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Bilateral Investment Treaties and International Human Rights Law: Harmonization through Interpretation

Stratos Pahiis



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Executive Summary

The number of bilateral investment treaties and disputes arising from them has exploded during the past two decades. Recent investment arbitrations have highlighted the potential for this new and increasingly important form of law to interact and conflict with international human rights law. The aim of this Report is to examine the relationship between these two bodies of law. Section One explores the substance of BITs and their relationship to international law generally. It identifies BITs as international treaties, which according to the Vienna Convention on the Law of Treaties (VCLT), must be interpreted within the broader context of international law. It examines the principle of systemic integration, the presumption against conflict in international law, and how these principles call for BITs to be interpreted in harmony with other relevant and applicable international law. The Section confirms that investment tribunals have the jurisdiction to consider external law in the interpretation and application of BITs, and it goes on to explore in what circumstances other international law would be relevant and applicable for these purposes.

Section Two explores the relationship between BITs and international human rights law specifically. It argues that achieving harmony between the two sets of laws is critical given the *erga omnes* nature of human rights obligations, the constitutive nature of human rights norms, and the limited applicability of conflict resolution tools to potential conflicts with human rights law. The Third Section explores the potential for conflict between human rights law and BITs and whether such conflicts can be harmonized through interpretation. Applying the framework developed in Sections One and Two to the interpretation of major BIT terms, it shows that while potential conflicts do exist between these provisions and international human rights law, they can be mitigated by adopting reasonable and already accepted non-conflicting interpretations of the terms. Section Four goes on to discuss how the lack of transparency in investor-State arbitrations conflicts with the right to information and democratic governance, and undermines the fulfillment and protection of other human rights.

The Report concludes the following: First, international investment tribunals have not only the authority but the obligation to consider international human rights norms while interpreting and applying BITs. Specifically, they must take seriously the potential for conflict between these two sets of laws, and interpret and apply BITs in a manner that minimizes these conflicts. Second, while the potential for conflict between BITs and international human rights law is real and growing, it can be mitigated by following standard principles of interpretation and applying generally accepted interpretations of BIT terms.

Introduction

The rise of the bilateral investment treaty (BIT) represents one of the most significant recent developments in international law.¹ Designed to promote and protect international investment, BITs require each State Party to provide protections and guarantees to foreign investors originating from the counter-State Party. Although each treaty may differ in a number of ways, most contain the same standard terms: protection against arbitrary and discriminatory treatment; the guarantee of “fair and equitable treatment”; “full protection and security”; protection against unlawful and uncompensated expropriation; and the right to transfer funds into and out of the State Parties. While the substantive terms of BITs are important, the procedural remedies that BITs make available to foreign investors are of particular significance. Historically, aggrieved foreign investors who had exhausted the local remedies of the State hosting the investment (Host State) were forced to rely upon their State of origin (Home State) to exert diplomatic pressure or to bring an international claim on their behalf. In a marked departure from this dynamic, BITs provide foreign investors standing to commence an arbitration against the Host State directly, and to seek monetary damages for alleged breaches of the treaty.

Since the fall of the Berlin Wall—and the concomitant political shift toward liberal economics, the surge in availability of international capital, and the expansion of new market and production opportunities for businesses and investors—States have been increasingly willing to assume the responsibilities and liabilities inherent in BITs in order to attract investment to their homelands and to protect the investments of their nationals abroad. Accordingly, the number of BITs in force has increased at an impressive clip, from 300 in 1990 to over 3,000 today.² The number of investor-State arbitrations arising from these treaties has increased in tandem with the thickening web of agreements. From 26 registered disputes in 1990, there are now over 300 known arbitrations³—a figure which is estimated to represent less than one-half of all investor-State arbitrations.⁴

While designed to promote and protect international investment, the impacts of BITs extend beyond the treatment of foreign investment and investors. Most obviously, the

1— BITs represent the most common form of State-based agreements on investment, but they are not the only one. Substantively similar agreements are also entered into on multilateral bases and are sometimes included as provisions within trade agreements. While this Report uses the term “BIT,” its analysis is meant to apply all agreements similar in substance to BITs.

2— ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 345 (2nd ed., 2010).

3— ICSID, *The ICSID Caseload – Statistics*, p. 7 (2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>.

4— Luke Eric Peterson, *ICSID publishes new statistical Report of the Centre's work*, 13 *INVEST. ARB. REP.* (Aug. 28, 2010).

protections and guarantees that BITs provide to foreign investors have the potential to implicate States' capacity to regulate domestically and, in turn, impact a broad range of legal, economic, constitutional and social issues. Effects on domestic regulatory capacity can also affect States' ability to implement and adhere to other international legal obligations, creating the potential for interaction and conflict of international norms. In this regard, the relationship of BIT's with international human rights law is particularly significant and complex. Because each set of laws relates to the treatment of different but overlapping groups, is underpinned by different but overlapping values, and implicates domestic regulation in different but overlapping ways, BITs and international human rights law have significant potential to both interact and conflict.⁵

A number of recent arbitrations have thrown this potential for interaction and conflict into sharp relief. In *Foresti v. South Africa*, for example, European investors invoked a BIT to challenge a series of affirmative action policies that South Africa claimed were dedicated to undoing the legacy of apartheid and advancing racial equality⁶ — obligations binding on South Africa by virtue of various international human rights instruments.⁷ The claimants argued that the laws, which required the investors to hire and sell shares of their businesses to historically disadvantaged South Africans, breached the fair and equitable treatment and expropriation clauses of South Africa's investment agreements.⁸ While the claims have since been dropped, the investors had sought upwards of \$350 million in damages.⁹

In another set of recent actions, European investors in the water sector successfully challenged the water pricing policy that Argentina implemented during the economic crisis that it faced at the turn of the millennium. During the crisis, the Argentine Peso was significantly devalued, which in turn diminished the value of the profits that foreign investors might have reaped. Contrary to prior assurances to the investors that a currency devaluation would be offset by increasing water rates, Argentina refused to increase the price of water, arguing that doing so would have made water unaffordable to many of its citizens, thereby undermining their rights under various human rights

5— See generally Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law* in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45, 49-55 (Dupuy, Francioni & Petersmann eds., 2009) (noting, for example, that there are “not only apparent but also clearly substantial similarities between the two sets of rights” but also that there is potential for conflict between them).

6— *Piero Foresti v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, ¶ 69 (Aug. 4, 2010) (citing Counter-Memorial).

7— See, e.g., International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by South Africa Dec. 10, 1998; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, ratified by South Africa Dec. 10, 1998.

8— *Foresti*, ICSID Case No. ARB(AF)/07/1, Award, ¶¶ 54, 78 (citing Claimants' Memorial).

9— LUKE ERIC PETERSON, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION 40, 41 (2009) available at: http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

instruments.¹⁰ In a recent set of decisions, an investment tribunal found that Argentina's failure to adjust water rates did in fact constitute a breach of the fair and equitable treatment clause of Argentina's investment treaties.¹¹ These investors, and others similarly situated, have sought up to \$1 billion in damages.¹²

Chevron v. Ecuador provides a further illustration of the complex relationship between BITs and international human rights law. Chevron commenced this arbitration¹³ in response to an environmental class-action lawsuit brought against it in an Ecuadorian court. The class of 30,000 indigenous Ecuadorians was recently awarded \$9 billion in compensation for the health and environmental damages caused by toxic waste released into the Amazon rainforest by a Chevron subsidiary.¹⁴ In its investment claim against Ecuador, Chevron argues, *inter alia*, that the trial violated the standard of fair and equitable treatment and an agreement with the previous government, which had released Chevron's subsidiary of any environmental liability.¹⁵ The company has sought both a declaration from the international tribunal that the suit violated international law, and indemnification for the \$9 billion judgment against it.¹⁶

While each of the above disputes raises a number of unique questions, all illustrate the potential for interaction and conflict between BITs and international human rights law—a potential that only stands to grow more significant with the rising number of BITs and investor-State arbitrations. The aim of this Report is to explore the relationship between these two sets of laws. While it does not intend to be an exhaustive study of what is a very complex and multifaceted issue, it is unequivocal in the following conclusions: First, international investment tribunals have not only the authority but the obligation to consider international human rights norms while interpreting and applying BITs. Specifically, they must take seriously the potential for conflict between these two sets of laws, and interpret and apply BITs in a manner that minimizes these conflicts. Second, while the potential for conflict between BITs and international human rights law is real and growing, it can be mitigated by following

10— Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 232 (Jul. 30, 2010); Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, and Anglican Water, Ltd. (AWG) v. Argentine Republic, UNCITRAL, Decision on Liability, ¶ 252 (Jul. 30, 2010).

11— Suez, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 228; Vivendi, ICSID Case No. ARB/03/19, and Anglican Water, Ltd., UNCITRAL, Decision on Liability, ¶ 248.

12— Luke Eric Peterson, *Argentina liable for denying fair and equitable treatment to Suez-led consortia of foreign investors in Buenos Aires and Santa Fe water concessions*, 3 INVEST. ARB. REP. (Aug. 5, 2010).

13— Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, UNCITRAL, Claimants' Notice of Arbitration (Sept. 23, 2009), available at <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>.

14— Simon Romero, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, Feb. 14, 2011, available at <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>; Jonathan Stempel, *Chevron urges arbitration in \$27 billion Ecuador case*, REUTERS, Aug. 5, 2010, available at <http://www.reuters.com/article/2010/08/05/us-chevron-ecuador-rainforest-idUSTRE67448K20100805>.

15— Chevron Corp., UNCITRAL, Claimants' Notice of Arbitration, ¶¶ 64-68.

16— *Id.* ¶ 76.

standard principles of interpretation and applying generally accepted interpretations of BIT terms.

1. Bilateral Investment Treaties: An Interpretive Framework

1.1. Bilateral Investment Treaties and Arbitrations

Bilateral investment treaties may differ in many respects, but for the purposes of this Report, the term “BIT” is defined as a legal agreement between States that governs the relationship between the State Parties and qualifying foreign investors. BITs are to be distinguished from agreements signed directly between State agents and investors. While what constitutes a protected investor varies from treaty to treaty, BITs generally cover nationals as well as legal entities either incorporated or constituted under the laws of one of the State Parties.¹⁷ Such investors must have an investment recognized by international law or the treaty itself, most of which provide for a very broad definition of investment, often specifying “every kind of asset.”¹⁸ Despite the bilateral nature of these treaties, “[t]here is a surprising degree of uniformity between substantive protections” afforded by them.¹⁹ Most treaties provide for the “fair and equitable treatment”²⁰ of foreign investors and protect against “arbitrary and discriminatory treatment,”²¹ and unlawful and uncompensated expropriations.²² Interpretation of these terms, however, has varied significantly.²³

A defining characteristic of the modern BIT is the standing that it provides to foreign investors to initiate an arbitration against the Host State for alleged violations of its treaty obligations. In most BITs, States conditionally consent to such arbitrations, typically requiring that the investor engage in negotiations with the Host State before commencing the arbitration. However, in practice, failure to seek an amicable solution is not generally a bar to arbitration.²⁴ The arbitration process for these disputes is strongly influenced by the model of international commercial arbitration.²⁵ The arbitrations are not handled by a unified international court structure, but rather by ad

17— ALAN REDFERN, MARTIN HUNTER, ET AL., REDFERN & HUNTER ON INTERNATIONAL ARBITRATION §§ 8.17, 8.19 (2009).

18— *Id.* § 8.23.

19— *Id.* § 8.58.

20— *Id.* § 8.59.

21— *Id.* § 8.75.

22— *Id.* § 8.79.

23— *Id.* § 8.58 (comparing CME Czech Republic BV v. Czech Republic, UNCITRAL, Award (Mar. 13, 2003) with *Lauder v. Czech Republic*, UNCITRAL, Award (Sept. 3, 2001)); see generally Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAML REV. 1521 (2005). See also, *infra* Section 3.2.

24— REDFERN & HUNTER, *supra* note 17, §§ 8.33-8.34.

25— Meg Kinnear, *Transparency and Third Party Participation in Investor-State-Dispute Settlement*, p.1 (Dec. 12, 2005) available at <http://www.oecd.org/dataoecd/6/25/36979626.pdf>.

hoc tribunals, whose decisions do not create precedent, are not subject to regular appellate review, and may not even be publicly available. The procedural rules applied to the arbitration differ according to the rules identified within the BIT. The most popular arbitration rules applied in investment disputes are the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (ICSID Rules), ICSID Additional Facility Arbitration Rules, Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Stockholm Rules).²⁶ These rules allow for the disputing investor and State to select the members of the ad hoc arbitration tribunals themselves.²⁷ The degree of transparency of the arbitration process and outcome depends on the particular rules selected and the parties' wishes, and varies from the very open to the totally secret.²⁸

While BITs do not normally specify the compensation due to investor-claimants for breaches of the treaty, tribunals have awarded damages for breach in accordance with the principle, established by *Chorzow Factory*,²⁹ that treaty breaches create an obligation to compensate for the resulting economic harm.³⁰ In recent cases, investor-claimants have demanded not only monetary damages but also injunctive relief.³¹ Should the offending State not comply with a judgment under an ICSID arbitration, investors have recourse to the ICSID Convention, which requires all of its 146 State members to recognize and enforce the award as if it were a final judgment from their own national courts.³² If it is arbitrated under different auspices, investors may seek enforcement through the New York Convention on the Recognition and Enforcement of Arbitral Awards,³³ which requires the same of its 142 member States.

