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International investment arbitration and the rule of law: the issue of legal certainty in arbitral jurisprudence dealing with human rights' protection of local populations.

Par

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Abstract and keywords

Abstract: Initially outside of its scope of application, international investment arbitration is increasingly facing human rights protection issues. The development of investments dealing with public services has led to violations of socio-economic rights for host States' populations. When States tried to adopt regulations to protect those rights, they were brought to arbitration for breaching their Bilateral Investment Treaty obligations. The human rights case law in investment arbitration is developing and quickly evolving. Nevertheless, its analysis enables to highlight important legal certainty issues, rendering difficult the protection of economic, social, and cultural rights. Facing this, the legitimacy of the system is disputed and the protection of the rule of law by international investment arbitration is seriously challenged.

Keywords: international investment arbitration; jurisprudence; legal certainty; human rights; economic; social, and cultural rights; rule of law.

Résumé et mots-clefs

Résumé : L'arbitrage international d'investissement se voit de plus en plus confronté à des enjeux originellement hermétiques à l'arbitrage : la protection des droits de l'homme. En effet, le développement d'investissements ayant le monopole de certains services publics offense parfois les droits économiques et sociaux des populations des États hôtes. Si ces mêmes États tentent d'adopter des réglementations protectrices de ces droits, ils se voient opposer l'arbitrage d'investissement pour violations d'un traité bilatéral d'investissement. La jurisprudence en la matière est en pleine évolution, mais son étude permet de souligner d'importants problèmes de sécurité juridique dans les sentences arbitrales, ne permettant pas de garantir ces droits fondamentaux. L'accumulation de ces deux problématiques soulève alors la question de la protection de l'état de droit par l'arbitrage d'investissement, mettant à mal la légitimité de ce mécanisme alternatif de règlement des différends.

Mots-clefs : arbitrage international d'investissement ; jurisprudence ; sécurité juridique ; droit de l'homme ; droit économiques, sociaux et culturels ; état de droit.

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Abbreviations lists

IIA: International investment agreement

BIT: Bilateral investment treaty

CAFTA: Central America Free Trade Agreement

CSR: Corporate social responsibility

FDI: Foreign direct investment

FET: Fair and Equitable Treatment

ECHR: European Convention European Convention for the Protection of Human Rights and Fundamental Freedoms

ECOSOC Rights: Economic, social and cultural rights

ECtHR: European Court of Human Rights

IIA: International investment agreement

ICC: International Chamber of Commerce

ICJ: International Court of Justice

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICSID: International Centre for Settlement of Investment Disputes

IHRL: International human rights law

IIL: International investment law

ISDS: Investor-state dispute settlement

MFN: Most-favored nation

NAFTA: North American Free Trade Agreement

NDP: Non-disputing party

NGO: Non-governmental organisation

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

UNCTAD: United Nations Conference on Trade and Development

UNGA: United Nations General Assembly

VCLT: Vienna Convention on the Law of Treaties

WHO: World Health Organisation

WJP: World Justice Project

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Introduction

"Arbitration is not simply compatible with the key features of the rule of law, but has an increasingly important role to play in upholding those key features, both nationally and internationally."[1]

The rule of law is an international concept especially promoted after war times[2] that aims at ensuring peace, good governance and democracy throughout the world[3]. The honorable Chief Justice Geoffrey Ma recently said that "the importance of the rule of law cannot be emphasised enough"[4]. Any legal system is supposed to ensure that its core elements are implemented within society, and adjudication mechanisms play a key role in safeguarding them[5]. Therefore, investor-state dispute settlement (ISDS)[6] must uphold the rule of law to ensure its legitimacy and future[7].

International investment arbitration can be defined as "a public/administrative law mechanism [but] removed from the democratic constitutional realm. It aims at solving investment disputes that oppose a state and its (supposedly) public-interest policies to the commercial interests of a private

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[1] David Neuberger, "Keynote Speech: Arbitration and the Rule of Law" (2015) 17:4 Asian Dispute Review 180 at 190.
[2] Robert McCorquodale, "Business, the International Rule of Law and Human Rights" in Robert McCorquodale, ed, *The rule of law in international and comparative context* (London: British Institute of International and Comparative Law, 2010) at 32; *Universal Declaration of Human Rights*, 217 A (III) 1948.
[3] Thomas Henry Bingham of Cornhill, *The rule of law* (London: Penguin, 2011) at 9; "What is the Rule of Law?", online: *World Justice Project* <https://worldjusticeproject.org/about-us/overview/what-rule-law>.
[4] Geoffrey Ma, *Understanding the Importance of the Rule of Law in Society* (School of Law of the Seoul National University, 2019) at para 3; Joseph Hon Mr Justice Fok, *The Importance of the Rule of Law* (2016) at para 2.
[5] Geoffrey Ma, *Global Economy and the Rule of Law* (London, 2015) at 3–4.
[6] *Investor-State Dispute Settlement - Public Consultation*, by Organisation for Economic Co-operation and Development Investment Division (Paris: OECD, 2012) at 8: "ISDS is a fundamental element of States' efforts to reinforce the credibility of the commitments they make in their international investment agreements […] If a State is found to be in breach of its treaty obligations, the harmed investor can receive monetary compensation or perhaps other forms of redress […] Thus, ISDS is both an enforcement mechanism that promotes compliance and a means of compensating victims of harm caused by breaches of investment treaty provisions […] ISDS is an unusual – or even unique – system for adjudication".
[7] Ma, *supra* note 4 at para 18: "And where the rule of law does exist, it is undoubtedly a strength and becomes an institution that will have a long term future".

investor"[8]. It is necessary that an international investment be realised in a legally sound framework[9]. In this sense, it is recognised that "the protection of foreign investment by way of treaties is one of the great international legal success stories"[10].
Nevertheless, because of their adjudicating powers, arbitrators of investor-state dispute settlement must also work on the realization of the rule of law within the system[11].

The task is arduous as investment arbitration is often confronted with a multitude of challenges and interests that undermine the rule of law.

It is necessary to write a few words on the context that surrounds the rule of law question in investment arbitration. The globalisation favours international economy and there has been a sizable increase of international foreign direct investments (FDI)[12].
FDI can have negative impacts on a host state and its population[13]. Investors seek the best environment for their investment but also the most profitable[14]. The regulations in force in a particular country play a decisive role in its willingness to invest[15]. Indeed, most of the policies adopted by a government, from taxation, company law, to labour, safety and socio-economic regulations, can impact an investment[16].

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[8] Nicolas Hachez & Jan Wouters, "International investment dispute settlement in the twenty-first century: does the preservation of the public interest require an alternative to the arbitral model?" in Freya Baetens, ed, *Investment Law within International Law* (Cambridge: Cambridge University Press, 2013) 417 at 424.
[9] Ma, *supra* note 5 at 3.
[10] Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60 ICLQ 573 at 574.
[11] Susan D Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2006) 19:2 Pacific McGeorge Global Bus & Development LJ 337 at 340; Julián Bordacahar, "The Rule of Law As Created by Arbitrators – An Update on the Discussions At The Recent IBA Arbitration Day in Buenos Aires", (Avril 2018), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2018/04/08/iba-buenos-aires-report/>.
[12] Franck, *supra* note 11 at 338; Rémi Bachand, Martin Gallié & Stéphanie Rousseau, "Droit de l'investissement et droits humains dans les Amériques" (2003) 49 Annuaire français de droit international 575; For a definition of FDI, see *OECD Benchmark Definition of Foreign Direct Investment* (Paris: OECD, 2008) at 48: "Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise".
[13] Hon. Mr Justice Fok, *supra* note 4 at para 11: "International investment occurs in countries with poor human rights records".
[14] Franck, *supra* note 11 at 339.
[15] Hon. Mr Justice Fok, *supra* note 4 at para 11.
[16] Joachim Karl, "International Investment Arbitration: A Threat to State Sovereignty?" in Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining Sovereignty in International Economic Law* (Portland: Hart Publishing, 2008) at 231.

Those private entities sometimes try to lobby government officers in order to obtain favorable investment conditions. It is a situation where host states participate in the lowering of "labour standard or promoting toxic products" to attract FDI[17].

Some argue that international investment law participates in that, by enabling foreign corporations to negatively influence domestic regulations[18]. States face a threat of going through with a costly investment arbitration and end up refraining from adopting regulation that would be better for its population[19]. Consequently, ISDS challenges democracy because unelected investors strongly impact the policies of governments elected by the people[20].

This phenomenon of softening regulations to favor investors is called the "regulatory chill" and is one of the dramatic consequences of FDI. This tends to exist in capital-importing, less-developed countries[21].

