responsibility for breaches of human rights obligations to foreign investors. This, however, does not mean that there is no intersection of human rights in investment disputes. One of the main challenges arises due of the limited scope of jurisdiction of tribunals which derive their competence from an international investment treaty and thus, human rights disputes cannot be directly brought before tribunals. Again, this does not mean that no human rights considerations can be brought before arbitral tribunals. An entry point for human rights in investment arbitration is the consideration of human rights as part of the applicable law. This can be done through the 'legality requirement' clauses or can be done through interpreting the relevant rules of the VCLT.

Another way of introducing human rights arguments in front of tribunals is when states try to invoke their human rights obligations as defences to state responsibility. As has been evidenced by the discussion above, tribunals have had different responses to these claims, with certain tribunal willingly acknowledging and accepting that human rights can be invoked to exclude the wrongfulness of a breach of obligations of an investment treaty.

The analysis of certain case laws above, show that when the tribunals have been faced with arguments of human rights considerations, they have been mostly reluctant to engage in detailed discussions about human rights. Generally, investment tribunals have mostly stuck by their limited scope of jurisdiction and have not been too keen on deciding whether certain actions do or do not fall within the purview of human rights. However, as evidenced above, in theory, nothing stands in the way for tribunals to take into account arguments of human rights arguments raised by either party to the dispute, or through, amicus briefs.