26— United Nations Conference on Trade and Development (UNCTAD), *Latest Developments in Investor-State Dispute Settlement*, p. 2, IIA MONITOR No. 1 (2009), available at http://www.unctad.org/en/docs/webdiaeia20096_en.pdf.

27— See ICSID Rules of Procedure for Arbitration Proceedings, R. 3, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter “ICSID Rules”]; ICSID Arbitration (Additional Facility) Rules, art. 6, available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> [hereinafter “ICSID Additional Facility Rules”]; Arbitration Rules of the United Nations Commission on International Trade Law, arts. 6-7, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) (as revised in 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf> [hereinafter “UNCITRAL Rules”]; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010), art. 13, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf [hereinafter “Stockholm Rules”].

28— See *infra* Section 4.1.

29— Case Concerning the Factory at Chorzow (Germany v. Poland), Judgment on the Merits, 1928 P.C.I.J. (ser. A) No. 17, at p. 47 (Sept. 13).

30— REDFERN & HUNTER, *supra* note 17, § 8.122.

31— See Luke Eric Peterson, *Phillip Morris files first-known investment treaty claim against tobacco regulations*, INVEST. ARB. REP. (Mar. 3, 2010) (reporting that the Claimants in FTR Holdings S.A. v. Republic of Uruguay, ICSID Case no. ARB/10/7, have requested that the Tribunal suspend certain tobacco regulations).

32— Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 54, 575 U.N.T.S. 159, entered into force Oct. 14, 1966 [hereinafter “ICSID Convention”].

33— Convention on the Recognition and Enforcement of Arbitral Awards, art. III, 21 U.S.T. 2517, entered into force June 7, 1958.

1.2. Bilateral investment treaties as international law

Notwithstanding the participation of private parties in investor-State arbitrations, BITs remain legal agreements and matters of *pacta sunt servanda* between States. The standing of private investors to bring claims for a breach of treaty and to advance interpretations of the treaty's terms does not change the public nature of BITs. An investor does not become a party to the agreement by virtue of the rights and standing afforded to it under the agreement; its standing and rights are derivative of their Home State's status as a party to the agreement. Moreover, despite the potential liability that the agreements create with respect to non-State actors, BITs and investor-State arbitrations bear ultimately upon the fundamentally public legal question of international State responsibility.³⁴ As such, BITs fit squarely within the accepted definitions of public international law set forth by Guggenheim: "Le droit international public...est l'ensemble des normes juridiques qui règlent les relations internationales,"³⁵ and Quoc Dinh, Daillier and Pellet: "le droit international se définit comme le droit applicable à la société internationale."³⁶ As recognized by the Tribunal in *Loewen*:

[Investment] claims have a quite different character [than private law claims], stemming from a corner of international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law....³⁷

The public international legal character of BITs is of significant consequence to their interpretation and application within the context of international law. Specifically, these characteristics qualify BITs as treaties under the Vienna Convention on the Law of Treaties (VCLT)³⁸ and subject them to the rules of interpretation codified therein.

34— See Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 191, 210 (2010).

35— PAUL GUGGENHEIM, *1 TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 1 (1953).

36— NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 35 (7th ed. 2002).

37— *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 233 (Jun. 26, 2003).

38— Vienna Convention on the Law of Treaties, art. 1(a), 1155 U.N.T.S. 331, entered into force Jan. 27, 1980 ("treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

1.3. VCLT Article 31(3)(c) and the principle of systemic integration

Article 31 of the VCLT, which is widely considered to represent customary international law on the rule of treaty interpretation,³⁹ reads as follows:

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Paragraph 3 contains three matters, not ranked in any particular order of priority,⁴⁰ to be considered, along with the context, in the interpretation of a treaty. Among them is subparagraph (c): “any relevant rules of international law applicable in the relations between the parties.” Taking into account these rules, along with the other matters

39— See, e.g., I L. OPPEHNEIM, *OPPENHEIM'S INTERNATIONAL LAW* 1271-1275 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992); FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION (finalized by Martti Koskeniemi), ¶ 177, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), [hereinafter “ILC REPORT ON FRAGMENTATION”]; Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), 1994 REPORT 6, ¶ 41 (Feb. 3); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, p. 17, WT/DS2/AB/R (Apr. 29, 1996).

40— Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP.L.Q. 279, 290 (2005); ILC REPORT ON FRAGMENTATION ¶ 425.

listed in Article 31, is a mandatory part of the interpretive process, “govern[ing] all treaty interpretation.”⁴¹ As French has noted, VCLT 31(3)(c) “does not say ‘take [] into account...any relevant rules of international law’ *only when there is a textual or conceptual uncertainty*. On the contrary...it seemingly applies whenever there are ‘relevant rules... applicable in the relations between the parties’.”⁴²

Indeed, applying VCLT 31(3)(c) is central to discovering the meaning of the text. As Jenkins and Watts explained:

It is frequently stated that if the meaning of a treaty is sufficiently clear from its text, there is no occasion to resort to ‘rules of interpretation’ in order to elucidate the meaning. Such a proposition is, however, of limited usefulness. The finding whether a treaty is clear or not is not the starting point but the result of the process of interpretation.⁴³

1.3.1. “taken into account”

While the treaty text itself provides little guidance on how other relevant rules of international law should be “taken into account,” it has been widely interpreted as requiring the “systemic integration” of international law. As “[a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law,”⁴⁴ systemic integration calls for these provisions to be interpreted in harmony with this broader context. The importance of this approach was emphasized by the ILC Report on Fragmentation:

[Systemic integration] is quite important in a decentralized and spontaneous institutional world whose priorities and objectives are often poorly expressed. It is also important for the critical and constructive development of international

41 — Unlike reference to travaux préparatoires under Article 32, which are only to be consulted when confirmation is required or the meaning is ambiguous, obscure or manifestly absurd or unreasonable, Article 31(3) specifically uses the word “shall” and contains no qualifiers. The ILC provides that “[s]ystemic integration governs all treaty interpretation,” but this approach is particularly relevant when the treaty term is open-textured, the term has a recognized meaning in international law, or the treaty is silent with respect to applicable law. CONCLUSIONS OF THE WORK OF THE STUDY GROUP ON THE FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, ¶¶ 18-21, adopted by the International Law Commission at its Fifty-eighth session, reprinted in 2 Y.B. INT’L L. COMM’N. (2006) [hereinafter “ILC CONCLUSIONS ON FRAGMENTATION”]. See also McLachlan, *supra* note 40, at 290; RICHARD K GARDINER, TREATY INTERPRETATION 259 (2008).

42 — Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INTEL & COMP.L.Q. 281, 303 (2006).

43 — OPPEHNEIM, *supra* note 39, at 1267.

44 — ILC REPORT ON FRAGMENTATION, ¶ 414.

institutions, especially institutions with law-applying tasks. To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of “systemic integration” it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or “regime.”⁴⁵

In practice, systemic integration has taken the form of interpreting treaties in reference to other law in order to avoid normative conflict and to inform and achieve consistency in the interpretation of parallel treaty terms. While a clean line cannot necessarily be drawn between these two approaches, it is clear that both are aimed at achieving a coherent and unified international legal system, in which applicable norms are applied in a mutually supportive way.

1.3.1.1. Harmonizing potential conflicts

There exists a strong presumption against conflict in international law. This principle, which is widely recognized by commentators,⁴⁶ was articulated by the International Court of Justice in the *Right of Passage* case:

It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.⁴⁷

This presumption extends to interactions between all forms of international law, including between two treaties as well as between treaties, customary international law, and general principles of international law.⁴⁸ When there are multiple reasonable interpretations of a norm, it calls for the tribunal to pick one that avoids conflicts with other norms. This presumption does have limits; it does not apply where there is a clear

45 — *Id.* ¶ 480.

46 — See, e.g., I L. OPPEHNEIM, *OPPENHEIM'S INTERNATIONAL LAW* Vol. 1, 1275 (Robert Jennings & Arthur Watts, eds., 9th ed., 1996) (there exists a “presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations toward third states.”); Charles Rousseau, *De la comptabilité des norms juridiques contradictoires dans l'ordre international*, 39 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 133, 153 (1932) (“...lorsqu'il est en presence de deux accords de volontés divergentes, il doit être tout naturellement porté a rechercher leur coordination plutôt qu'à consacrer à leur antagonisme.”); ILC CONCLUSIONS ON FRAGMENTATION, ¶ 4 (“It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”).

47 — *Right of Passage Over Indian Territory (Portugal v. India)*, 1957 REPORT 125, 142 (Nov. 26).

48 — ILC CONCLUSIONS ON FRAGMENTATION, ¶¶ 19-21.

intention on the part of the States to derogate from or violate another international legal norm.⁴⁹

Because “[r]ules appear to be compatible or in conflict *as a result of interpretation*,”⁵⁰ employing VCLT 31(3)(c) to take into account other international law in the interpretation of a treaty is fundamental to upholding the presumption against conflict. The International Court of Justice, for example, invoked Article 31(3)(c) to this effect in *Oil Platforms*. In this case, the Court was called on to determine, *inter alia*, whether the U.S.’s destruction of Iranian oil platforms during the Iran-Iraq war constituted a breach of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. Specifically, the Court was faced with the question of whether these acts were excused by a provision of the treaty which allowed the State Parties to take measures “necessary to protect...essential security interests.”⁵¹ Determining that the Treaty should not be interpreted to excuse acts which would be unlawful under other international law, the Court referenced general international law including the United Nations Charter on the use of force:

[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by...the 1955 Treaty.⁵²

Similarly, the European Court of Human Rights has invoked Article 31(3)(c) to interpret European Convention Article 6(1) in harmony with the principle of State immunity and to avoid an interpretation that would lead to a conflict of norms.⁵³

49 — See ILC REPORT ON FRAGMENTATION, ¶ 42 (“although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: it may resolve apparent conflicts; it cannot resolve genuine conflicts”) (internal quotations omitted).

50 — *Id.* ¶ 412.

51 — Case Concerning Oil Platforms (Iran v. United States of America), 2003 REPORT 161, 181-82 (Nov. 6).

52 — *Id.*, at 182.

53 — *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157; *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37. The ECHR also referred to VCLT Article 31(3)(c) in *Bankovi v. Belgium and others*, 2001-XII Eur. Ct. H.R. 335. See also *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 13-14 (1975).

It explained the relevance of systemic integration as follows:

[The Court] reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties.” The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.⁵⁴

1.3.1.2. Achieving consistent and informed interpretations

Relatedly, Tribunals have employed VCLT 31(3)(c) to inform the interpretation of discrete treaty terms by referencing parallel terms in other treaties and known quantities in international law, such as established definitions and interpretations, that are understood to reflect the common understanding of the parties.

The Iran Claim’s Tribunal took this approach in interpreting its jurisdictional mandate in *Esphahanian v. Bank Tejarat*. The Tribunal was faced with the question of whether a dual national of both the United States and Iran could bring a claim before the Tribunal, which was established to “decid[e] the claims of nationals of the United States against Iran and claims of nationals of Iran against the United States.”⁵⁵ In order to inform its interpretation of “national” in this context, the Tribunal made reference to a number of external international legal materials on the law of diplomatic protection, including the 1930 Hague Convention on the Conflict of Nationality Laws, decisions from the International Court of Justice, and relevant legal literature.⁵⁶ The Tribunal concluded that these sources supported interpreting “national” to refer to the “dominant and effective” nationality of the claimant. As such, a dual national could bring a claim against Iran or the United States only when their dominant and effective nationality was of the other State.⁵⁷

The jurisprudence of the WTO Appellate Body provides another example of informing the interpretation of a specific treaty term by referencing external international law. In

54— Al-Adsani, 2001-XI Eur. Ct. H.R., ¶155 (internal citations omitted).

55— *Esphahanian v. Bank Tejarat*, 2 IRAN-USC.T.R. 160 (1983).

56— *Id.*, at 161-64.

57— *Id.*, at 166.

58— General Agreement on Tariffs and Trade, art. XX, 55 U.N.T.S. 187 entered into force Jan. 1, 1948.