In addition to the "regulatory chill", FDI can also raise the problem of stabilisation clauses. They are contained in BITs and prevent a host state to change its legal and regulatory framework as it could affect the investment. These clauses aim at protecting the business undertaken in the same terms and conditions that existed at the day of the agreement[22]. This is particularly dangerous in states that seek to improve their environmental and human rights regulations[23]. Investors,

[17] Vivian Kube & Ernst-Ulrich Petersmann, "Human Rights Law in International Investment Arbitration" (2016) 11:1 Asian J of WTO & Intl Health L & Policy 65 at 85.
[18] Lee Williams, "Whats Is TTIP? And Six Reasons Why the Answer Should Scare You", *The Independent* (6 October 2015), online: <https://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>.
[19] Ursula Kriebaum, "Is ISDS Beneficial or Dangerous for the Rule of Law Both in the International and the National Spheres" (2015) 109 Proceedings of the Annual Meeting, published by the American Society of Intl L 203 at 204: "Regulatory chill is typically seen as a state actor failing to enact or enforce bona fide regulatory measures because of a perceived or actual threat of investment arbitration".
[20] Williams, *supra* note 18.
[21] Kube & Petersmann, *supra* note 17 at 85.
[22] McCorquodale, *supra* note 2 at 37.
[23] *Ibid* at 43: "stabilization clauses [in BITs] can hinder states that wish to improve human rights, environmental and/or labour standards in their own territory, for to do so requires a change to the regulatory environment in that state and could have an adverse impact on the investor's project, which would make the state in breach of its contract".

through BITs are gaining power, "dethroning the State from its status as the sole subject of international law and this fundamentally alters the international investment landscape"[24].

As a result, international investment is another example of the race-to-the-bottom phenomenon that exists in a globalised world[25]. The situation is characterised by corporations that "use their new strength and mobility in the global economy to exert political influence notably by playing-off states and communities against one another to leverage optimum investment conditions"[26]. There are multinationals that make even more money than developing countries, and use that power to influence specific policies such as environmental and labour regulations (i.e. socio-economic rights).

As a consequence, there are investments that badly impact the host state local populations and seriously jeopardise human rights[27]. Indeed, "foreign investors are generally not altruistic organizations, and their interests may not always coincide with those of society as a whole"[28]. Breaches of human rights go against one of the rule of law's core feature which is fundamental rights protection[29]. Guarantee of human rights as an element of the rule of law is subject to debates[30]. However it is our view, following the opinion of Lord Bingham and the EU Venice Commission to consider fundamental rights' protection as a feature rather than "the raison d'être"

[24] Yves Fortier, "Investment protection and the rule of law: change or decline ?" in Robert McCorquodale, ed, *The rule of law in international comparative context* (London: British Institute of International and Comparative Law, 2010) at 121.
[25] Dale D Murphy, *The structure of regulatory competition: corporations and public policies in a global economy*, International economic law series (Oxford: Oxford University Press, 2006); Jim Chen, "Globalization and Its Losers" (2000) 9 Minn J Intl L 157 at 167 and following.
[26] Simon Retallack, "Economic Globalization and the Environment" (2000) 4 Transnational Associations 173 at 176; Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004) 27:2 Boston College Intl & Comp L Rev 429; Kyla Tienhaara, "Chapter 26: Regulatory chill and the threat of arbitration: A view from political science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011).
[27] Mavluda Sattorova, "Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform" (2019) 113 AJIL Unbound 22–27.
[28] J Hewko, "Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?" (2002) 11 European Constitutional Review 71 at 72.
[29] Bingham of Cornhill, *supra* note 3 c 7.
[30] *Ibid* at 66; Jeffrey Jowell, "The Rule of Law: Rhetoric or Universal Principle" (2012) 20:1 Asia Pac L Rev 3 at 12–14.

of the rule of law[31]. Indeed, if there is no protection of fundamental rights, it is difficult to consider that a state is complying with the rule of law[32]

Consequently, where host states notice the seriousness of the situation, they seek to address it by raising environmental and human rights standards. Unfortunately, companies are often willing to begin investment arbitration proceedings to challenge those government policies[33]. The threat of arbitration often leads host States to soften their human rights policies instead of going to costly dispute settlement system[34].

Here, international investment arbitration comes into play where the host state breached its BIT obligations to foster its populations' protection through human rights regulations. More and more, investors have recourse to arbitration "to challenge environmental, health, and other social regulations regarding waste disposal, tobacco control, and similar social services"[35]. Therefore, arbitrators are confronted with opposite interests. The recent awards highlight that investors' "commercial interests run counter to a pro-human rights agenda"[36].

However, international human rights law is not the field of predilection of investment arbitration. It is usually concerned with investments and economic' interests. Dispute arising from investment treaties affect a variety of spheres such as "international relations, implicates international legality of domestic government conduct, and puts millions of taxpayer dollars at risk"[37]. In other words, the rights of the investor such as fair and equitable treatment, also called

[31] Bingham of Cornhill, *supra* note 3 at 66 and followings; *Report on the Rule of Law*, by Venice Commission, CDL-AD (2011) 003 rev (2011); note 3.
[32] The Rt Hon Dominic Grieve QC, *The rule of law and the prosecutor* (Attorney General's Office, 2013): "Absent protection for human rights, courts and legal system may deprive fellow citizens of their freedom, property and ultimately their very existence. In such circumstances, the claim that the rule of law is observed is but a mockery of the truth".
[33] Adam H Bradlow, "Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims through Investor-State Dispute Settlement Mechanisms" (2018) 43:2 Yale J Intl L 355 355 at 356.
[34] *Ibid* at 357.
[35] *Ibid* at 356; *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, by Alfred-Maurice de Zayas, 70th Sess, UN Doc. A/70/285 (2015) at para 6 [de Zayas Report 2015].
[36] Bradlow, *supra* note 33 at 368.
[37] Susan D Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) 86:1 NCL Rev at 1.

"private" rights, confront public interests and the former are often more protected by ISDS[38]. This is why it can be said "these disputes create public problems while enhancing private rights"[39]. But those private actors can only be sued in international investment arbitration as there is no other international adjudication mechanism that have the power to judge them. Therefore, there are "challenging transitions which require a re-examination of the bedrock principles upon which the system was founded. Investment arbitration is now at this critical juncture"[40].

Awards involving human rights concerns are expanding and raise serious rule of law problems. Arbitrators are confronted with new issues and the legal certainty in the system is not always guaranteed. Along with human rights protection, this situation is serious as it undermines the core features of the rule of law. This is where the focus of this thesis lies on.

These recent challenges in investor-state dispute settlement raise a number of enquiries as to how arbitrators are protecting local population's human rights. In other words, it can be wondered whether those actors of investment arbitration have developed a coherent and consistent method to ensure legal certainty in their decisions. It is necessary to have a look at how those adjudicators have dealt with legal certainty in human rights cases, so as to afford them protection. All-in-all, does investment arbitration enhance or weaken the rule of law through legal certainty in awards involving human rights questions?

This thesis will use, as its basis for analysis, a number of decisions rendered in ISDS that involve socio-economic rights. This legal research, based on a thorough review of the available investment arbitration case law, aims at providing an explanation of how awards involving human rights have been dealt with until recently. International instruments, binding or not, impact arbitrators, and those documents will shed some light on understanding how the system is evolving. The discussion of the judgments rendered will enable us to show how ISDS stands before socio-

[38] Markus W Gehring & Dimitrij Euler, "Public interest in investment arbitration" in Dimitrij Euler, Markus W Gehring & Maxi Scherer, eds, *Transparency in international investment arbitration: a guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge: Cambridge University Press, 2015) at 8–9.
[39] *Ibid* at 9.
[40] Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2004) 73:3 Fordham L Rev 1521 at 1610–1611.

economic rights questions and whether the regime has adapted to these developing problems. This will enable us to discuss whether legal certainty prevails, to identify the lacunas, and possible improvements for ISDS.
Because international investment arbitration is a transnational mechanism for dispute resolution, a transnational approach of the substantive law will be used in order to tackle these issues.

As rule of law components, legal certainty and human rights are challenging the international arbitration regime. This thesis aims at bringing some answers to these questions by, first, discussing the interactions between the widespread concept of the rule of law and international investment arbitration (Part 1). Then, an analysis of the jurisprudence developed by arbitrators will emphasise on the respect and implementation of these concepts in the system (Part 2).

Part 1: The rule of law, legal certainty and its application in the field of international investment arbitration dealing with human rights

Most if not almost all countries on the planet pretend to abide by the rule of law[41]. Through ratified international conventions[42], declarations[43] or statements and in their organisation of state power, they claim to be democratic and respectful of the rule of law component. In the same lines, any legal system developed at either a transnational or an international level, be it international justice and courts of alternative dispute resolutions mechanism, aim at abiding by the rule of law.

[41] Brian Z Tamanaha, "International Level" in *On the Rule of Law: History, Politics, Theory*, 1st ed (Cambridge: Cambridge University Press, 2004) at 127; Bingham of Cornhill, *supra* note 3 at 6: "Thus there is a strong international consensus that the rule of law is a meaningful concept, and a rather important one at that".

[42] *Charter of the United Nations*, Can TS 1945 No 7 1945 Preamble; *Consolidated Version of the Treaty on the European Union* (entered into force 1 december 2009), 2008/C 115/01 2007 Article 2; *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (entered into force 3 September 1953), ETS 5 1950 Preamble.

[43] *UDHR*, *supra* note 2; *United Nations Millennium Declaration*, GA Res 55/2, UNGAOR, 55th Sess UN Doc A/RES/55/2 (2000) [UN Millennium Declaration 2000]; *Strengthening and Coordinating United Nations Rule of Law Activities – Addendum*, by Secretary General, UNGAOR, 68th Sess, UN Doc A/68/213/Add. 1 (2014) [Strengthening and Coordinating United Nations Rule of Law Activities 2014]; *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res 67/1, UNGAOR, 67th Sess, UN Doc A/RES/67/1 (2012) [Declaration of the UNGA on the Rule of Law 2012].

However, one can wonder what this concept, originating from continental Europe[44] and known as the German doctrine *Rechtsstaat*[45] or French *état de droit*[46], actually covers. The rule of law has evolved over time to achieve an elaborated definition today[47] but its first components can be traced back to Ancient Greek times[48]. It is made of several features that, if they are not abided by, can lead to arbitrariness and dictatorship[49]. This has serious consequences on human rights as people's liberties, freedoms, rights can be violated (sudden disappearance, random search, seizure or imprisonment, torture etc.)[50]

Those are the reasons why States, their different organs and especially their judiciaries through supreme courts or constitutional courts, seek to protect and implement the rule of law in their daily work. The development of alternative dispute resolution mechanisms has not been immune from these goals. International investment arbitration, as a legal mean to provide justice, is subject to the respect and implement the rule of law and what it entails[51].

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[44] Brian Z Tamanaha, "Classical Origins" in *On the Rule of Law: History, Politics, Theory*, 1st ed (Cambridge: Cambridge University Press, 2004) 7 at 7; For a discussion of Chinese and Japanese traditions towards the rule of law, see René David & John E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd ed (London: Stevens, 1985) at 542: The author explains that Japan puts emphasis on the rules of behaviour (giri-ninjo) whereas Chinese traditional doctrine considers law to be "bad policy"; Theo J Angeli & Jonathan H Harrison, *Working Paper: History and Importance of the Rule of Law* (World Justice Project, 2003) at 4–5: "there are fundamental questions and divided opinions about whether, or to what degree, these elements of the rule of law existed or were put into practice in non-Western cultures, much less how they developed over time".

[45] The expression "Rechtsstaat" is owed to C.T. Welcker in the following book. Karl Theodor Welcker, *Die letzten Gründe von Recht, Staat und Strafe* (Giessen: Heyer, 1813); Kant is often considered to be the first great contributor to the doctrine of Rechtsstaat without using this expression in his work. To Kant, the german "rule of law" meant the "rule by law", the power of the state being limited by the constitution of Germany: Immanuel Kant, *Groundwork of the metaphysics of morals*, 2nd ed, Mary J. Gregor & Jens Timmermann, eds. (Cambridge: Cambridge University Press, 2012): The "Rechtsstaat" as described by Kant, has known important evolutions; See especially Rainer Grote, "Rule of Law, Rechtsstaat and Etat de droit" in Christian Starck, ed, *Constitutionalism, Universalism and Democracy – Comparative Analysis* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) at 286; On this topic, see also Michel Rosenfeld, "The Rule of Law and the Legitimacy of Consti- tutional Democracy" (2001) 74 Southern California Law Review 1307 at 1318–1329.

[46] Danilo Zolo, "The Rule of Law: A Critical Reappraisal" in Pietro Costa & Danilo Zolo, eds, *The Rule of Law History, Theory and Criticism* (Dordrecht: Springer Netherlands, 2007) 3 at 3.

[47] Bingham of Cornhill, *supra* note 3; Thomas Henry Bingham of Cornhill, "The Rule of Law" (2007) 66 Cambridge Law Journal 67.

[48] Aristotle, *Politics*; Plato, *Complete works*, John M. Cooper & D. S. Hutchinson, eds. (Indianapolis, Ind: Hackett Pub, 1997); Tamanaha, *supra* note 44.

[49] Bingham of Cornhill, *supra* note 3 at 9, 83.

[50] *Ibid* at 9.

[51] Stephan W Schill, "International Investment Law and the Rule of Law" in Jeffrey L Jowell, J C Thomas & Jan Van Zyl Smit, eds, *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Singapore: Academy Publishing, 2015) 81; Kriebaum, *supra* note 19; Mohamed El Baradei, "International Arbitration: The Big Picture', in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution

As it will be briefly discussed in this chapter, perfect obedience to the rule of law seem to be an unrealistic goal. Indeed, if the headlines of the rule of law are widely acknowledged, there is still a long route before an internationally agreed definition of the concept[52] . It can be wondered what the international status of the rule of law is and what are its main components. Furthermore, its implementation is more than relative in many states and various breaches can be highlighted today. International investment arbitration has its own difficulties in abiding by the rule of law. This thesis aims at focusing on a few of them, namely the protection of human rights and the development of legal certainty in awards. But what do those concepts mean and what do they entail? What are the issues that investor-state dispute settlement (ISDS) faces regarding the rule of law, human rights, and legal certainty?

In order to answer those questions, this part will start by drawing a short history of the concept of the rule of law and explain its major components, in order to understand its importance domestically and internationally (Chapter 1). Secondly, it will focus on two of its components that will be the core of the discussion of this thesis, which are the notions of legal certainty and coherence, and human rights (Chapter 2). The third chapter aims at setting up the relationship between international investment arbitration, the rule of law, legal certainty and human rights and detail briefly the major problems that exist today (Chapter 3).

and Conformity," in *International Arbitration and the Rule of Law: Contribution and Conformity* ICCA Congress Series, kluwer law international b.v ed (2017) 3 at 4: "It is thus our responsibility to ensure that the major principles of the Rule of Law [...] are upheld nationally and internationally. This naturally includes arbitration ..."

[52] Peter Rijpkema, "The Rule of Law Beyond Thick and Thin" (2013) 32:6 Law and Philosophy 793; Edith Vanspranghe, "Duality of the Rule of Law in International Organizations' Practice" in Martin Belov, ed, *The Rule of law at the beginning of the twenty-first century* (The Hague: Eleven International Publishing, 2018).

Chapter 1: The rule of law

The rule of law is a concept that covers various important elements, and all of them could be the subject of a discussion. It is beyond the scope of this thesis to discuss all of them but they will be mentioned in order to understand the broader meaning of the rule of law. This paper will only focus on two of them, namely legal certainty and coherence in human rights fields.
A preliminary and concise definition is necessary here but will be further detailed in section 3 of this chapter. The rule law can be understood in the following way: "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts"[53]. In other words, the rule of law exhibits "the need to curb the overwhelming and unbridled strength of power"[54].

The rule of law as a concept is entrenched in many domestic and international legal instruments and it is the same for almost each of its features. A focus will be brought on the instruments relevant to this paper.
As to the history of the rule of law, one can wonder about the relevance of such discussion in this piece. It is our view that understanding where this fundamental theory comes from, helps demonstrate its importance and explain its relevance and influence in today's world.

Therefore, section 1 will trace the evolution of the concept through history and the words of philosophers (Section 1). Then, the various definitions of the doctrine and the debates surrounding its meaning will be discussed (Section 2) and finally some of the most important legal instruments entrenching the concept will be mentioned so as to understand the legal basis for protecting it (Section 3).

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[53] Bingham of Cornhill, *supra* note 3 at 8.
[54] Pietro Costa, "The Rule of Law: a Historical Introduction" in Pietro Costa, Danilo Zolo & Emilio Santoro, eds, *The rule of law: history, theory and criticism* Law and philosophy library (Dordrecht: Springer, 2007) 73 at 75.

Section 1: A brief history of the rule of law : from Aristotle to Dicey

The rule of law has become a cornerstone principle of democracies but it has evolved over time[55], thanks to civil revolutions, lawyers, judges, and respected philosophers, to turn into the concept as it is known today[56].

The first elements of the rule of law can be traced back to Antiquity; "Greek ideas with respect to the rule of law are therefore best understood as exemplary models, inspiration, and authority for later periods"[57]. It is at that time that the ideas of regulating the power of the rulers emerged[58]. Aristotle was of the opinion that "the rule of law is preferable to that of any individual"[59].

Plato agreed with the idea of restraining the power of the government[60]. He stated: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state" [61]. The need to constrain the government's power, which is one of the core features of the rule of law, was being acknowledged in Greek society[62]. Both, Aristotle and Plato, defended the idea that the law "should further the good of the community"[63].

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[55] *Ibid*: "the horizon of meaning of the rule of law is to be found within an extremely wide time span, encompassing both ancient and medieval times".
[56] Bingham of Cornhill, *supra* note 3 at 10 The author discusses "important historical milestones on the way to the rule of law as we know it today"; See especially Aristotle, *supra* note 48; Plato, *supra* note 48; Charles de Secondat Montesquieu, *The spirit of laws* (Holmes Beach, Fla.: Gaunt, 2011); Alexis de Tocqueville, *Democracy in America* (Paris: C. Gosselin, 1835); Jean-Jacques Rousseau, *Du Contrat Social* (Amsterdam: Marc-Michel Rey, 1762); Albert Venn Dicey, *Introduction to the study of the law of the constitution*, 10th ed (London: Macmillan, 1959); Paul Craig, "'Formal and Substantive conception of the rule of law: an analytical framework'" (1997) Public Law 470; Neuberger, *supra* note 1; Ma, *supra* note 4.
[57] Tamanaha, *supra* note 44 at 7.
[58] *Ibid*.
[59] Aristotle, *supra* note 48.
[60] Plato, *The Laws*, translated by Trevor Saunders (London: Penguin, 1970) at 174.
[61] Plato, *supra* note 48 at 1402.
[62] Tamanaha, *supra* note 44 at 10.
[63] *Ibid* at 9.