Shrimp-Turtle, the Appellate Body was called on to determine whether sea turtles, purportedly protected by the U.S. import ban on certain shrimp, qualified as “exhaustible natural resources” under GATT Article XX(g).⁵⁸ Without specifically citing Article 31(3)(c) of the VCLT, the Appellate Body referenced external international law to make its determination. First, in order to determine whether sea turtles, as living animals, could qualify as “natural resources,” it cited the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals, and Agenda 21—all of which define “natural resources” to include both living and non-living things.⁵⁹ Next, in its analysis of whether the sea turtles in question were “exhaustible,” it referenced the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁶⁰ which categorized the sea turtles as “species threatened with extinction.” With these references in hand, the Appellate Body determined that the term “exhaustible natural resource” did encompass the sea turtles in question.

1.3.2. “relevant rules of international law”

Applying VCLT 31(3)(c) in practice requires determining what other law should be taken into account in the interpretation of a treaty. Both textual analysis of the clause as well as the practice of tribunals suggest that the universe of law to be taken into account is relatively broad.

It is widely understood that Article 31(3)(c) refers to all sources of international law recognized by Article 38(1) of the Statute of the International Court of Justice,⁶¹ which include:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶²

When such law is actually relevant to the interpretation of a BIT will depend upon the circumstances. But there is strong reason to believe that the provision is

59— Appellate Body, *United States – Import Prohibition Certain Shrimp and Shrimp Products*, ¶¶ 130-31, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter “*Shrimp-Turtle*”].

60— *Id.* ¶ 132.

61— GARDINER, *supra* note 41, at 256 (2008); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 753, 780 (2002).

62— Statute of the International Court of Justice, art. 38(1), 33 U.N.T.S. 993, entered into force Oct. 24, 1945.

meant to be interpreted broadly, irrespective of the treaties' purported subject matters. As Simma and Kill observe:

If the drafters had intended the term 'relevant' to mean 'relating to the same subject matter' they could have simply repeated the Article 30 formulation in Article 31(3)(c). Instead, the drafters chose to use the term 'relevant', a term whose ordinary meaning is broader than 'addressing the same subject matter.'⁶³

The cases discussed in the above sub-Section offer evidence of this practice. In each, the Tribunals cited other international law not necessarily within the same "subject matter" as the main treaty in question.

1.3.3. "applicable in the relations between the parties"

Commentators and judges have supported a similarly broad understanding of what constitutes "applicable" law in the context of VCLT Article 31(3)(c).⁶⁴ The ILC, for example, supports adopting a broad understanding of applicability.⁶⁵ Simma and Kill reason that use of the word "applicable" rather than "binding" or "in force" allows for flexibility in these cases. They note that "[w]hereas the concept of a rule of law being 'binding' has a precise and discrete legal content, the same is not the case for the concept of 'applicability.'⁶⁶ Indeed, equating "binding" with "applicable" would exclude reference to some of the sources of international law recognized by the ICJ, including "the teachings of... publicists," and contradict the understanding that Article 31(3)(c) refers to all such sources.

Respecting the distinction between "binding" and "applicable" allows tribunals greater

63 — Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Toward a Methodology*, 678, 695 in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER* (ed. Christina Binder, et al. 2009).

64 — French, *supra* note 42, at 307 ("it is suggested that the issue of applicability not be considered so strictly, but that, in most cases, Article 31(3)(c) should only require applicability between the parties to a particular dispute"); McLachlan, *supra* note 40, at 315 ("reference may properly be made to other treaties, even if they are not in force between the litigating parties, as evidence of the common understanding of the parties as to the meaning of the term used").

65 — ILC CONCLUSIONS ON FRAGMENTATION ¶ 21. The ILC suggests that the secondary law in question may increase in importance where all parties to the treaty under interpretation are also parties to the other agreement, or where the secondary treaty rule has attained status as customary international law or provides evidence of a common understanding of the parties as to the object and purpose or term of the treaty under interpretation. *Id.* This approach appears to be at least based on the practical consideration that requiring that the rule be binding on all parties to the agreement for it to be considered under VCLT Article 31(3)(c) would effectively cordon off large multilateral agreements from other international law, as the number of State Parties increases, the likelihood of other agreements applying to all of them diminishes.

66 — Simma & Kill, *supra* note 63, at 697.

latitude to interpret discrete treaty terms in reference to other international law. This is significant, as other international law need not be binding on all parties in order to provide evidence of a common understanding or known quantity. For example, in *Shrimp-Turtle* a dispute between the United States, Malaysia and Thailand, among others, the WTO Appellate Body referred to treaties which did not bind all of the disputing parties in order to inform its interpretation of “exhaustible natural resource.”⁶⁷ Moreover, it allows tribunals to consider rules that are applicable between two parties even where they are formally binding on just one. For example, in the context of investor-State arbitration, an obligation *erga omnes* may be applicable between the two State Parties where only the Host State is bound; the Host State owes a duty to fulfilling that norm to the Home State, irrespective of the latter’s relationship to the norm.⁶⁸

		Binding on Home State	
		Yes	No
Binding on Host State	Yes	Applicable	May be applicable if extra-territorial, or evidences known quantity in international law or common understanding of the parties
	No	May be applicable if <i>erga omnes</i> , or evidences known quantity in international law or common understanding of the parties	Not applicable unless evidences known quantity in international law or common understanding of the parties

67 — *Shrimp-Turtle*, ¶ 130 (referring to the United Nations Convention on the Law of the Sea, a treaty the United States had not ratified; the Convention on Biological Diversity, a treaty that neither Thailand nor the United States had ratified; and, the Convention on the Conservation of Migratory Species of Wild Animals, which Malaysia, Thailand, and the United States had not ratified).

68 — Simma & Kill, *supra* note 63, at 701. See also *infra*, Section 2.1.

Conversely, a rule binding on just the Home State, which imposes extra-territorial obligations toward the Host State, may similarly be applicable between the two parties.⁶⁹

1.3.4. Systemic integration and temporality

VCLT Article 31(3)(c) does not specify whether external rules of international law, in order to be considered, must have already been in force at the time the treaty being interpreted was concluded. In practice, however, tribunals have often referenced other international law that is drafted or entered into force subsequent to the treaty in question. In fact, some judges and commentators have invoked Article 31(3)(c) with the express purpose of “updating” interpretations of international law through reference to subsequent developments. For example, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, the ICJ held that “[treaty] interpretation cannot remain unaffected by the subsequent development of law,” and that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.”⁷⁰

Similarly, in an arbitration under the OSPAR Convention, the Tribunal stated: “lest it produce anachronistic results that are inconsistent with current international law, a tribunal must engage in actualization or contemporization when construing an international instrument that was concluded in an earlier time.”⁷¹ In *Aegean Sea Continental Shelf*, the ICJ held that where a generic term is used, “the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.”⁷²

69 — This analysis is predicated on the assumption that the parties between whom a rule must be applicable are the two States party to the BIT, not the parties to the particular dispute. Indeed, the accepted approach on choice of law—whereby the parties to the dispute, by consenting to an arbitration under the BIT, impliedly consent to the choice of law contained therein—provides a strong rationale for this position. See *infra* Section 1.4. However, if applicability in the context of VCLT 31(3)(c) were determined by reference to the disputing parties, independent of the State Parties, only a broad definition of “applicable” would be tenable. For defining “applicable” as synonymous with “binding” in investor-State arbitrations would cordon off BITs from the broader system of international law that gives them validity and force. Tribunals, for example, would be prohibited from referencing the Vienna Convention on the Law of Treaties or to the law of International State Responsibility, as neither are directly binding upon non-State investors. The same would go for most all other international law. To avoid such a situation, a more flexible concept of “applicable” would have to be used. Presumably, such a definition would consider international law that had a bearing on the relationship between the State and investor, such that to be applicable, it need only to be binding on the Host State whose relationship with the investor is at issue.

70 — *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 REPORT 16, 31 (Jun. 21).

71 — *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Decision, 42 I.L.M. 1118, ¶ 103 (2003).

72 — *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 1978 REPORT 3, 32 (Dec. 19).

Likewise, all of the conventions cited by the Appellate Body in *Shrimp-Turtle*, came into existence after the drafting of the GATT, which the Tribunal was interpreting. The Appellate Body noted the need to extend the employment of systemic integration to rules beyond those that already existed at the time of the drafting:

The words of Article XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.⁷³

The ILC, emphasizing the dynamism of the international legal system, recommends that law subsequent to the treaty being interpreted can be considered, especially where the subsequent norm is customary or a general principle of international law, or where the treaty being interpreted “has a very general nature or is expressed in such general terms that it must take into account changing circumstances.”⁷⁴ The nature of subsequent norms, as will be further explored in the following Section, may also make their consideration more or less imperative.

1.4. Jurisdiction and choice of law rules

Neither the limited jurisdiction of investment tribunals nor the applicable choice of law rules prevent the consideration of other international law in the interpretation of BITs. In fact, other international law often plays a considerable role in the interpretation and application of BITs.

The most commonly used arbitration rules allow the parties themselves to agree upon what law is applicable, or, in the absence of such an agreement, provide the tribunal the authority to determine the applicable law.⁷⁵ It is widely accepted that the disputing

73 — *Shrimp-Turtle*, ¶ 129.

74 — ILC CONCLUSIONS ON FRAGMENTATION, ¶ 23.

75 — See ICSID Convention, art. 42(1) (“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”); UNCITRAL Arbitration Rules, art. 33(1) (“The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such a designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”); Stockholm Rules, art. 22(1) (“The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.”).

parties implicitly agree to BIT's choice of law provision by consenting to an arbitration pursuant to the treaty.⁷⁶ When a BIT does specify applicable law, it frequently calls for the application of international law,⁷⁷ thus providing tribunals express authority to apply international law.

Even in the less common circumstance where a BIT contains an express choice of law that fails to explicitly mention international law, international law is still normally applied. Though the omission could be read as an implicit preference to refrain from applying international law, it is not normally so interpreted. As Schreuer has stated with respect to ICSID arbitrations, “the practice of ICSID tribunals, the overwhelming weight of writers and important policy considerations all indicate that there is at least some place for international law even in the presence of an agreement on choice of law which does not incorporate it.”⁷⁸

This is largely because BITs with choice of law provisions “[a]lmost always” specify that the dispute be decided in accordance with the provisions of the Agreement,⁷⁹ and even when they do not, it is generally accepted that the BIT itself constitutes substantive applicable law.⁸⁰ In either case, application of the BIT—an international treaty—requires the application of international law.⁸¹ This was succinctly expressed by the Tribunal in *MTD Equity Sdn Bhd v. Republic of Chile*: “This instrument being a treaty,

76— CHRISTOPH SCHREUER, ET AL., *THE ICSID CONVENTION: A COMMENTARY* 558 (2nd ed. 2009). See also, Banifatemi, *supra* note 34, at 195 (“although consent to arbitration is dissociated in time, the parties to the arbitration are still presumed to have been given their *common consent* to arbitration at the time the investor accepts the Host State’s general consent by filing the request for arbitration”) (citing Emmanuel Gaillard, *L’arbitrage sur le fondement des traités de protection des investissements*, in *REVUE DE L’ARBITRAGE* 853, 859 (2003)). See also Antoine Goetz et al. v. Republic of Burundi, (ICSID Case No. ARB/95/3) Award, Feb. 10, 1999, ¶ 94 (French original) (“Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that the claimants did the same by filing their request for arbitration based on the Treaty.”). *But see* LG&E Energy Corp. v. Argentine Republic, ICSID Case no. ARB/02/1, Decision on Liability, ¶ 85 (Oct. 3, 2006) (“It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the Treaty, thus presumably choosing the Treaty and the general international law as the applicable law for this dispute. Nevertheless, these elements do not suffice to say that there is an implicit agreement by the Parties as to the applicable law, a decision requiring more decisive actions. Consequently, the dispute shall be settled in accordance with the second part of Article 42(1).”).

77— Banifatemi, *supra* note 34 at 197-98.

78— SCHREUER, *supra* note 76, at 583.

79— Banifatemi, *supra* note 34, at 197.

80— SCHREUER, *supra* note 76, at 578.

81— See also REDFERN & HUNTER, *supra* note 17, § 8.48. Even if a BIT choice of law clause expressly called for the exclusion of international law, it is questionable whether the BIT could be applied in such isolation. As Pauwelyn has stated: “[I]n their treaty relations states can ‘contract out’ of one, more or, in theory, all rules of international law (other than those of *jus cogens*), but they cannot contract out of the system of international law.” JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 37 (2003).

the agreement to arbitrate under the BIT requires the Tribunal to apply international law.”⁸² Similar logic applies when, as in most cases, the BIT does not provide for any express choice of law at all. The BIT itself is generally applied as the substantive law,⁸³ thus necessitating the co-application of international law.⁸⁴ Under the arbitration rules there is no impediment to such an approach. When there is no explicit choice of law, the rules either require the application of “such rules of international law as may be applicable,” (ICSID and ICSID Additional Facility) or neither specifically authorize or prohibit it (UNCITRAL and Stockholm).⁸⁵

1.5. Systemic integration of international human rights law in practice

Investor-State tribunals have shown a willingness to embrace systemic integration and reference international human rights law in the interpretation of BITs. In both *Tecmed v. Mexico*⁸⁶ and *Azurix v. Argentina*,⁸⁷ for example, the Tribunals referenced jurisprudence of the European Court of Human Rights on the right to property in their interpretations of the respective BITs’ expropriation clauses. Similarly, in *Mondev v. United States*,⁸⁸ the Tribunal evaluated whether or not the Claimant received “treatment in accordance with international law” by reference to interpretations of the European Convention on Human Rights Article 6(1) and the right to due process. In its decision on jurisdiction in *Ioan Michula and Others v. Romania*,⁸⁹ the Tribunal referenced Article 15 of the Universal Declaration on Human Rights in determining whether the Claimant had standing as a Swedish national under the treaty. While these and other interpretations further explored in Section Three reflect a level of ease with the systemic integration of international human rights law and BITs by reference to parallel treaty terms, the potential for conflict between these norms has received only superficial treatment by tribunals.⁹⁰ As discussed in the following Sections,

82 — MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 87 (May 25, 2004). See also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 67, (Jul. 14, 2006) (“the Tribunals’ inquiry is governed by the ICSID Convention, by the BIT and by applicable international law,” with the laws of Argentina being “only an element of the inquiry because of the treaty nature of the claims under consideration”).

83 — SCHREUER, *supra* note 76, at 578.

84 — REDFERN & HUNTER, *supra* note 17, § 8.48.

85 — See *supra* note 75.

86 — *Técnicas Medioambientales S.A. (Tecmed) v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 116-122 (May 29, 2003).

87 — *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 311-12 (Jul. 14, 2006).

88 — *Mondev Int’l, Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 141-144 (Oct. 11, 2002).

89 — ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility ¶ 88 (Sept. 24, 2008).

90 — See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240 (Jul. 30, 2010) (“Argentina is subject to both international obligations, i.e. human rights treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as was discussed above, Argentina could have respected both types of obligations.”); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 114-121 (May 12, 2005) (dismissing the potential for conflict between the Argentine Constitution, international human rights law, and the BIT in question in part because “the Constitution carefully protects the right to property, just as the treaties on human rights do”).

however, the potential for conflict between these two sets of laws is real, and the nature of international human rights norms creates an imperative to mitigate it whenever reasonably possible.

2. The Need for Harmonization with Human Rights Law

Systemic integration according to VCLT 31(3)(c) is a mandatory part of the interpretive process that applies with respect to all relevant and applicable law. Similarly, the presumption against conflict is not restricted to certain types of law, but, according to the ICJ, applies broadly to all government texts. The question, therefore, is not whether international human rights law should be taken into account in the interpretation of BITs, or whether the interpretation of BITs should reflect a presumption against conflict with human rights law. Rather, the issue is how much weight attaches to these considerations, as opposed to the other factors that guide treaty interpretation according to Article 31.⁹¹

This Section argues that applying the principles of systemic integration and harmonization to the interpretation of BITs, while important with respect to all international law, is especially critical with respect to international human rights law. The *erga omnes* nature of human rights obligations, the constitutive nature of human rights norms, and the limited applicability of conflict resolution tools to deal with them all provide strong rationales for giving international human rights law significant weight in the interpretation of BITs and upholding a strong presumption against a conflict between the two sets of norms.

2.1. International human rights law and State liability

In *Barcelona Traction*, the ICJ drew an “essential distinction” between reciprocal and nonreciprocal legal obligations. The former, such as those laws concerning diplomatic protection, run State to State. The latter “[b]y their very nature...are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁹²

In contrast to BITs, which are reciprocal agreements, based on an instrumental bargain between States, international human rights norms have been widely recognized as

91 — See McLachlan, *supra* note 40, at 310.

92 — *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, Judgment, 1970 REPORT 3, 32 (Feb. 5).

obligations *erga omnes*.⁹³ Because every State has a legal interest in their protection, a violation of a human rights obligation creates liability to all States. Breaches of multilateral treaty-based human rights obligations, even if not recognized as *erga omnes*, pose similarly wide-ranging liability.⁹⁴ As Simma and Kill argue, “[t]hese outstanding obligations under multilateral human rights treaties represent a powerful argument in favour of interpreting the investment treaty in a manner coherent with international human rights law.”⁹⁵

The presumption against conflict concerns not only the unity and coherence of international law, to which such widespread breaches pose a threat. It is also meant to respect the intent of the State Parties, of whom it is presumed, do not enter into conflicting obligations that would give rise to liability. The more widespread the potential liability, therefore, the more reasonable it is to presume a conflict was not intended. As such, “it cannot be lightly presumed that a State would conclude a bilateral treaty that would impose obligations that would place the State in breach of obligations owed to multiple other States, if not to the international community as a whole.”⁹⁶

93— See, e.g., Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 2, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (“[E]very State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.”); *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 239 (1978) (“Unlike international treaties of the classic kind, [the European] Convention comprises more than merely reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral relationships, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement.’”); *infra* note 100 & accompanying text; 1989 Resolution of the International Law Institute, on the Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States, art. 1, in 63 INSTITUTE DE DROIT INTERNATIONAL ANNUAIRE 338 (1989) (“This international obligation [to respect human rights]... is *erga omnes*; it is incumbent on every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. This obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.”); ILC REPORT ON FRAGMENTATION, ¶ 389.

94— It should not be assumed that States party to BITs mean to bilaterally or unilaterally modify their multilateral human rights obligations. Inter-se modifications of multilateral treaties are only allowed when provided for by the treaty, or in cases where the modification does not affect third-party rights and is not incompatible with the object and purpose of the treaty. Vienna Convention on the Law of Treaties, art. 41 (1). Because any modification of a human rights instrument would necessarily affect third-party rights, without express authorization from the treaty itself, a State’s human rights obligations under the multilateral treaty would remain in force.

95— Simma & Kill, *supra* note 63, at 706 (*referencing* Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libya), 1985 REPORT 192, 216 (Dec. 10)) (*also citing* R. Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties*, 27 HEIDELBERG J. INT’L LAW 491, 500 (1967)).

96— Simma & Kill, *supra* note 63, at 706 (*referencing* Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libya), 1985 REPORT 192, 216 (Dec. 10)) (*also citing* R. Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties*, 27 HEIDELBERG J. INT’L LAW 491, 500 (1967)).

2.2. Constitutive versus instrumental norms

While the defining distinction between *erga omnes* and reciprocal obligations is procedural⁹⁷ (relating to whom these obligations are owed), both the *erga omnes* nature of human rights law and the reciprocal nature of BITs are inextricably linked to the contrasting content of their underlying norms. The non-exhaustive list of *erga omnes* obligations recognized by the Court in *Barcelona Traction* were also *jus cogens*—norms so fundamental that they are non-derogable by any State in any circumstance.⁹⁸ The presumption against conflict with one of these norms is especially heightened, as an agreement found to conflict with a *jus cogens* norm is rendered invalid and thus ineffective.⁹⁹ Of course, while all *jus cogens* norms are *erga omnes*, the converse is not true.¹⁰⁰ Nonetheless, even in the absence of a *jus cogens* classification, the *erga omnes* nature of human rights obligations is inextricably tied to the constitutive and normative character of the underlying norms. For example, the Inter-American Court of Human Rights emphasized:

modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States....[Rather] [*i*]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order...for the common good.¹⁰¹

Similarly, the European Commission of Human Rights stated:

the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but *to realize the aims and ideals of the Council of Europe*....¹⁰²

97 — ILC REPORT ON FRAGMENTATION ¶ 389.

98 — Draft articles on Responsibility of States for Internationally Wrongful Acts, art. 26 & Commentary, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., UN Doc. A/56/10 (2001), reprinted in 2 Y.B. INT'L L. COMM'N 74 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter "Draft Articles on State Responsibility"].

99 — *Id.*, art. 26, Commentary, ¶ 3 ("Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm.... Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.")

100 — ILC CONCLUSIONS ON FRAGMENTATION, ¶ 38 ("It is recognized that while all obligations established by *jus cogens* norms, as referred to in conclusion (33) above, also have the character of *erga omnes* obligations, the reverse is not necessarily true. Not all *erga omnes* obligations are established by peremptory norms of general international law. This is the case, for example, of certain obligations under the principles and rules concerning the basic rights of the human person, as well as of some obligations relating to the global commons.") (internal citations omitted).

101 — The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A), No. 2, ¶ 29 (Sept. 24, 1982) (emphasis added).

102 — Austria v. Italy, Application No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, 138 (Eur. Comm'n on H.R.) (emphasis added).

The ICJ has also emphasized the relationship between the substantive character of human rights norms and their procedural *erga omnes* nature. In *Barcelona Traction* it stated: “*In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*”¹⁰³ In its interpretation of the Genocide Convention the ICJ made a similar link. While the prohibition against genocide is *jus cogens*, the Court appeared to speak of human rights instruments generally when it said:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.¹⁰⁴

These descriptions make clear that human rights *erga omnes* obligations “are grounded not in an exchange of rights and duties but in an adherence to a normative system.”¹⁰⁵ This conceptualization is further supported by the U.N. Charter, the first Article of which names the promotion of human rights as one of purposes of the United Nations.¹⁰⁶

BIT norms, by contrast, are reciprocal bargains between States. States assume the responsibilities and liabilities inherent in BITs for the benefits of attracting foreign investment to their soil and the reciprocal protections afforded to their nationals’ investments abroad. While the protections offered by BITs are parallel to human rights protections in many ways (for example, the protection against discriminatory treatment), in stark contrast with human rights law, their obligations apply only to those in a certain class (investors) with certain nationalities (that of the counterparty), not to all universally.¹⁰⁷ Hence the quip by Jose Alvarez that “the NAFTA investment chapter is the most bizarre human rights treaty ever conceived...[it] is a human rights treaty for a special-interest group.”¹⁰⁸

103 – *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, Judgment, 1970 REPORT 32 (Feb. 5).

104 – Reservations to the Convention on the Prevention of the Crime of Genocide, Advisory Opinion, 1951 REPORT 15, 23 (May 28).

105 – René Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRITISH YEARBOOK OF INTERNATIONAL LAW 386 (1994).

106 – U.N. Charter art. 1, ¶ 4.

107 – Cf. Human Rights Committee, *General Comment 15, The position of aliens under the Covenant*, U.N. Doc CCPR/C/27, ¶ 1 (1986) (“In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”).

108 – Jose Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L REV. 303, 308 (1997).

Surely, this arrangement is not accidental, but instead reflective of the instrumental nature of the agreements.¹⁰⁹

This contrast between the normative nature of international human rights agreements and the instrumental nature of investment agreements provides a strong rationale for interpreting the latter in harmony with the former. As Professor Reisman stated, “[p]recisely because the human rights norms are constitutive, other norms must be reinterpreted in their light, lest anachronisms be produced.”¹¹⁰

Indeed, in *Sawhoyamaxa*, the Inter-American Court on Human Rights came to an even bolder conclusion:

[E]nforcement [of bilateral commercial treaties] should always be compatible with the American Convention [on Human Rights], which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.¹¹¹

Notably, the Court in *Sawhoyamaxa* did not state that both forms of laws must be compatible with each other, but rather that BITs must be compatible with human rights law. This wording suggests that the Court intended to recognize human rights law as hierarchically superior, independent any formal recognition of *jus cogens*. Such a conclusion need not be reached, however, in order to recognize the importance of maintaining coherence between instrumental laws and the broader normative system. Nor is such a conclusion necessary for upholding the presumption that States do not implicitly enter into instrumental agreements that violate the broader normative system to which they have acceded.

2.3. The Preamble of the VCLT

An additional argument for giving considerable weight to international human rights law in the interpretation of BITs is provided by the Preamble of the Vienna Convention on the Law of Treaties, which:

Ha[s] in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination

109– See Dupuy, *supra* note 5, at 48, 49 (“while the protection of aliens is still conditioned by the reciprocity of inter-state relations, the protection of individual human rights has an *objective* character, as it does not depend on the reciprocity of rights and obligations between sovereign states”).

110– W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’LL. 866, 873 (1990).

111– Case of the Sawhoyamaxa Indigenous Community v. Republic of Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 140 (Mar. 29, 2006).

of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all...

Applying the rules of interpretation laid out in Article 30 of the VCLT to the interpretation of the VCLT, itself, involves consideration of the Preamble and the mention of human rights therein. Therefore, the principle of universal respect for and observance of human rights should provide the context for interpreting the VCLT, and through its application, the interpretation of all other treaties.

2.4. Other conflict resolution techniques

The limited applicability of traditional conflict resolution tools to potential conflicts with international human rights law is further reason to uphold the principle of harmonization in the interpretation of BITs.