It is also at that time and again, through the words of Aristotle, that the concept of equality before the law emerged[64]. It is was an important principle of the Greek system, but it "did not mean that the same legal standards were applied to everyone"[65], notable exceptions being women, slaves. non-citizens).

The Roman also contributed in developing the premises of the rule of law, especially through Cicero who criticized the King's disobedience of the law, calling him "a despot"[66]. Cicero is often said to be "an early advocate of the rule of law"[67]. Nevertheless, as the Republic turn into an Empire, the idea of democracy and popular participation as developed by the Greeks, was not a prominent feature of the Roman history[68].

These statements are the premises of the concept of the rule of law and highlight that even thousands of centuries ago, there existed a need to protect it in order to reach and guarantee democracy. The Greeks sought to resist tyranny[69] by submitting the government to popular consent and limiting the rule by men[70]. This is still the major concern of the rule of law; these ideas from Ancient times still constitute the core elements of the rule of law that are known today[71]. The rule of law gained in substance[72] and was progressively enshrined in various documents during the Middle-Ages[73].

The rule of law tradition especially settled in the West[74]. It is in England that we can find one of the greatest Middle-Ages document codifying core rule of law's ideas. The Magna Carta, signed by King John of England in 1215[75], codified some aspects of the rule of law such as the submission of the authority to the law, the prime version of the separation of power and the

[64] Aristotle, *supra* note 48 pt 3.16.
[65] Tamanaha, *supra* note 44 at 7.
[66] Cicero, *The Republic and The Laws*, translated by Niall Rudd (Oxford: Oxford University Press, 1998).
[67] Tamanaha, *supra* note 44 at 11.
[68] Angeli & Harrison, *supra* note 44 at 8.
[69] *Ibid* at 7.
[70] Aristotle, *The Nicomachean ethics*, translated by W. D. Ross & Lesley Brown (Oxford: Oxford University Press, 2009) bk 5 para 6: "we do not allow a man to rule".
[71] Bingham of Cornhill, *supra* note 47.
[72] Brian Z Tamanaha, "Medieval Roots" in *On the Rule of Law: History, Politics, Theory*, 1st ed (Cambridge: Cambridge University Press, 2004) 15 at 15.
[73] *Ibid*: "The rule of law tradition congealed into existence in a slow, unplanned manner that commenced in the Middle Ages, with no single source or starting point".
[74] *Ibid* at 18.
[75] *Ibid* at 26.

representation of the people by, what was then, a Parliament. At that time, the Barons sought to limit the power of the King, recognising the necessity to constrain the power of the government. It led to the adoption of the Charter[76]. It also affirms the recognition of freemen's liberties[77]: "[w]e have also granted to all freemen of our kingdom, for us and our heirs for ever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs for ever."[78] Several human rights were also codified such as the prohibition against arrest, imprisonment or seizure without a trial[79]; the right to due process[80]; the principle of legality (*nulle crimen sine lege*)[81]; right to property and its protection[82]. The submission of the Crown to due process can be found in several chapters[83]. It can be affirmed that the Great Charter is a landmark in the recognition of human rights and the condemnation of arbitrary will.[84]

The evolution of the rule of law continued, especially thanks to important defenders of democracy such as Bracton[85] who wrote : "nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king"[86]. Before leaving Medieval times, authors have asserted that "the principle foundation on which medieval political theory was built was the principle of the supremacy of law"[87].

[76] *Ibid* at 25–26.
[77] *Ibid* at 26.
[78] *Magna Carta*, (1215) c 1.
[79] *Ibid* s 39.
[80] *Ibid* c 40.
[81] *Ibid* c 38.
[82] *Ibid* c 39.
[83] *Ibid* cs 28, 30, 38, 40, 52, 55.
[84] Wilfried Lewis Warren, *King John*, 2nd ed (London Eyre Methuen, 1978) at 240.
[85] Henry de Bracton, *On the Laws and Customs of England: quod Rex non debed esse sub homine, sed sub Deo et lege* (Harvard University Press, 2020).
[86] Henry de Bracton, *On the Laws and Customs of England* (Cambridge: Harvard University Press, 1968) at 305–06.
[87] RW Carlyle, *Medieval Political Theory in the West* (Edinburgh: William Blackwood & Sons, 1928) at 457; Joseph M Snee, "Leviathan at the Bar of Justice" in Arthur E Sutherland, ed, *Government Under Law* (Cambridge, Mass.: Harvard University Press, 1956) at 118; Tamanaha, *supra* note 72 at 27.

Until the seventeenth century, sovereign authority "was bolstered by the doctrine of the Divine Right of Kings"[88]. "[K]ings were 'above the law,' because they made the laws and were responsible for their actions only to God"[89].

Sir. Edward Coke[90] with the help of judges followed this path and increasingly made "judges served as the guardians of and spokesman for the law"[91], until the important revolution that shook the United Kingdom, leading to the adoption of the Bill of Rights in 1689[92]. Again, this document aimed at limiting the power of the government, recognising rights and liberties to the population for the purpose of establishing a democratic state. The Bill of Rights subjected the King to obey the law of Parliament and called itself "[a]n Act for declaring the rights and liberties of the subject and settling the succession of the crown"[93]. It enshrined several rule of law principles: the independence of the judiciary, the prohibition against cruel and inhumane treatment, due process and other civil liberties[94].

The Habeas Corpus Act adopted ten years earlier in 1679, also had an important impact on the development of human rights' protection by guaranteeing the right to challenge the legality of an arrest or detention for those deprived of their liberty[95]. The writ of Habeas Corpus is still used in several countries around the world, especially for the hearing of Guantanamo detainees[96]. These recent cases show the relevance of historical documents in the contemporary world.

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[88] Tamanaha, *supra* note 72 at 28.
[89] Richard Pipes, *Property and Freedom* (New York: Vintage, 2000) at 136.
[90] *Case of Proclamations*, [1610] 77 ER 1352 ; *Dr Bonham's case*, [1610] 77 ER 646 .
[91] Tamanaha, *supra* note 72 at 29.
[92] *Bill of Rights (Act)* (entered into force 16 December 1689), 1688 c.2 (1 Will and Mar Sess 2) 1689.
[93] *Ibid.*
[94] Bingham of Cornhill, *supra* note 3 at 23–25: "The lesson that even the supreme authority in the state is subject to the law was painfully learned [...] But the Britain which emerged from the Glorious Revolution was one where the rule of law, imperfectly and incompletely, held sway".
[95] *An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas* (entered into force 27 May 1679), 31 Cha. 2. 2 1679.
[96] *Rasul v Bush*, [2004] 542 US 466 ; *Boumediene v Bush*, [2008] 553 US 723 ; Bingham of Cornhill, *supra* note 3 at 22–23.

The influence of the UK in terms of rule of law features was immense in France[97], Canada, and the U.S.A[98]. Indeed, the British Bills of Rights inspired the adoption of the French Declaration of the Rights of Man and of the Citizen[99] as well as the US Bill of Rights[100], ratified in 1791, and the drafters of the U.S. Constitution. Those documents contain important provisions regarding "human and natural rights"[101]. The ideas developed in England were spread beside the island and reinforced by several philosophers such as Montesquieu[102], Tocqueville[103], Rousseau[104] and others. The rule of law continued to develop and improve so as to enhance democracy.

The discussion of the historical origins of the rule of law and some of its non-exhaustive landmarks does not leave much room for academic debate. There seems to be an agreement on where core features of the concept come from and how they have evolved. Nevertheless, the path from antique principles to the enactment of such documents (charters, bill of rights, legislation) highlights the importance of human rights in societies for centuries[105].

This brief historical flashback helps to understand the shaping of today's societies which aim at the promotion, recognition, and protection of human rights and the rule of law. In addition, those thoughts and writings, notably the French Declaration[106], the US Constitution and Bill of Rights, are still of major relevance today[107]. Not only codified, these ideas have been claimed, affirmed

[97] Costa, *supra* note 54 at 81 and following: "the English experience was deemed by many Enlightenment French intellectuals to embody the freedom and tolerance still fiercely opposed in their own country".
[98] *Ibid* at 83–85: "the American model could be seen as a 'third option' that, whilst largely drawing from the English common law, was nonetheless centred around issues and concerns which would later be endemic in the French world"; Zolo, *supra* note 46 at 3.
[99] *Déclaration des droits de l'homme et du citoyen*, 1789.
[100] *United States of America: Constitution* (ratified 15 december 1791), USA-010 1787.
[101] Costa, *supra* note 54 at 83–84.
[102] Montesquieu, *supra* note 56.
[103] Tocqueville, *supra* note 56.
[104] Rousseau, *supra* note 56.
[105] For a discussion on the development of individual rights' protection during the French Revolution, see Costa, *supra* note 54 at 78–80.
[106] Bingham of Cornhill, *supra* note 3 at 27–28.
[107] *Ibid* at 30: "The American Bill of Rights was the subject of a protracted struggle, but the rights guaranteed in 1791 are rights which American citizens continue to enjoy".

and reaffirmed by the Courts[108], important political figures such as Eisenhower[109], Thatcher[110], Obama[111] and many others but also by highly valued academics[112].

Albert V. Dicey is among the first who proposed a definition of the rule of law[113]. In the XIXth century, he proposed a tripartite definition of the concept. He firstly recognised the principle of legality, which means that no man should be punished without a law adopted properly and by the competent authority[114] so as to enhance stability of the law[115]. The principle of *nulla poena sine lege* is strongly linked to the idea that the law should not be retroactive, as it would enable to condemn someone on the basis of a law that did not exist at the time of the offence. Secondly, he recognised the principles of equality before the law and that no man is above the law, as part of the rule of law[116]. Thirdly, he stated that fundamental rights were to be protected by the judiciary rather than by legislation, the latter being more efficient[117].

Dicey offered the first steps towards a definition of the rule of law but was criticized for being too narrow[118] and lacking elements regarding the content of the law[119] such as the separation

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[108] *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*, [2001] UKHL 23 at para 73; *Roncarelli v Duplessis*, [1959] SCC 121 at para 142; *Reference Re Secession of Quebec*, [1998] 2 SCR 217 ; *Christie v British Columbia (Attorney-General)*, [2007] SCC 21 at paras 18–24; *Papachristou v City of Jacksonville*, [1972] 405 US 156 ; *Planned parenthood of Southeastern Pennsylvania v Casey*, [1992] 502 US 833 ; Lady Brenda Hale, *The United Kingdom Constitution on the move* (The Canadian Institute for Advanced Legal Studies', 2017); Lord David Neuberger, *Access to justice* (London, 2017) at para 13: "The two fundamental functions of any government are the defence of the realm and the maintenance of the rule of law".

[109] William Safire, *Safire's political dictionary* (Oxford: Oxford University Press, 2008) at 604.

[110] Margaret Thatcher, *Freedom, Economic Liberty and the Rule of Law* (Britannia International Hotel London, 1996).

[111] Barack Obama, *Remarks by President Obama and President Pena Nieto of Mexico in Joint Press Conference* (2016).

[112] Dicey, *supra* note 56; Bingham of Cornhill, *supra* note 3; Neuberger, *supra* note 1; Lon L Fuller, *The Morality Of Law* (New Haven, Connecticut: Yale University Press, 1964); Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195; Craig, *supra* note 56; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory*, 1st ed (Cambridge: Cambridge University Press, 2004).

[113] Dicey, *supra* note 56 at 188.

[114] *Ibid.*

[115] Hilaire Barnett, *Constitutional & administrative law*, 11th ed (London: Routledge, 2016) at 50.

[116] Dicey, *supra* note 56 at 193.

[117] *Ibid* at 195: "We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts"; Bingham of Cornhill, *supra* note 3 at 3–4.

[118] Sir Ivor Jennings, *The Law and the Constitution*, 5th ed (London: Hodder & Stoughton, 1959) at 312.

[119] Craig, *supra* note 56 at 472.

of power[120], accessibility of the law such as intelligibility, coherence, predictability; or the protection of fundamental rights and what they encompass[121] . The first two elements of his definition still form part of the modern conception of the rule of law. But the last one seems to be outdated as most of the individual rights that exist today are protected by a variety of legislations, constitutions and international instruments. Nonetheless, his definition has been developed and extended by practitioners and academics, as it will be discussed later[122].

Thus, the objective of improving democracy has been existing for centuries and still exists in the modern world. Of course, there has been considerable evolution since then, but the respect of the rule of law is far from being perfect. It does not only belong to domestic parliaments and judges to protect the principle but such power has also been granted to arbitrators, lawyers, NGOs, international organisations, politics, and others. The rule of law has conquered every form of justice mechanism[123]. It is now the time to have a look at what constitutes the rule of law today.

Section 2: The recent definition of the rule of law and the absence of a universal understanding

The pursuit of the perfect rule of law definition has caused a lot of ink to flow[124]; papers, opinions, judgments, and debates are not lacking on the topic[125]. In a general way, it can be said

[120] Jennings, *supra* note 118 at 311.
[121] Craig, *supra* note 56 at 474.
[122] Bingham of Cornhill, *supra* note 3 at 5: "Dicey's ideas continued to influence the thinking of judges for a long time, and perhaps still do"; See Thesis *Thesis* Part 1, Chapter 1, Section 2.
[123] *The rule of law and transitional justice in conflict and post-conflict societies*, by Secretary General, UNSCOR UN Doc S/2004/616 (2004) at para 6 [The rule of law and transitional justice 2004]: "The rule of law is a concept at the very heart of the Organizations mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".
[124] Craig, *supra* note 56 at 467: "There is a voluminous literature on the rule of law which examines the concept from almost every conceivable perspective".
[125] Bingham of Cornhill, *supra* note 3 at 5: "As the debate broadened, differing concepts of the rule of law were put forward until a time came when respected commentators were doubtful whether the expression was meaningful at all"; Tamanaha, *supra* note 112 at 3: the rule of law is giving rise to "rampant divergence of understandings".

that the concept aims at avoiding the rule by power and the rule by law.[126] Nevertheless, many have attempted to define the rule of law and its core elements, but every attempt had flaws in one way or another[127]. Indeed, the rule of law is a broad notion encompassing vast concepts sometimes difficult to define themselves. Furthermore, there are important fluctuations surrounding what it means on a horizontal scale, i.e. from one country to another, and on a vertical scale, i.e. from a domestic meaning to an international one.

In order to be concise, a focus will be drawn upon the major authors from the common law world who have contributed to defining the rule of law. Continental Europe knows the concept of *Rechtsstaat* and *état de droit,* but they somewhat differ in their meaning and understanding[128] with the Anglo-Saxon "rule of law".

The *Rechtsstaat,* as developed by I. Kant means the "rule by law" rather than the rule of law[129]. In other words, the government must abide by the Constitution. It sounded more like a formal concept, "detached from any reference to ethical values and political content"[130].

The French *état de droit* was presented by Carré de Malberg[131], who was inspired by the notion of *Rechtsstaat* rather than the English rule of law[132]. For Carré de Malberg, the *état de droit* aimed at protecting individual rights against government arbitrariness. A fundamental difference which the English rule of law is the absence of parliamentary supremacy in the French *état de droit*[133]. The rule of law, as understood in the common law will be discussed in the following paragraphs.

A focus is put on the common law perception of the concept as it is the one taken by the United Nations and other international instruments. Then, it will be necessary to mention the most recent understanding of this theory that was given by Lord Bingham in 2007.[134] It will be shown that not only has he proposed the most comprehensive definition of the rule of law, but it has influenced several decisions and organisations, which also have made some improvements to his statement.

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[126] McCorquodale, *supra* note 2 at 29.
[127] Jeremy Waldron, *The Rule of Law*, summer 2020 ed (Stanford University, 2016): "Theorists of the Rule of Law are fond of producing laundry lists of the principles it comprises. These principles are of disparate kinds".
[128] Costa, *supra* note 54.
[129] Kant, *supra* note 45.
[130] Zolo, *supra* note 46 at 13.
[131] Raymond Carré de Malberg, *Contribution a la théorie général de l'État* (Paris: Sirey, 1920).
[132] Zolo, *supra* note 46 at 13.
[133] *Ibid* at 15.
[134] Bingham of Cornhill, *supra* note 47.

Authors, such as the famous British constitutionalist P. Craig, have decided to discuss the rule of law by operating a division between a formal and a substantive definition of the notion[135]. Those conceptions are also known as the "thin" or "thick" definitions of the rule of law.

A formal conception of the rule of law does not consider the content of the law. In other words, it is about discussing the process of enactment and promulgation of law without analyzing whether its content is adequate to the rule of law[136]. This is a thin definition which only emphasises formal and procedural aspects. This formal conception would be supported by the theories of L. Fuller[137] and J. Raz[138]. Both philosophers give an important credit to the clarity, accessibility of the law, and whether it was enacted in a lawful manner with few regards to the substance of the law.

On the other hand, the substantive conception of the rule of law focuses on the content of the law and the main rights that should be protected. Not only are the formal and procedural aspects covered by this definition, but the substance of the law which is the guarantee of "moral" rights is also covered[139]. This thick definition is more comprehensive than the former one, as it covers more aspects of the rule of law. This definition aims towards protecting human rights and democracy, where the thin view would not suffice to protect those concepts.[140]

Trevor RS Allan is of the opinion that the rule of law should serve the protection of human rights against governments' action[141]. He was inspired by Dworkin's philosophy[142] which expressed the idea that courts should adjudicate in light of the theory of justice[143]. In other words, there is an intrinsic link between political morality and the rule of law. According to Dworkin, citizens have "moral rights and duties" as well as political rights, that should be exercised through judicial institutions[144], i.e. the State.