2.4.1. *Lex posterior*

The principle that “later law supersedes earlier law” or *lex posterior derogat lege priori* is expressed in the Vienna Convention on the Law of Treaties Article 30, and is based upon the rationale that the later law is more likely to accurately reflect the parties’ intentions.¹¹² When all of the parties to an earlier instrument are also parties to a later conflicting instrument, *lex posterior* acts as a confliction resolution tool; it calls for the application of the later instrument, presuming that the parties intended it to extinguish the applicability of the conflicting terms of the prior instrument.¹¹³

But such an application of *lex posterior* does not supersede or obviate the need for harmonization between human rights and investment law. First and foremost, whether and to what extent provisions of the *lex anterior* are compatible with *lex posterior* is a question of interpretation, to which the principle of harmonization still applies. Second, assuming, arguendo, that *lex posterior* could be applied independently of harmonization, it could only effectively resolve a conflict where the parties to the later law are inclusive of the parties to the earlier law, i.e., when a multilateral human rights instrument is subsequent to a bilateral investment treaty. Should the BIT be the later law, it is highly unlikely that its two members would be inclusive of the multiple members of an earlier human rights instrument. The BIT parties’ human rights obligations to those other members of the human rights instrument would therefore exist unmodified. This is why despite calling for *lex posterior* to be applied even when parties to two instruments are not inclusive, VCLT Article 30(5) recognizes that such

112 – ILC REPORT ON FRAGMENTATION, ¶ 226.

113 – Vienna Convention on the Law of Treaties, art. 30 (3).

application may cause parties to breach their obligations under the earlier instrument. In these circumstances, the application of *lex posterior* has the potential to give rise to the wide-ranging liability discussed in the previous section that States would presumably not intend to create. It is noteworthy that the ILC Report takes it a step further:

Inasmuch as it is a question of parties to the later treaty being *different* from parties to the earlier treaty, it is doubtful whether any meaningful role is left to the *lex posterior*.¹¹⁴

Lex posterior can also be invoked as an interpretive tool, acting in conjunction with or informing the process of harmonization of the earlier human rights law and later BIT. Yet even in this role, its applicability is still limited, as the distinct nature of each set of obligations temper the principle's applicability. As the ILC Conclusions state:

In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined.¹¹⁵

It would indeed be strange to assume that a State that ratifies a human rights instrument with both State A and State B on Day two, intends to emphasize those obligations over an investment treaty signed with State A on Day one, but not over another investment treaty it ratified with State B on Day three. This is especially so considering the constitutive nature of human rights norms.

2.4.2. *Lex specialis*

The principle of *lex specialis derogat legi generali* suggests that when two or more norms interact or conflict, priority should be given to the more specific one, as that is assumed to be a more accurate expression of the State's intent.¹¹⁶ As with *lex posterior*, it can be applied both as a conflict resolution tool and an interpretive tool. When two norms

114 – ILC REPORT ON FRAGMENTATION, ¶ 243. While VCLT Article 30(4) calls for the application of *lex posterior* in cases where the duly bound parties are not identical under both sets of obligations, it recognizes that its use in these circumstances could lead to a breach of the *lex anterior*. Vienna Convention on the Law of Treaties, art. 30(5). Because human rights obligations arise from either custom or multilateral conventions, and are *erga omnes* in nature, applying *lex posterior* to resolve a conflict between human rights law and a later ratified BIT is likely to cause a breach rather than resolve a conflict.

115 – ILC CONCLUSIONS ON FRAGMENTATION, ¶ 26.

116 – ILC REPORT ON FRAGMENTATION, ¶ 60.

conflict, *lex specialis* may resolve conflicts when it is invoked to apply the more specific norm and set aside the more general one.¹¹⁷ In this respect, the application of *lex specialis* to conflicts between investment law and human rights law suffers the same defects as *lex posterior*. Where the parties to the “special law” are not inclusive of the parties to the “general law,” applying the former may result in a breach of obligations to the non-included parties of the latter.

Lex specialis, like *lex posterior*, can also be invoked in its interpretive form, giving priority to the more specific rule but reading it “against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.”¹¹⁸ Yet, applied as such, is not clear what operating effect *lex specialis* would have other than just provide another name for systemic integration. As the ILC Conclusions state:

The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization...continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.¹¹⁹

Regardless, the limited applicability of both *lex specialis* and *lex posterior* to conflicts between BITs and international human rights—combined with the *erga omnes* and constitutive nature of human rights norms—calls for placing significant weight on the consideration of human rights law in the interpretation of BITs and creates a special imperative to interpret BITs in harmony with human rights law whenever reasonably possible.

3. Identifying and Harmonizing Potential Conflicts

The general nature of BITs and international human rights law, as well as a number of recent investor-State arbitrations, suggest that the potential for conflict with international human rights law exists. As explored in the previous two Sections, tribunals have both the jurisdiction and the obligation to harmonize such conflicts through interpretation. Whether tribunals actually have the capacity to harmonize conflicts is the subject of this Third Section. While the existence and resolution of conflicts will often turn on the specific factual and legal circumstances of each case, the following general examination of the major substantive terms of BITs shows that certain conflicts with international human rights law can be anticipated and largely mitigated by adopting harmonious interpretations that are already widely accepted.

117 – *Id.*, ¶ 57.

118 – *Id.*, ¶ 56.

119 – ILC CONCLUSIONS ON FRAGMENTATION, ¶ 9 (internal citations omitted).

3.1. Identifying potential conflicts

Whether a conflict can or cannot be resolved will fundamentally depend upon the recognition of whether an international legal conflict exists in the first place. To this end, before moving on to examine the substantive terms of BITs, it is worth exploring, in a general fashion, the requirements that international human rights law imposes on States and the definition of conflict in international law.

3.1.1. Human rights obligations

Human rights law imposes both positive and negative obligations on States.¹²⁰ The Committee on Economic, Social and Cultural Rights (CESCR) has classified States' obligations with respect to human rights into three categories. First, the obligation to respect requires that States refrain from interfering with the enjoyment of rights. Second, the obligation to protect requires that States protect the enjoyment of these rights from violations by third parties. Third, the obligation to fulfill requires States to "take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of" rights.¹²¹ These obligations are equally pertinent to both economic, social and cultural rights (ESCR), as well as to civil and political rights.

The distinction between civil and political rights and economic, social and cultural rights, therefore, is not one based on their positive or negative nature. Rather, it is based on the recognition "that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time" and must be progressively realized.¹²² This framework, however, is not intended to allow absolute discretion to State Parties with regard to ESCR. States have a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights..."¹²³ And, States are under immediate obligation "to take steps" which in itself, is not qualified or limited by other considerations"¹²⁴ and "move as expeditiously and effectively as possible towards [full realization]."¹²⁵ "Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations,"¹²⁶ and be taken to the maximum of a State's available resources. Moreover, States are prohibited

120 – Human Rights Committee, *General Comment No. 31*, ¶ 6 ("The legal obligation [that each State Party to the [International Covenant on Civil and Political Rights] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind] is both negative and positive in nature.") (*referencing* International Covenant on Civil and Political Rights, art. 2 (1), 999 U.N.T.S. 171, *entered into force* Mar. 24, 1976).

121 – U.N. High Comm'r for Human Rights, *Human Rights, Trade and Investment*, ¶ 30, U.N. Doc. E/CN.4/Sub.2/2003/9 (2003).

122 – Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties obligations* (Art. 2, ¶ 1) ¶ 9, U.N. Doc. HRI/GEN/1/Rev.9 (1990).

123 – *Id.* ¶ 10; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, ¶ 9 (Jan. 22-26, 1997).

124 – *Id.* ¶ 2.

125 – *Id.* ¶ 9.

126 – *Id.* ¶ 2.

from introducing deliberately retrogressive measures, unless “fully justified by reference to the totality of the rights provided for....”¹²⁷

3.1.2. Defining conflict

Determining when States’ international human rights obligations might conflict with BITs requires first defining what constitutes a conflict in international law, which is a less than settled matter.

The definition of conflict in international law “has, surprisingly, attracted little attention,”¹²⁸ and ranges widely. Some definitions adhere to the strict conceptualization of the term. Jenks, for example, defines conflict “in the strict sense of direct incompatibility...where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.”¹²⁹ Other commentators have been critical of such a strict conceptualization of conflict.¹³⁰ Czaplinski and Danilenko define a conflict as arising “when the later treaty in a particular situation violates the rights of any other party to the earlier treaty, or when the provision of the later treaty seriously infringes provisions of the earlier treaty which are indispensable for the effective implementation of the object or aim of that treaty.”¹³¹ Borgen argues that a narrow definition of conflict does not address the concerns of States, as they are “not only concerned with when it is impossible for a state to abide by two treaties, but also when one treaty frustrates the goals of another.”¹³² Under his definition, a conflict exists when “the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty.”¹³³ Aufricht defined conflict in an even broader fashion, existing when two treaties “deal with the subject matter in a different manner.”¹³⁴ Similarly, the ILC defines conflict as existing “where two rules or principles suggest different ways of dealing with a problem.”¹³⁵

127 – *Id.* ¶ 9.

128 – See PAUWELYN, *supra* note 81, at 166-169, for a brief discussion.

129 – Wilfred Jenks, *Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 426 (1953). For further support for this conceptualization, see Wolfram Karl, *Conflicts Between Treaties*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468 (R. Bernhardt ed., 1984).

130 – For example, Erich Vranes and Joost Pauwelyn argue for a wider definition which recognizes that a permissive norm granting a State Party the right to do or not to do something may conflict with a prohibitory norm or obligatory norm. See Erich Vranes, *The Definition of “Norm Conflict” in International Law and Legal Theory*, 17 EUR. J. INT’L L. 395 (2006); PAUWELYN, *supra* note 81, at 176.

131 – W. Czaplinski and G. Danilenko, *Conflicts of Norms in International Law*, 21 NETHERLANDS Y.B. OF INT’L L. 3, 13 (1990).

132 – Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 573, 575 (2005) (internal citations omitted); Jenks recognizes that this situation, which he dubs a divergence, can “from a practical point of view, be as serious as a conflict,” but he still leaves it out of his definition. Jenks, *supra* note 129, at 426.

133 – Borgen, *supra* note 132, at 575.

134 – Hans Aufricht, *Supersession of Treaties in International Law*, 37 CORNELL L. Q. 655, 655-56 (1952); see also Hersch Lauterpacht, *The Covenant as the “Higher Law”*, 17 BRIT. Y.B. INT’L L. 54, 58 (1952); and Rousseau, *supra* note 46, at 135.

135 – ILC REPORT ON FRAGMENTATION, ¶ 25.

As interpretation and conflict resolution are inextricably linked, it is useful to distinguish between potential and genuine conflicts, as well as between inherent conflicts and conflicts in the applicable law.¹³⁶ An inherent conflict exists when one norm constitutes, in and of itself, a breach of another norm (Treaty 1 says Country A must do X, while Treaty 2 says Country A must not do X). A conflict in the applicable law exists when compliance or invocation of one norm leads to the breach of another norm (to comply with or exercise a right granted by Treaty 1, Country A does Y, which is prohibited by Treaty 2). Both such conflicts may exist as potential conflicts or as genuine conflicts. A potential conflict exists when the interpretation or application of one norm may conflict with another norm. A genuine conflict exists when all reasonable interpretations or applications of the norm will conflict.

For the sake of brevity and balance, this Report uses as guideposts both Borgen's definition of conflict as the frustration of goals and Jenk's definition of conflict as mutual exclusivity. Under the former, a BIT conflicts with human rights law when the existence or application of a BIT norm frustrates a human rights norm or undermines the capacity of a State to take bona fide measures to protect, respect or fulfill its human rights obligations. Under the latter definition, a conflict exists where compliance with a BIT requires a State to breach its human rights obligations and vice versa.

3.1.3. The human right to property

It is worth noting that recognizing the right to property as a human right, as articulated in various human rights instruments,¹³⁷ does not diminish the need for systemic integration or resolve all potential conflicts between human rights and BITs. First, the right to property is not the only protection contained within BITs. Non-discrimination and fair and equitable treatment are more accurately described as standards of treatment than codifications of the right to property. More importantly, the human right to property is neither absolute nor necessarily coextensive with the protections of property contained in BITs. The right to property exists within a wider corpus of rights with which potential tensions and potential conflicts exist. As examined in Section 3.2.3, *infra*, human rights courts charged with interpreting the human right to property grapple with these tensions. To the extent, therefore, investment tribunals rely on the

136 – This framework and terminology is borrowed from PAUWELYN, *supra* note 81, at 178.