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[135] Craig, *supra* note 56.
[136] *Ibid* at 467.
[137] Fuller, *supra* note 112.
[138] Raz, *supra* note 112.
[139] Craig, *supra* note 56 at 481; Ronald Dworkin, *Law's empire* (Cambridge: Harvard University Press, 1986).
[140] John Tasioulas, "Symposium: The Rule of Law: Thick, But Not Too Thick?", (17 May 2016), online: *Opinio Juris* <http://opiniojuris.org/2016/05/17/symposium-the-rule-of-law-thick-but-not-too-thick/>.
[141] Trevor RS Allan, *Law, Liberty and Justice, the Legal Foundations of British Constitutionalism* (Oxford: Clarendon, 1993).
[142] Dworkin, *supra* note 139.
[143] *Ibid*; Craig, *supra* note 56 at 477.
[144] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 11–12.

However, as it will be highlighted when discussing human rights cases in international investment arbitration, there is growing evidence which shows that human rights are more and more violated by multinational corporations with States adopting regulations to protect them. This shows that this rule of law idea of protecting human rights from State's actions need to evolve in light of the other type of human rights violations that exist today.

More recently, a well-known judge decided to step aside from this division between substantive (thick) and formal (thin) definitions of the rule of law. Indeed, a contemporary definition of the rule of law was given by Lord Bingham in 2007[145]. The UK Supreme Court Judge shared his highly valued thoughts, stating that the rule of law means "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts".[146]

According to Lord Bingham, any democratic society should abide by eight principles, the first one being the existence of clear, predictable, intelligible and accessible law. The principle of predictability will, amongst others, be at the core of this work and developed in the second part of this chapter. Secondly, he acknowledged that there should be no exercise of discretion from the authorities of the state and that public powers should be exercised reasonably. Also, equality before the law must be ensured, due process should be respected, a separation of powers should be entrenched and officials should exercise their powers carefully and within their limits. Mechanisms for resolving disputes should exist and be accessible for the people. Finally, the State should comply with its international obligations. This means that "international rule of law may be understood as the application of rule of law principles to relations between states and other subjects of international law"[147]. In the thoughts of Lord Bingham, a society abiding by the rule of law should protect fundamental human rights. This last concept will also be the focus of this paper.

[145] Bingham of Cornhill, *supra* note 47.
[146] *Ibid* at 69.
[147] Thomas Henry Bingham of Cornhill, *Rule of Law in the International Order* (2008).

Along with Lord Bingham, many judges have acknowledged the importance of the rule of law throughout the world: "the rule of law is a foundational principle"[148]; it is "a fundamental postulate of our constitutional structure"[149]; it "lies at the root of our system of government"[150].

The Canadian judge B. McLachlin, stated that "[t]he rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect."[151] On the same lines, Lord Hoffman of the British Supreme Court judge acknowledged that "[t]here is however another relevant principle which must exist in a democratic society. That is the rule of law."[152] Of course, those quotes are not exhaustive as many other highly respected institutions and judges have taken the same position. In the third part of this chapter, the position of arbitrators towards the rule of law will be discussed.

The United Nations has been very proactive in recognizing the rule of law and participating in its promotion. In 2004, the Secretary General of the United Nations proposed a comprehensive understanding of the rule of law, that can be read as follow:

> A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[153]

It is worth mentioning that the United Nations is doing considerable work towards the protection and enforcement of the rule of law, showing the important necessity of protecting the concept.[154]

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[148] *Christie v. British Columbia (Attorney-General)*, *supra* note 108 at para 19.
[149] *Roncarelli v. Duplessis*, *supra* note 108 at para 142.
[150] *Reference re Secession of Quebec*, [1998] SCC 217 at para 70.
[151] *UNA v Alberta (Attorney General)*, [1992] 1 SCR 901 at 931.
[152] *R (Alconbury Developments Ltd. and Others) v Secretary of State for the Environment, Transport and the Regions*, *supra* note 108.
[153] The rule of law and transitional justice 2004, Secretary General, *supra* note 123 at para 6; Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43.
[154] Eric Doss, "United Nations and the Rule of Law", online: *United Nations* <https://www.un.org/ruleoflaw/>.

Finally, rigor requires the mention of the World Justice Project's work on the rule of law. This organisation that aims at advancing the rule of law worldwide[155], suggests that nine criteria should be fulfilled for a State to affirm that it abides by the rule of law. The government should be opened, it must be free from corruption, a system of civil and criminal justice must exist, alternative dispute mechanisms should be put into place (informal justice), order and security should be ensured, regulatory enforcement and the protection of fundamental rights should be guaranteed and, there must be constraint on government powers.[156]

Many elements of the rule of law are recurring among the various definitions that have been mentioned. But even though a lot has been written, "its exact meaning is widely contested"[157]. As demonstrated, the legal theories that underlie the concept find no agreement[158]. In addition, the protection of human rights raises questions, in particular concerning economic, social and cultural rights[159]. Furthermore, the rule of law can be understood as a principle of governance or the minimum standard to achieve for a good law[160].

It can still be affirmed that no agreed definition of this concept exists amongst the various governments, which render its implementation and protection complicated. As Vanspranghe puts it, "the content of the rule of law, just like its status, remains rather indeterminate in international law, including in its domestic dimension."[161] It is therefore difficult for judges and arbitrators to enforce a theoretical, sometimes nebulous, concept where clarity and certainty are required.

The above discussions on the origins, evolution and definitions of the rule of law have shown that it is a constantly evolving concept that adapts to the transformation of societies. This developing theory it hardly compatible with an enshrined irremovable definition. However, an internationally agreed definition would help to practically implement the rule of law.

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[155] "About Us", online: *World Justice Project* <https://worldjusticeproject.org/about-us>.
[156] note 3.
[157] Rijpkema, *supra* note 52 at 793; Waldron, *supra* note 127: "As well as these debates about the value of the Rule of Law there is, within the camp of those who stand for legality, incessant controversy about what the Rule of Law requires".
[158] Craig, *supra* note 56 at 487: "It has been argued that clarity in this respect cannot be attained unless public lawyers are aware of the issues of legal theory which underlie the concept".
[159] See Thesis note 122 Part 1, Chapter 2, Section 2.
[160] Rijpkema, *supra* note 52 at 795.
[161] Vanspranghe, *supra* note 52 at 142.

Having discussed the origins of the rule of law and how it seems to be understood today, it is now time to consider where the concept can be found in legal instruments. Of course, every legislature and judiciary have dedicated words to this notion. But the following section will focus on international instruments as they are more relevant for arbitrators in international investment disputes than any domestic piece of legislation in relation to rule of law features.

Section 3: The rule of law in international instruments

After the atrocity of the first world war, the concept of the rule of law was entrenched at an international level in several universal instruments. The "international rule of law may be understood as the application of rule of law principles to relations between states and other subjects of international law"[162]. After the war, there was a strong political will to protect peace and democracy throughout the world and avoid any further violation of human rights. As McCorquodale puts it, "it is evident that the international rule of law has been identified as a goal for the international system"[163].

There are a variety of international documents concerning the protection of the rule of law, some of them binding, which means that any violation can be sanctioned while others are purely declaratory.

The first document that recognises the concept is the Universal Declaration of Human Rights[164], adopted in the aftermath of the Second World War by the United Nations General Assembly. In its preamble, it is stated that "[w]hereas it is essential […] that human rights should be protected by the rule of law"[165].

Along with the UDHR, the United Nations has adopted a variety of resolutions reaffirming the necessity to pursue the objective of protecting the rule of law and guarantee human rights to

[162] Bingham of Cornhill, *supra* note 147.
[163] McCorquodale, *supra* note 2 at 32.
[164] *UDHR*, *supra* note 2.
[165] *Ibid* Preamble.

everyone. The Security Council has made famous recommendations in this sense as well as the General Assembly[166].
During the World Summit of 2005, it was acknowledged that "good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger"[167].

Other famous organisations such as the World Bank have recognised the importance of the concept. Indeed, the World Bank recognized that obedience to the rule of law would enable people to "have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence"[168]. It can be said that the economic sphere was not exempted from rule of law consequences.

Along with these documents, there exist primary sources of international law that are legally binding instruments which impose a duty on State to respect the rule of law. The International Covenant on Civil and Political Rights[169], the Covenant on Economic Social and Cultural Rights[170], the UN Charter[171] etc. Those are legally binding treaties that impose obligations upon States parties for the purpose of guaranteeing fundamental rights and, consequently, strengthening the rule of law.
The rule of law is also entrenched in treaties developed at a regional level, as in article 2 of the Treaty on the European Union which states that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights"[172]. The preamble of the European Convention on Human Rights is another example of this assertion.[173]

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[166] UN Millennium Declaration 2000 note 43; The rule of law and transitional justice 2004 Secretary General, *supra* note 123; Declaration of the UNGA on the Rule of Law 2012 note 43.
[167] *2005 World Summit Outcome*, GA Res 60/1, UNGAOR, 68th Sess, UN Doc A/RES/60/1 (2005) at para 11 [World Summit Outcome 2005].
[168] *A Decade of Measuring the Quality of Governance*, by The World Bank (2006) at 3 [World Bank Report 2006].
[169] *International Covenant on Civil and Political Rights* (entered into force 23 March 1976), United Nations, Treaty Series, vol. 999, p. 171 1966.
[170] *International Covenant on Economic, Social and Cultural Rights* (entered into force 3 January 1976), United Nations, Treaty Series, vol. 993, p. 3 1966.
[171] *UN Charter*, *supra* note 42.
[172] *TEU*, *supra* note 42 s 2.
[173] *ECHR*, *supra* note 42.

The diverse institutions of investment arbitration affirm their respect for the rule of law and their ongoing role of protecting and strengthening it. For instance, the China International Economic and Trade Arbitration Commission (CIETAC) acknowledges that the rule of law for companies is crucial and that "CIETAC has been always actively participating in the construction of the platform for rule of law and the communication with enterprises, actively participating in the rule-making of international trade law."[174] This position on the importance of the rule of law is also shared by the Hong Kong International Arbitration Centre (HKIAC).[175] The International Chamber of Commerce (ICC) has affirmed the necessity and its commitment to protect the rule of law, especially concerning activities through the Internet[176]. The Executive Board of the ICC recalls that it supports the rule of law and advocates for solutions that ensure its respect[177].

It can be seen that there is a variety of documents enshrining the rule of law an international level and that it is an ongoing goal to achieve for the international community. Almost all international governments decided to promote, strengthen and implement the rule of law. Arbitration has a role to play in helping the promotion and strengthening of the rule of law. This thesis emphases on its impact on legal certainty and human rights. Before discussing the problem that arises in investment arbitration towards the rule of law, it is necessary to understand what legal certainty and human rights actually mean.

[174] "Wang Chengjie Attended the Seventh Forum on the Rule of Law for Chinese Enterprises and Delivered a Speech", (2019), online: *cietac.org* <http://www.cietac.org/index.php?m=Article&a=show&id=16411&l=en>.
[175] "The Rule of Law in the context of International Arbitration - A Judge's Perspective", online: *Hong Kong International Arbitration Centre* <https://www.hkiac.org/node/1080>.
[176] Jean-Guy Carrier, "ICC Secretary General at the 7th Internet Governance Forum", (2012), online: *International Chamber of Commerce* <https://iccwbo.org/media-wall/news-speeches/icc-secretary-general-jean-guy-carrier-at-the-7th-internet-governance-forum/>.
[177] Dominic Kelly, "The International Chamber of Commerce" (2005) 10:2 New Political Economy 259 at 265–266.

Chapter 2: A focus on two rule of law features: legal certainty and the protection of human rights

Legal certainty and human rights are important features of the rule of law[178]. It is often said that the requirement of coherence in the law and judicial decisions is important so as to ensure legal certainty and predictability of the law[179]. Furthermore, it is widely recognised that the protection of human rights is among the principal goals of the international community and states[180]. Human rights are fundamental rights guaranteed to individuals in order to protect them from arbitrariness, detrimental behaviours and ensure them a certain standard of living[181].
Therefore, this section will focus on understanding the meaning of legal certainty and coherence (Section 1), what amounts to human rights (Section 2) in light of their nexus with the rule of law. Then, the issues they raise in investment arbitration will be discussed in the third part of this chapter.

Section 1: The element of legal certainty and coherence : definition and utility

"The concepts of legal certainty and the rule of law are closely connected"[182]; as it has been explained, legal certainty is one of the core principles of the rule of law.[183]

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[178] Reza Banakar, "Reflexive legitimacy in international arbitration" in Volkmar Gessner & Ali Cem Budak, eds, *Emerging legal certainty: empirical studies on the globalization of law* Oñati international series in law and society (Aldershot: Ashgate, 1998) 347 at 353 and following.
[179] Hans Gribnau, "Legal certainty: a matter of principle" (2010) 12/2014 EATLP Leuven 69 at 69, 90–91.
[180] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43.
[181] *UDHR*, *supra* note 2 Preamble.
[182] Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*, 1st ed (London: Routledge, 2016) at 54.
[183] Julia Motte-Baumvol, "Le comportement de l'investisseur" in Walid Ben Hamida & Frédérique Coulée, eds, *Convergences et contradictions du droit des investissements et des droits de l'homme: une approche contentieuse = Convergences and contradictions between investment law and human rights law: a litigation approach*, Publications de l'Institut international des droits de l'homme 35 (Paris: Pedone, 2017) at 203.

In Fuller's theory, "the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject"[184]. In other words, if the lawmaker is always changing the state of the law (or a judge is always changing the case law), it is impossible for individual to reach the behavioral expectations set up in the law. Legal certainty is said to be among the "fundamental principles"[185] or "highest values" of a legal system[186].

More recently, in her book, Elena Paunio defines legal certainty in the following way: "[f]ormal legal certainty implies that laws and adjudication in particular must be predictable: laws must satisfy imperatives of clarity, stability, intelligibility, and predictability so that those concerned can calculate with relative accuracy the legal consequences of their actions as well as the outcome of legal proceedings."[187]

Legal certainty is relying on several other principles; stability, predictability and legal clarity (i.e. those notions represent "legal clarification")[188]. Indeed, coherence and publicity in the law ensure its stability and therefore, render it predictable. Predictable law means anyone in the society (be it a person, an institution, a company) is able to know how to act or behave. The legal consequences of a particular behaviour are predictable.

Judges have acknowledged the importance of preserving legal certainty in a democratic society and have recognised its benefit in promoting the rule of law. Indeed, in the case *Canada (Minister of Citizenship and Immigration) v. Vavilov*[189], the Supreme Court stated that "the rule of law requires courts to provide a greater degree of legal certainty than reasonableness

[184] Lon L Fuller, "Human Interaction and the Law" in *The Principles of Social Order*, k.l. winston ed (Oxford: Hart Publishing, 2001) at 254.
[185] Franz Bydlinski, *Fundamentale Rechtsgrundsätze: zur rechtsethischen Verfassung der Sozietät* (Vienna: Springer-Verlag, 1988) at 173 refered by the author as "Fundamentalprinzip" .
[186] Stefan Wrbka, "Comments on Legal Certainty from the Perspective of European, Austrian and Japanese Private Law" in Mark Fenwick & Stefan Wrbka, eds, *Legal Certainty in a Contemporary Context* (Singapore: Springer Singapore, 2016) 9 at 10.
[187] Paunio, *supra* note 182 at 51; Thomas Schultz & Cédric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study" (2014) 25 EJIL 1147 at 1164.
[188] Wrbka, *supra* note 186 at 13.
[189] *Canada (Minister of Citizenship and Immigration) v Vavilov 2019*, [2019] SCC 65 .

review allows."[190] Lord Diplock ascertained that "[e]lementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available"[191].

Legal certainty is also important for commercial transactions; it has long been recognised as an important principle of the business world. Indeed, Lord Mansfield in 1774 said that "[i]n all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators then know what ground to go upon"[192]. In other words, Lord Bingham justifies this reasoning by explaining that no one would do business in a country with unclear and vague legal rights and obligations[193]. Therefore, it is crucial to promote coherence in law order to create legal certainty in law.

Coherence in law does not really have a definition; it "is held to be something more than mere logical consistency of propositions"[194] and it includes "elements such as consistency, comprehensiveness and completeness"[195]. Coherence of judgments and legal reasoning must be ensured where the rule of law exists because "contradictions between fundamental rules go at the expense of the coherence – and justice – of the system as a whole."[196]

The consequences of an absence of coherence in the decisions rendered by tribunals greatly impacts legal certainty. As Hobér rightly puts it, "[l]ack of coherence and consistency sooner or later results in unpredictability and uncertainty."[197] Taking the case of international arbitration, if the behaviour of arbitrators varies greatly in similar cases, even though most investment tribunals are *ad-hoc*, this has considerable impacts on companies, investors, governments and the state of the law.

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[190] *Ibid* at para 62.
[191] *Fothergill v Monarch Airlines Ltd*, [1981] AC 251 at 279 G.
[192] *Vallejo v Wheeler*, [1774] 1 Cowp 143 at 153.
[193] Bingham of Cornhill, *supra* note 3 at 38.
[194] Paunio, *supra* note 182 at 82.
[195] *Ibid.*
[196] Gribnau, *supra* note 179 at 88.
[197] Kaj Hobér, "Investment Treaty Arbitration and Its Future -- If Any", (2015) 7 YB Arb & Mediation 58 at 64.

Indeed, the absence of legal certainty and coherence can have serious consequences especially regarding the realization of an investment as both parties, be it the state or the companies, will not be able to know which position to adopt in order not to be sanctioned[198]. This is particularly problematic when it comes to an area of law, such as human rights, that is itself facing unclearness and debate about rights' definitions and protection[199].