137 – See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 17, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter “Universal Declaration of Human Rights”]; Protocol No. 1 to the European Convention on Human Rights, art. 1, 213 U.N.T.S. 262, *entered into force* May 18, 1954 [hereinafter “First Protocol, European Convention on Human Rights”]; American Convention on Human Rights, art. 21, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978.

human right to property to extinguish the appearance of conflict, they should do the same.¹³⁸

3.2. Harmonizing potential conflicts

3.2.1. Non-discrimination: National Treatment and Most Favored Nation Treatment

The principle of non-discrimination, embodied in both the National Treatment (NT), Most Favored Nation (MFN) clauses, and sometimes as a stand-alone provision, represents one of the most fundamental protections offered to investors through BITs. National Treatment, in general, prohibits discrimination against foreign investors by mandating that they be treated at least as well as domestic investors. Most Favored Nation treatment provides the same protection against discrimination with respect to other foreign investors. Stand-alone protection against discrimination, sometimes read into the Fair and Equitable Treatment clause,¹³⁹ sometimes contained explicitly within the BIT text, protects against discriminatory treatment generally. Consistent across all of these clauses is that the protection against discrimination is a relative one, dependent on how other investors are treated.

3.2.1.1. Potential conflicts

There does not appear to be an inherent conflict between the prohibition on discriminatory treatment in BITs and States' human rights obligations. On the contrary, human rights law is built upon the principle of non-discrimination.¹⁴⁰ NT, MFN and human rights law, therefore, would appear to point in the same direction, not defeat the purpose of either, nor be mutually incompatible.

In application, however, the potential for conflict exists. This is because the effects of State measures, even those with the purest of intentions and the most equitable and intelligent designs, will almost always fall more heavily on some than on others. As such, friction may arise between human rights law and BITs in cases where a measure not predicated on discriminating against the foreign investor nonetheless creates a disproportionate burden for him or her. If all such treatment were considered discriminatory, States would be prevented from enacting bona fide human rights

138 – Cf. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 114-121 (May 12, 2005) (dismissing the potential for conflict between the Argentine Constitution, international human rights law, and the BIT in question in part because “the Constitution carefully protects the right to property, just as the treaties on human rights do”).

139 – See *infra* Section 3.2.2.

140 – See, e.g., Human Rights Committee, *General Comment 18, Non-discrimination*, ¶ 1, U.N. Doc. HRI/GEN/1Rev.1 (1994) (“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”).

protections. Harmonizing BITs' non-discrimination terms with human rights, therefore, calls for considering the human rights goal of the measure in question when determining whether it is discriminatory or not.

3.2.1.2. Harmonization and systemic integration

While non-discrimination is a foundational principle of international human rights law, even human rights law allows for different treatment when justified by a legitimate non-discriminatory purpose. For example, the Human Rights Committee has held that different treatment is not discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."¹⁴¹ Similarly, the Committee on the Elimination of Racial Discrimination (CERD) "observe[d] that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate."¹⁴² The Inter-American Court takes a similar approach.¹⁴³

Investment tribunals, through two closely related methods, have also been willing to consider the purpose of a measure when determining whether it is a violation of a BIT non-discrimination term.¹⁴⁴ The first method, which closely resembles the approach taken by the European Court of Human Rights,¹⁴⁵ calls for considering whether the objective of the measure is a justification for different treatment. Tribunals taking this approach have differed as to how the measure must relate to a legitimate public policy in order for it to qualify as a justification, from requiring a plausible relationship,¹⁴⁶ a reasonable relationship,¹⁴⁷ or requiring the measure to be the least inconsistent with investment obligations of all policy options available.¹⁴⁸ Under this approach, human

141 – *Id.* ¶ 13.

142 – Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination, ¶ 2, U.N. Doc. A/48/18 (1996).

143 – See Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 57 (Jan. 19, 1984) (“[N]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”).

144 – See generally Frederico Ortino, *Non-Discriminatory Treatment in Investment Disputes* in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 344, 349-363 (Dupuy, Francioni & Petersmann eds., 2009).

145 – See *Hoffmann v. Austria*, 255 Eur. Ct. H.R. (ser. A) ¶ 33 (1992) (citing *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) ¶ 31 (1990)).

146 – *GAMI Invest, Inc. v. Mexico*, UNCITRAL, Final Award, ¶ 114 (Nov. 15, 2004).

147 – *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2, ¶¶ 87-88 (Apr. 10, 2001).

148 – See *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, ¶¶ 215, 255 (Nov. 13, 2000) (finding that the measure was discriminatory because there existed other legitimate alternative measures, which were less inconsistent with NAFTA, for achieving the same policy objective).

rights law could be used to inform whether the measure is indeed directed toward a non-discriminatory public policy.¹⁴⁹ The second method evaluates whether distinctions between investors justify the measure's different treatment. This method has largely been applied to BITs that define "discrimination" as treating investors in "like" or "similar" circumstances differently.¹⁵⁰ Most existing case law has dealt with provisions containing this qualification.¹⁵¹ Interpretations of what constitutes "likeness" between investors is central to assessing discriminatory treatment, and has varied from whether and to what extent there is a competitive relationship between the two,¹⁵² whether they are dedicated to exporting their products,¹⁵³ to whether they are in an identical situation when such a comparison exists.¹⁵⁴

Determining whether two investments are "like" can also be informed by considering the "circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."¹⁵⁵ Human rights law, therefore, can help inform the basis of different treatment and reconcile potential conflicts. After all, the impact of a bona fide human rights measure should be rationally, if not equally, assigned. Any disparate impact experienced by investors should then be based on their differences with respect to the human rights goal. At least one investment tribunal referenced international law in such a way. In *Parkerings-Compagniet*, the Tribunal ruled that two investments were not "like" as they were treated differently by international law.¹⁵⁶

3.2.2. Fair and Equitable Treatment

The Fair and Equitable Treatment standard (FET) sets forth an objective standard of treatment. Unlike the non-discrimination protections of NT and MFN, FET it is not dependent on the treatment afforded to domestic or other foreign investments.

149 – See Dupuy, *supra* note 5, at 52 ("To a large extent, the human rights framework can...be helpful in reducing the uncertainty of the law in the definition of what constitutes effectively a public purpose.")

150 – See, e.g. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter "NAFTA"].

151 – Ortino, *supra* note 144, at 344, 354.

152 – See S.D. Myers, UNCITRAL, Partial Award, ¶ 251 (noting that the foreign and domestic investors were alike in the sense that they provided the same service).

153 – See Occidental Exploration and Production Co. v. Ecuador, UNCITRAL, Award, ¶¶ 167-73, (Jul. 1, 2004).

154 – See Methanex Corp. v. United States, UNCITRAL, Final Award, Pt IV, Chpt. B, ¶ 17, (Aug. 3, 2005) ("it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed").

155 – S.D. Myers, UNCITRAL, Partial Award, ¶¶ 247-250.

156 – *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 392 (Sept. 11, 2007) ("[T]he fact that the [Claimant's] MSCP [multi-storey car park] project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive. Indeed, the record shows that the opposition raised against the [Claimant's] projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the [Claimant's] project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, [Claimant's] MSCP in Gedimino was not similar with the MSCP constructed by [the other investor].").

Interpretations of FET can be loosely classified in two categories: those that define it as co-extensive with the International Minimum Standard (IMS), a customary international law standard (CIL) related to the treatment of aliens, and those that define it to encompass and go beyond the IMS. The IMS, which emerged in the *Neer* case,¹⁵⁷ is defined by the American Law Institute in the following terms:

The international standard of justice...is the standard required for the treatment of aliens by: (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems.¹⁵⁸

Concretely, the IMS has been applied to protect against egregious State conduct and the denial of justice, and to guarantee the full protection and security of foreigners and their investments.¹⁵⁹ It has also been interpreted to establish a standard of “good governance,” where treatment “conform[s] to the canons of a modern and well-organized State.”¹⁶⁰ In all of its iterations, the IMS has been understood to create a due diligence rather than strict liability obligation with respect to these protections.¹⁶¹

The interpretation of FET as equivalent to the IMS has substantial support. For example, the NAFTA Free Trade Commission (FTC) issued a binding interpretation that the FET standard in NAFTA in fact prescribes this CIL standard and does not require further protections.¹⁶² Similarly, the FET standard has been defined as equivalent to the IMS in a number of arbitrations outside of the NAFTA context¹⁶³ and in the model BITs of the United States (2004), Canada (2004), and Norway (2007). It should be noted that no State has argued that FET provides protections which extend beyond the IMS.¹⁶⁴ Many tribunals and commentators, however, have interpreted FET as being independent of the IMS.¹⁶⁵ As an independent standard, FET has been interpreted to: (i) guarantee transparency of government regulatory processes;

157 – *Neer v. Mexico*, No. 136 (U.S.-Mex. General Claims Comm’n Oct. 15, 1926), 21 AJIL 555 (1927).

158 – American Law Institute’s Restatement (Second) of Foreign Relations Law of the United States ¶ 165.2 (1965).

159 – IONA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL FOREIGN INVESTMENT LAW 62-63 (2008).

160 – Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Separate Opinion of Pedro Nikken, ¶ 36 (Jul. 30, 2010) [hereinafter “Suez, Separate Opinion of Pedro Nikken”].

161 – TUDOR, *supra* note 159, at 62.

162 – NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (Jul. 31, 2001).

163 – See, e.g., *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001); *Biwater Gauff, Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 592 (June 24, 2008) (“the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law”).

164 – Suez, Separate Opinion of Pedro Nikken, ¶ 7.

165 – See, e.g., Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6J. WORLD INVEST. & TRADE 357 (2005); *Saluka v. Czech Republic* (UNCITRAL), Partial Award, ¶¶ 294-95 (Mar. 17, 2006).

(ii) ensure the government acts in good faith and in a non-arbitrary manner; (iii) protect against discrimination; (iv) provide full protection and security to foreign investments; (v) protect the legitimate expectations of the investor; and (vi) guarantee a stable regulatory environment for the investment. Application of FET in practice has turned on the particular facts, circumstances, and subjective expectations of the parties.¹⁶⁶

3.2.2.1. Potential conflicts

There does not appear to be an inherent conflict between protecting human rights and treating foreign investors fairly and equitably. As with the principle of non-discrimination, treating investors fairly and equitably is complementary of human rights principles. The same complementarity appears to extend, both in principle and application, to the following concrete protections FET has been interpreted to offer: (i) due process and protection against the denial of justice; (ii) transparency of government regulatory processes; (iii) a guarantee of good faith and non-arbitrariness; and (iv) non-discrimination. Fundamentally, these are procedural protections reflective of human rights norms, which can serve as a reference in their interpretation.¹⁶⁷ However, at least three interpretations of FET do pose potential conflicts, namely, interpretations that require a stable regulatory environment, the full security and protection of the investment, and the protection of the investor's legitimate expectations.

3.2.2.2. Systemic integration and harmonization

3.2.2.2.1. Full Protection and Security

While the provision of full protection and security often appears as a stand-alone standard,¹⁶⁸ it is considered to be embodied within the IMS, of which FET can be considered a reflection. In either case, it is generally applied as a due diligence (rather than strict liability) standard.¹⁶⁹ The ICJ in *ELSI* stated that the term requiring parties to provide “the most constant protection and security” to nationals of the other party, “cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”¹⁷⁰ Similarly in *Lauder*, the Tribunal found that the full security and protection standard “obliges the Parties to exercise such due

166 – *Waste Management, Inc. v. Mexico*, ICSID Case no. ARB(AF)/00/3, Award, ¶ 99 (Apr. 30, 2004) (the FET standard is “to some extent a flexible one which must be adapted to the circumstances of each case.”).

167 – See *supra* note 87 & accompanying text.

168 – When as such, the analysis would generally be the same, allowing for differences in the specific phrasing of the terms.

169 – RULDOPH DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 61 (1995); see also discussion in TUDOR, *supra* note 156, at 184.

170 – *Elettronica Sicula S.p.A. (U.S.A. v. Italy)*, Judgment, 1989 REPORT 15, 54 (Jul. 20).

diligence in the protection of foreign investment as reasonable under the circumstances.”¹⁷¹ Understood as such, a harmonious application of the full protection and security standard may require that international human rights law be considered when assessing what is “reasonable under the circumstances.” At least one tribunal has taken such an approach. In *Tecmed*, the clause was invoked in relation to demonstrations that had adversely affected the investment. The tribunal avoided a potential conflict between this clause and the rights to assembly and association¹⁷² by reading the standard of full protection and security to require “react[ing] reasonably, in accordance with the parameters inherent in a democratic state.”¹⁷³

3.2.2.2.2 Stability of regulatory environment

Although it has only been advanced in the context of BITs where the goal of “stability” is contained within the Preamble,¹⁷⁴ one interpretation of FET holds that it guarantees the stability of the regulatory environment.¹⁷⁵ To the extent that it prohibits or penalizes States from introducing new regulations, this interpretation poses a serious potential conflict to human rights law. As the High Commissioner has stated:

Introducing new regulations to promote human rights is an important aspect of States’ duty to fulfill human rights. As economic, social and political conditions change, it is appropriate that in response States might introduce appropriate regulations strengthening protection for human rights.¹⁷⁶

This interpretation has been strongly questioned by investment tribunals as an unwarranted encroachment upon the police powers of States recognized by customary international law.¹⁷⁷ In accordance with systemic integration—which presumes that the parties refer to customary international law and general principles of law for all questions not expressly addressed by the treaty¹⁷⁸ — critics have questioned whether States intend to impliedly relinquish the fundamental right to regulate through FET.

171 – *Lauder v. Czech Republic*, UNCITRAL, Final Award, ¶ 308 (Sept. 3, 2001).

172 – Protected, *inter alia*, by ICCPR arts. 21 and 22, respectively.

173 – *Tecmed v. Mexico*, ICSID Case no. ARB(AF)/00/2, Award, ¶ 177 (May 29, 2003).

174 – See, e.g., *LG&E Energy Corp. v. Argentine Republic*, ICSID Case no. ARB/02/1, Decision on Liability, ¶ 125 (Oct. 3, 2006) (“[T]he stability of the legal and business framework in the State is an essential element in the standard for what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.”).

175 – *Id.* (citing *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, ¶ 183 (Jul. 1, 2004)); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case no. ARB/01/18, Award, ¶ 274 (May 12, 2005).

176 – U.N. High Comm’r for Human Rights, *supra note* 121, ¶ 31.

177 – The “police powers” doctrine is described by the U.S. Restatement of Foreign Relations: “A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states.”

178 – ILC CONCLUSIONS ON FRAGMENTATION, ¶ 19.

For example, the Tribunal in *S.D. Myers* held that a breach of FET “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”¹⁷⁹ Similarly, the Tribunal in *Continental Casualty Company*, in no uncertain terms stated:

[I]t would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT’s Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable.¹⁸⁰

Professor Nikken, in his Separate Opinion in the *Suez* case, pointed out the inappropriateness of assuming a State renounced its regulatory power by agreeing to a provision as vague as FET:

The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment.... That commitment would touch on core competencies of the State, which is inconceivable the State would impliedly renounce. A treaty obligation, whereby the State guarantees the stability of its legal order by renouncing the exercise of regulatory power must be explicit and cannot be assumed through an implicit declaration, diluted in general and ambiguous expressions about a treatment of investment standard (nor even by the way, through the preamble of a treaty).¹⁸¹

Such critiques echo the ICJ in *Tunisia v. Libya*, which held that “it is not lightly to be presumed that a State would renounce or fetter its right under Article 60.”¹⁸² Both the Tribunal in *Continental Casualty* and Professor Nikken remarked that it would be particularly unreasonable (or inconceivable) that these rights would be impliedly renounced given how central they are to the core functioning of the State. It could only be more unreasonable to assume that a State would renounce those regulatory rights necessary for the fulfillment of its other international legal responsibilities.

3.2.2.3 Legitimate expectations

Various arbitral tribunals have interpreted FET to protect the legitimate expectations of the investor.¹⁸³ The tribunal in *Saluka*, for example, interpreted legitimate

179 – *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, ¶ 263 (Nov. 13, 2000).

180 – *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 258 (Sep. 5, 2008).

181 – *Suez*, Separate Opinion of Pedro Nikken, ¶ 31.

182 – Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (*Tunisia v. Libya*), 1985 REPORT 192, 216 (Dec. 10).

183 – It has also been strongly rebuked: see *Suez*, Separate Opinion of Pedro Nikken.

expectations to be “the dominant element of that [fair and equitable treatment] standard.”¹⁸⁴ In *Tecmed*, the Tribunal held that FET demands “provid[ing] to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”¹⁸⁵ Likewise, the tribunal in *International Thunderbird Gaming Corporation* explained that “the concept of ‘legitimate expectations,’ relates to a situation where a contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”¹⁸⁶

This interpretation of FET could potentially be problematic if, in application, investors’ expectations conflicted with the requirements of international human rights law. Avoiding such a conflict requires informing what constitutes a “legitimate” expectation with what is required of States under human rights treaties. For example, it would not appear legitimate to expect that a State would fail to fulfill its other international obligations, or that the regulatory environment would remain static, especially given the dynamic nature of international law,¹⁸⁷ changing conditions in the Host State, and how significant regulations are to the fulfillment of human rights obligations.

But what of expectations borne of specific representations made by the State? Should it be considered legitimate for an investor to rely upon an assurance that the investor could affirmatively violate a human right or be exempt from regulations aimed at fulfilling a human right? That such an assurance would likely violate domestic and international law and therefore be unenforceable, suggests that it would not be. In addition, it appears neither fair nor equitable on its face.¹⁸⁸ What if, however, the original assurances were at the time understood by both parties to conform to international law, but that, because of changed or unanticipated circumstances, they no longer did? In this case, a harmonious interpretation of FET may be aided by considering the intent behind the creation and the breach of the expectations—specifically, whether the former was done in good faith and whether the latter was justifiable. For example, the Tribunal in *Saluka* held:

Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in *light of the circumstances*.... No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether

184 – *Saluka v. Czech Republic*, UNCITRAL, Partial Award, ¶ 302 (Mar. 17, 2006).

185 – *Tecmed v. Mexico*, ICSID Case no. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).

186 – *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, ¶ 147 (Jan. 26, 2006).

187 – See *supra* Section 1.3.4.

188 – See Dupuy, *supra* note 5, at 54 (“One may argue...that [when a State fails to respect its human rights obligations in a contracting with a foreign investor] for their expectations to be considered as ‘legitimate,’ investors must also have taken due notice of the state’s obligations deriving from its human rights obligations.”).

frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.¹⁸⁹

Likewise, the tribunal in *Saluka v. Czech Republic* held that a breach of the legitimate expectations of an investor would not necessarily breach the FET clause as long as the breach and reason for the breach were proportionate: “[t]he determination of a breach of [fair and equitable treatment] requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.”¹⁹⁰

3.2.3. Expropriation

While most BITs do not define “expropriation,”¹⁹¹ the term has been interpreted to include both direct takings of property rights, including the revocation of possession and title, as well as indirect takings, where deprivation of property rights occur through regulation. Given States’ well-recognized authority to regulate for the public interest, the question of what constitutes an indirect expropriation is a contentious issue. BITs generally allow expropriation, in both forms, so long as it is undertaken for a legitimate public purpose, done in a non-discriminatory way and according to principles of due process, and compensation is paid to the investor.¹⁹²

3.2.3.1. Potential conflicts

As expropriation is allowed by BITs, it does not present an inherent legal conflict in the strict sense of incompatibility. In application, however, expropriation clauses could work to frustrate the purpose of human rights norms. Where States are forced to compensate investors for lost earnings on investments that violate a human right, investment law could effectively frustrate the purpose of human rights law. Where compensation demanded of the State is prohibitively expensive, expropriation clauses could prevent States from taking expropriatory action for the benefit of advancing a human rights obligation. Similarly, adopting an expansive definition of indirect expropriation that requires compensation be paid to investors adversely affected by bona fide regulatory measures could create a serious regulatory chill and thus undermine the ability of States to enact measures for fulfilling their human rights obligations.

189 – *Saluka v. Czech Republic*, UNCITRAL, Partial Award, ¶¶ 304-05 (Mar. 17, 2006).

190 – *Id.* ¶ 306.

191 – L. Yves Fortier & Stephen Drymer, *Indirect Expropriation in the Law of International Investment: I Know it When I See It, or Caveat Investor*, p. 4, The Twelfth Annual Goff Arbitration Lecture (Dec. 9, 2004).

192 – *Id.*, at 3.

This potential conflict was implicitly recognized by the Tribunal in *Feldman* when it noted:

Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this. . . .¹⁹³

3.2.3.2. Systemic integration and harmonization

3.2.3.2.1. Indirect expropriation

It is widely accepted that States do not face liability for the normal, non-discriminatory, and bona fide exercise of their police powers for the general welfare,¹⁹⁴ which have been understood to include the power to tax and maintain public order, health and morality.¹⁹⁵ The definite scope of police powers has not been delineated in a comprehensive fashion,¹⁹⁶ and it could be valuably informed by international human rights law, which can be understood to affirm the regulatory rights of the State required for their implementation. A State could not ratify human rights instruments in good faith, after all, if it did not possess or did not believe it possessed the requisite authority to implement them.

In cases of indirect expropriation where the tribunal does not apply the police powers doctrine or does not find its application dispositive, the potential for expropriation clauses to frustrate the fulfillment of human rights norms remains. In such cases, it may be useful to look to human rights jurisprudence, which grapples with the tensions between the right to property and other human rights.¹⁹⁷ For example, Article 1 of the First Protocol of the European Convention on Human Rights distinguishes between deprivations of property (analogous to expropriation) and the control of the use of property (analogous to police powers). The former demands compensation be paid to the property owner while the latter, if done in accordance with the public interest, generally does not. Indirect or de facto deprivations are understood to occur in only limited circumstances where the owner retains title to the property but effectively loses the right to use, let or sell the property.¹⁹⁸ For a deprivation to be deemed to occur, it is

193 – *Feldman v. Mexico*, ICSID Case no. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002); See also *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, ¶ 281 (Nov. 13, 2000) (“international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures”).

194 – Restatement (Third) of Foreign Relations Law of the United States, § 712, cmt. g, at p. 201.

195 – Louis B. Sohn & Richard Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT’L L. 545, 553 (1961).

196 – Fortier & Drymer, *supra* note 191, at 8.

197 – See e.g., *Lauder v. Czech Republic*, UNCITRAL, Final Award, ¶¶ 200-02 (Sept. 3, 2001) (citing *Mellacher and Others v. Austria* 169 Eur. Ct. H.R. (ser. A) (1989); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 311-12 (Jul. 14, 2006) (citing *James and Others v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 11 (1986)); *Teemed v. Mexico*, ICSID Case no. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003) (citing *James*, 98 Eur. Ct. H.R. 11)).

198 – *Mellacher and Others v. Austria* 169 Eur. Ct. H.R. (ser. A) ¶ 44 (1989).

not sufficient for one of these rights to lose some of their substance; the right must disappear.¹⁹⁹ All other interferences with property done “in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” are considered to constitute mere controls on the use of property.²⁰⁰ As discussed above, the Tribunals in *Tecmed v. Mexico* and *Azurix v. Argentina* both explicitly referenced the jurisprudence of the European Court of Human Rights on property controls and expropriation and largely adopted its approach.²⁰¹

A similarly tailored definition of indirect expropriation was supported by Professor Christie, who wrote that State actions wouldn’t be expropriatory if they had “a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property.”²⁰² Other tribunals have similarly recognized States’ needs to engage in regulatory activity when determining whether an expropriation has taken place.²⁰³

3.2.3.2.2 Compensation

States face an obligation to protect against abuses of human rights by third parties. Forcing a State to compensate an investor engaged in human rights abuses for losses or perspective losses stemming from those violations would not only enable third-party abuses of human rights but discourage States from taking the necessary protective actions required by international law. Such a conflict can be mitigated by following the approach espoused by A. de Laubadère²⁰⁴ and followed by the Tribunal in *SPP v. Egypt*, which refused to award lost profits that would have been accrued to an investment in violation of international law:

Obviously, the allowance of *lucrum cessans* may only involve those profits which are legitimate. . . . Thus, even if the Tribunal were disposed to accept the validity of the Claimants’ DCF [discounted cash flow] calculations, it could only award *lucrum cessans* until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that

199 – *Sporrong and Lonnroth v. Sweden*, 52 Eur. Ct. H.R. ¶ 63 (ser. A) (1982).

200 – First Protocol, European Convention on Human Rights, art. 1.

201 – See *supra* notes 85-86 & accompanying text.

202 – G.C Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT Y.B. INT’L L. 307, 331-332 (1962).

203 – See, e.g., *Feldman v. Mexico*, ICSID Case no. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002) (“[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this. . . .”); *S.D. Myers, Inc. v. Canada (UNCITRAL)*, Partial Award, ¶ 281 (Nov. 13, 2000) (“international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures”).

204 – A. DE LAUBADÈRE, II TRAITE DES CONTRATS ADMINISTRATIFS 556 (2nd ed. 1984) (“*le lucrum cessans* correspond au ‘bénéfice légitime’ que le cocontractant pouvait normalement escompter”).

date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.²⁰⁵

Other tribunals have held that claims related to an investment that is made in bad faith or in violation of law are not only not entitled to compensation but non-admissible for international arbitration. The requirement that an investment be made in good faith and in accordance with the law has been affirmed by several investment awards, including *World Duty Free*, which held that a contract based on corruption was not admissible,²⁰⁶ and *Plama*, which held that a contract based on fraudulent representation was not protected.²⁰⁷ The Tribunal in *Phoenix* made a more explicit connection between a violation of international human rights law and the admissibility of an investment claim:

It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.²⁰⁸

Even where there is nothing illegitimate about the investment or profits, a conflict may appear where an expropriation is taken for the advancement of a human right, such as the return of ancestral land to indigenous people. After all, any amount of compensation is likely to discourage, at least to some extent, States from taking expropriatory measures. Thus, in these situations, the right of the investor and the advancement of particular human rights are likely to remain in tension with one and other.²⁰⁹

205 – *Southern Pacific Properties, Ltd. v. Arab Republic of Egypt*, ICSID Case no. ARB/84/3, Award, ¶¶ 190-191 (May 20, 1992).

206 – *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

207 – *Plama Consortium, Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 143 (Aug. 27, 2008).

208 – *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case no. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009).

209 – Professor Nikken observes that the *Sawhoyamaya* suggests that the correct approach for a State facing a conflict between the rights of indigenous people to their ancestral land and the rights of a foreign investor to that land would be to expropriate the land and compensate the foreign investor. This, he explains, is because “the function of property in [an investment] is mainly economic and has a monetary value” and therefore can be compensated monetarily, while ancestral lands may have a value to the indigenous people that is non-monetary. See Pedro Nikken, *Balancing of Human Rights and Investment Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 246, 265-270 (Dupuy, Francioni & Petersmann eds., 2009).

4. Investor-State Arbitrations: Procedural Reform

The relationship and potential for conflict between BITs and international human rights law does not end with the substance of the BIT's terms. The procedural rules governing investor-State arbitrations also have the potential to conflict with human rights norms.

While there have been recent improvements to some of the procedural rules governing investor-State arbitrations, they too often reflect the secrecy and exclusivity of private commercial arbitration procedures, upon which investor-State arbitrations were inappropriately based.²¹⁰ Private commercial arbitrations are predicated upon private party consent and are limited to matters and interests that do not affect third parties.²¹¹ Maintaining confidentiality and the exclusion of third-party participants in these contexts may be entirely appropriate. Investor-State arbitrations, however, are of manifest public concern. Beyond potentially implicating State responsibility and other international legal obligations, jurisdiction over sovereign acts can have a profound impact on the process of democratic law-making, as well as on the rights and interests of non-parties to the dispute, for whom, at least in cases where human rights are implicated, the State is not an adequate representative. Procedural rules that allow or require such disputes to take place in secret and in isolation pose potential conflicts with the right to information, a critical component of the right to freedom of expression. Furthermore, they may also undermine the achievement of other human rights, and the capacity for democratic governance. To the extent these procedural rules cannot be harmonized with broader human rights norms and democratic principles, they should be amended to reflect the legal context in which they operate.

4.1. Secrecy and the right to expression, access to information, and democratic governance

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the rights to seek and receive information as components of the fundamental right to freedom of expression.²¹² Yet ICSID, ICSID Additional Facility, UNCITRAL, and Stockholm rules of arbitration all require the consent of both parties to hold an open hearing²¹³ or to publish the award.²¹⁴ These rules effectively

210 – Kinnear, *supra* note 24, at 1.

211 – *Id.*, at 2.

212 – Universal Declaration of Human Rights, art. 19; ICCPR, art. 19.2.

213 – ICSID Rules, R. 32(2); ICSID Additional Facility Rules, art. 39(2); UNCITRAL Rules (2010), art. 28(3); Stockholm Rules, art. 27.

214 – ICSID Rules, R. 48(4); ICSID Additional Facility Rules, art. 53(3); UNCITRAL Rules (2010), art. 34(5); Stockholm Rules, art. 46.

give a private party the right to veto a State's implementation of its fundamental human rights obligation, creating the potential for conflict in the strictest sense.²¹⁵ While the existence of an arbitration under ICSID arbitration rules and the ICSID Additional Facility Rules is made public through its public registry, outside of the ICSID context, even the fact that an arbitration has commenced may be kept private. UNCITRAL arbitrations are often held ad hoc in non-institutional settings and some arbitration centers, such as the International Chamber of Commerce and the Stockholm Chamber of Commerce do not keep public registries.²¹⁶ Should a State decide not to make public an arbitration under one of these fora, current procedural arrangements would contribute to the undermining of the human right to information.

Allowing investors or States to unilaterally restrict the right to information is especially problematic given how critical this right is for the achievement of democratic governance, accountability, and other international human rights. In a case confirming that the right to information was violated when a State withheld information related to a foreign investment contract, the Inter-American Court of Human Rights described the virtuous cycle of freedom of information, freedom of expression and democratic governance:

[T]he State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.

Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.²¹⁷

Secrecy is still more problematic given how critical State accountability is to the protection and realization of other fundamental human rights.

215 – The state of transparency is relatively more advanced under the ICSID rules and Additional Facility rules, as excerpts of decisions that demonstrate the legal reasoning behind final decisions are published; still, full awards are not published without the consent of both parties.

216 – OECD Investment Committee, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, ¶¶ 6, 7 (June 2005), available at: <http://www.oecd.org/dataoecd/25/3/34786913.pdf>.

217 – Claude-Reyes, et al. v. Chile, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 86, 87 (Sept. 19, 2006).

As noted by the High Commissioner for Human Rights:

Transparency is essential for the realization of human rights as it promotes access to information concerning the allocation of resources in the context of progressively realizing economic, social and cultural rights, including the right to water. Such information is essential for effective public action and monitoring of both the public and private sector.²¹⁸

4.2. Participation of non-disputing parties

Given the direct impact that international investment law can have on human rights, access to information may not be sufficient for their protection or realization; participation in the arbitral process itself may sometimes be necessary. As this Report shows, it is imperative that investment tribunals interpret BITs in a way that complies with human rights law. A failure to do so can potentially lead to the violation of the human rights of persons not party to the dispute. States may not always be counted on to deal adequately with these implications in the course of the arbitration; States are the duty-holders not rights-holders in international human rights law. Moreover, States may not have the factual or legal expertise to raise these issues.

While *amicus curiae* are expressly allowed under ICSID and ICSID Additional Facility Rules, it is ultimately the tribunal's decision whether to allow them or not.²¹⁹ Meanwhile, the UNCITRAL rules have only been interpreted to not prohibit them.²²⁰ None of the sets of rules, however, address *amicus*' access to the parties' pleadings, which may be necessary for making an informed and worthwhile contribution to the case.

4.3. Legitimacy of the investor-State arbitration process

Beyond respecting the freedom of information and enhancing democratic governance and accountability, greater transparency and public participation in international investment arbitrations will likely increase the legitimacy of the investor-State

218 – U.N. High Comm'r for Human Rights, *supra* note 121, ¶ 52.

219 – ICSID Rules, R. 37(2); ICSID Additional Facility Rules, art. 41(3).

220 – The UNCITRAL Rules do not expressly allow for *amicus* briefs. But Article 17 of the revised rules (Article 15 of the earlier rules), which provides “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate,” has been interpreted to give Tribunals the discretion to admit *amicus* briefs. See *Methanex Corp v. United States* (UNCITRAL), Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, ¶ 31 (Jan. 15, 2001). The author is unaware of any arbitrations under the Stockholm Rules where the admission of *amicus* briefs arose. However, as Article 19(1) of the Stockholm Rules mimics Article 17 of the UNCITRAL rules, there is good reason to interpret them as similarly permissive of *amicus* participation. Compare Stockholm Rules, art. 19(1) (“Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such a manner as it considers appropriate.”) with UNCITRAL Rules, art. 17 (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate....”).

arbitration process. The Tribunal in *Aguas Argentinas* recognized this when they decided to accept amicus curiae briefs:

The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitration processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.²²¹

This is particularly important if one understands the arbitral process not simply as dispute resolving but law making, whose legitimacy depends on democratic participation. The capacious terms of BITs are largely informed by the interpretative content provided by tribunals, which itself becomes a body of law together with the original agreement. Greater openness is also likely to result in greater predictability and clarity for investors and States, which can help prevent disputes in the first place. While arbitral decisions are not formally binding, they do carry persuasive authority, and they do as a whole appear to drive the direction of the investor-State arbitral system.²²² At least some arbitrators have proposed that there may be a moral obligation to follow precedent in order to create stability and predictability.²²³ Tribunals do, in fact, frequently cite previous decisions, which if published more liberally could help guide investor, State, and arbitrator understanding.²²⁴ Increased legitimacy and acceptance of the process could also lead to greater acceptance of the results and more pressure for their enforcement,²²⁵ the lack of which appears to be becoming a significant issue.²²⁶

4.4. Recommendations

Given the forgoing, the ICSID, ICSID Additional Facility, UNCITRAL, Stockholm, and all other rules employed in investor-State arbitrations, should be amended to require greater transparency and public participation. Specifically, these rules should be reformed in the spirit of NAFTA Chapter 11, which require that:

- The filing of investment claims be made public;²²⁷

221 – *Id.* ¶ 22.

222 – Andrea Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. P.A. J. INT'L ECON. L. 587, 626 (1998).

223 – See Suez, Separate Decision of Pedro Nikken, ¶ 24 (“although there is no legal obligation to follow decided cases there is an indeed a moral obligation to follow decided cases in order to promote a predictable legal environment”) (citing G. Kaufman-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 ARBITRATION INT'L 357, 374 (2007)).

224 – Schneider, *supra* note 222, at 614.

225 – See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22 (1995).

226 – At least six countries are known to have not paid final awards issued against them. Luke Peterson, *How many states are not paying awards under investment treaties?* 3 INVEST. ARB. REP. (May 7, 2010).

- Pleadings and other relevant documents be published in a timely manner, subject to redaction of confidential business information or other privileged information;²²⁸
- Hearings be open to the public;²²⁹
- *Amicus Curiae* be expressly allowed²³⁰ to submit briefs and participate in oral arguments, where the *amici* have an interest in the arbitration and have the potential to bring a different perspective from the disputing parties, taking into account the costs of participation to the disputing parties; and
- All orders, decisions and awards issued by the Tribunal be made public in a timely fashion, subject to redaction of confidential business information or other privileged information.²³¹

Until such reforms are implemented, tribunals, when reasonably possible, should interpret the arbitration rules in a manner that minimizes conflict with the human rights to information and democratic governance, and States should begin inserting procedural reforms directly into their BITs.

227 – NAFTA, art. 1126(13).

228 – NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ 1 (Jul. 31, 2001).

229 – The U.S. and Canada announced their consent to open public hearings at all arbitrations. See Statements of Canada and the United States on Open Hearings in NAFTA Chapter Eleven Arbitrations, issued with NAFTA Free Trade Commission, Joint Statement: “Celebrating NAFTA at Ten” (Oct. 7, 2003). Mexico followed suit in 2004. NAFTA Free Trade Commission, Joint Statement: “Decade of Achievement” (Jul. 16, 2004). Recently, ICSID has taken the noteworthy step of broadcasting hearings over the web. See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Public Hearing (Jun. 2, 2010) available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement60>

230 – See Statement on Non-Disputing Party Participation, NAFTA Free Trade Commission, issued with Joint Statement: “Celebrating NAFTA at Ten: Statement of the Free Trade Commission on Non-disputing Party Participation” (Oct. 7, 2003).

231 – NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ 1 (Jul. 31, 2001).

Conclusion

The number of bilateral investment treaties and disputes arising from them has exploded during the past two decades. Recent investment arbitrations have highlighted the significant potential for this new and increasingly important form of law to interact and conflict with international human rights law. The aim of this Report was to examine the relationship between these two bodies of law. It explored the relationship of BITs and investor-State arbitrations to the context of international law generally and to international human rights law specifically. It examined the principles of systemic integration and harmonization that govern these relationships. In an attempt to show how these principles might be applied in practice, it analyzed certain standard BIT terms, their potential for conflict with human rights law, and interpretations of these terms that minimize such potential. Lastly, it examined how the procedural rules governing investor-State arbitrations can conflict with human rights law and suggested specific reforms to those rules.

This Report is not an exhaustive study of this complex and multi-faceted issue. Many important issues worthy of future study remain. Perhaps most notable is the interaction between human rights law and the application of “umbrella clauses,” which convert contractual breaches into breaches of international law. Contractual terms, being more specific and concrete than the major terms of BITs, appear more likely to present genuine conflicts with human rights law. How international tribunals define which contractual breaches are converted to international legal breaches and whether contracts that lead to the violation of international law are enforceable or justiciable are key questions lying at the intersection of investment and human rights law.

While these and other issues remain, this Report has been unequivocal in the following conclusions: First, international investment tribunals have not only the authority but the obligation to consider international human rights norms while interpreting and applying BITs. Specifically, they must take seriously the potential for conflict between these two sets of laws, and interpret and apply BITs in a manner that minimizes these conflicts. Second, while the potential for conflict between BITs and international human rights law is real and growing, it can be mitigated by following standard principles of interpretation and applying generally accepted interpretations of BIT terms.

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