As it will be explained, the protection of human rights varies from one arbitral tribunal to another. Consequently, it is difficult to have clarity on what are the duties and responsibilities for businesses regarding their investment in respect of human rights, what are the situations where human rights of the local population should prevail over the investment, and what is the actual state of international investment law concerning this question. If companies do not know how to behave, it does not help to take the required measures to avoid human rights breaches. In terms of improvement, this also means that it will keep on being complicated to address the question of the corporate social responsibility of businesses.[200]

Additionally, the absence of coherence in case law and in the law, leading to no legal certainty, leaves room for arbitrariness which is the very phenomenon that rule of law wants to avoid. The Supreme Court of Canada warned against the drawback of an absence of legal certainty. In *R v. Ferguson*[201], the court said that: " [t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice".[202] The court reaffirmed the importance of legal certainty, Paunio says "[t]he imperatives associated with the rule of law […] seem to require that indeterminacy such as

[198] Katharina Diel-Gligor, *Towards consistency in international investment jurisprudence: a preliminary ruling system for ICSID arbitration*, Nijhoff international investment law series volume 7 (Leiden: Brill Nijhoff, 2017) at 3: "Private investors, being incapable of calculating the risk of their businesses abroad, could become more reluctant in their investment decisions; sovereign States, for their part, would run the danger of being sued for regulatory or legislative actions, since they are unable to assess their legal consequences on the level of investment adjudication".
[199] Thomas Henry Bingham of Cornhill, *The rule of law* (London: Penguin, 2011) at 68: "this is a difficult area since there is no universal consensus on the rights and freedoms which are fundamental, even among civilized nations".
[200] Mary Robinson, "Business and Human Rights" in Robert McCorquodale, ed, *The rule of law in international and comparative context* (London: British Institute of International and Comparative Law, 2010) at 25.
[201] *R v Ferguson*, [2008] SCC 6 .
[202] *Ibid* at para 72.

vagueness and ambiguity are avoided, otherwise no control of government – or for that matter, judicial decision-making – can be guaranteed."[203]

If coherence and legal certainty are achieved, then the law is said to be predictable. This means that there must be clarity, consistency, and transparency in reasoning and the arguments developed, as well as a "use of pre-established interpretive criteria accepted by the legal community in question. To that extent, predictable reasoning also contributes to stabilizing procedural expectations in the context of judicial adjudication."[204] Predictability of the law ensures stability; this means that anyone in society will be able to know (to certain extent) what would be the legal outcome of a particular behaviour.[205] It can be seen that all the concepts are depending on each other because if predictability increases, legal certainty is strengthened. The system is self-sustainable.

The necessity to abide by legal certainty must be mitigated. It should not be strictly applied in all circumstances as it would mean that the law cannot be changed and that case law cannot be overturned. Indeed, "the law never offers absolute legal certainty. Equally, legal certainty is not an absolute value or ideal."[206] An immutable law is not desirable. Instead, changes must be made in the required forms and sparingly so as to ensure a stable legal environment[207].

Legal certainty is of utmost importance in any democratic society where the rule of law prevails. It needs to be guaranteed by every legal institution. In addition, the rule of law requires that human rights be guaranteed.

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[203] Paunio, *supra* note 182 at 56.
[204] *Ibid* at 98.
[205] Takis Tridimas, *The General Principles of EU Law*, 2nd ed (Oxford: Oxford University Press, 2006) at 242.
[206] Gribnau, *supra* note 179 at 92.
[207] Wrbka, *supra* note 186 at 14: "Striking an appropriate balance between legal clarity, stability, predictability on the one hand and the possibility to take account of special circumstances on the other is one of the key challenges for those who create legal rules".

Section 2: The protection of human rights and the rule of law : definitions and connections

It is affirmed that "the rule of law requires that the law afford adequate protection of fundamental human rights."[208] It is because the rule of law exists that fundamental rights are not empty shells. Peerenboom explains that the "[r]ule of law is seen as directly integral to the implementation of rights. Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world"[209]. All those affirmations emphasise the symbiotic relationship between human rights and the rule of law[210]. This intrinsic relationship is acknowledged by the international community in its adoption of the UDHR[211].

The thick definition[212], as well as international instruments, encompass the protection of human rights in the definition of the rule of law.[213] It means that every democratic state must guarantee certain fundamental rights, such as freedom opinion, the prohibition of torture and forced labour, rights to life, due process, etc. for its citizens in order to protect them from arbitrariness, abuses, tyranny, and oppression.[214].

The United Nation also asserts that where neither human rights nor the rule of law are respected, it is a threat to peace and security[215].

Governments, academics, legal practitioners, international organisations and others have recognised the importance of human rights guarantees.[216]

At an international level, human rights are defined as "the rights of individuals and groups that are recognized as such in international treaties and declarations as well by

[208] Bingham of Cornhill, *supra* note 3 at 84.
[209] Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship" (2005) 36:3 Geo J Intl L 809 at 812.
[210] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at para 17.
[211] *Ibid* at para 18; *UDHR*, *supra* note 2 Preamble: "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".
[212] See Thesis note 122 Part 1, Chapter 1, Section 2.
[213] Bingham of Cornhill, *supra* note 3 at 66–67.
[214] *Ibid* at 83.
[215] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at 8.
[216] *Ibid* at 4,16,17.

customary customary international law"[217]. At a national level, they are proclaimed in constitutions and "inherent to the human personality"[218].

Human rights encompass both civil and political rights as well as economic, social and cultural. Both incur different types of obligations and actions from governments[219].

Civil and political rights are the most common type of rights[220]; they imply the right to life[221], fair trial[222], freedom of expression[223] or prohibition of torture and other cruel and inhuman treatments[224]. They are relatively clear which facilitate their enforcement and international acceptance[225].

Economic, social and cultural promote "higher standards of living, employment, health, education, cultural cooperation and non-discrimination".[226]

Since the Second World War, the protection of human rights has been affirmed by most of the governments[227]. For instance, most democratic states have enshrined their fundamental rights in their constitutions, bills of rights, and mechanisms to protect individuals against State violations exist.

The Vienna Declaration of 1995 asserts that "[a]all human rights are universal, indivisible and interdependent and interrelated … it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and political freedoms"[228]. This declaration has been adopted by 170 States which shows the international consensus on the necessary protection of human rights.

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[217] Thomas Buergenthal, *Human Rights* (Oxford Public International Law, 2007).
[218] *Ibid.*
[219] Manisuli Ssenyonjo, ed, *Economic, social and cultural rights*, The International Library of Essays on Rights (Farnham: Ashgate, 2011) at 6–7.
[220] *ICCPR*, *supra* note 169; *ECHR*, *supra* note 42.
[221] *ICCPR*, *supra* note 169 Article 6.
[222] *Ibid* Article 14.
[223] *Ibid* Article 19.
[224] *Ibid* Article 7.
[225] Ssenyonjo, *supra* note 219 at 6.
[226] *Ibid* at xi.
[227] Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4:2 Trade, L & Development 283 at 288.
[228] *Vienna Declaration and Programme of Action*, by The World Conference on Human Rights, A/CONF.157/24 (United Nations General Assembly, 1993) at para 5.

Regional organisations have adopted conventions, such as the European Convention on Human Rights[229], the Pact of San Jose[230], to ensure their respect by State parties. Not only do State have to guarantee human rights protection in their territory, they must also "prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means"[231]. Therefore, it can be affirmed that "human rights form a necessary part of the international rule of law" [232]

Besides, the UNGA recognized the necessity of strengthening the rule of law[233]. In the same declaration, the UN describes the elements of the rule of law, and human rights protection is one of them. Furthermore, the "rule of law is associated with economic development, democracy and political stability, which are key determinants in rights performance."[234]. Therefore, it can be affirmed that human rights and the rule of law are intrinsically linked[235]. The UN have reaffirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing"[236].

The guarantee of human rights in various international instruments is not as ideal as it sounds. As Petersmann puts it, "effective protection of 'freedom from poverty' and constitutional limitations of abuse of government powers […] in worldwide IEL [international economic law] often remains a cosmopolitan dream."[237] The human rights topic faces several issues that invade the world of international investment arbitration. It is possible to classify them in two different categories.

First, what are human rights and which rights international human rights law contain still remain an unanswered question. As Lord Bingham rightly explains, "there is no universal

[229] *ECHR*, *supra* note 42.
[230] *American Convention on Human Rights* (entered into force 18 July 1978), 1969.
[231] *General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)*, UNCESCR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 39 [UN General Comment 14, 2000]; *Protect, respect and remedy : a framework for business and human rights*, by John Ruggie, HRCOR, 8th Sess UN Doc A/HRC/8/4/Add.2 (2008).
[232] McCorquodale, *supra* note 2 at 46.
[233] UN Millennium Declaration 2000 note 43.
[234] Peerenboom, *supra* note 209 at 812.
[235] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at paras 17–18.
[236] *The rule of law at the national and international level*, UNGAOR, 61st Sess, UN Doc A/RES/61/39 (2006) at 1.
[237] Petersmann, *supra* note 227 at 293.

consensus on the rights and freedoms which are fundamental, even among civilised nations."[238] If some of them are universally recognised (mostly civil and political rights)[239], other rights such as socio-economic rights are still debated[240]. Clearly, there is no "accepted ranking of the different rights that make up the list of goodies included in the ever-proliferating set of human rights instruments and customary international law"[241].

Therefore, there are issues surrounding the substance of international human rights law (IHRL). The absence of consensus surrounding certain rights, the vagueness regarding the definition of certain rights (water[242], the right to just and favourable condition of work[243], the right to an adequate standard of living[244] etc.) highlight a problem of legal certainty regarding IHRL[245]. There are disagreements amongst jurisdictions, tribunals (be it court or arbitral tribunals) on how to protect those human rights. The absence of legal certainty in this broad body of law leads to inconsistency in awards as will be discussed in the second chapter.
The vagueness of IHRL provisions leads some arbitrators, in investment arbitration, to avoid dealing with those rights as they do not know how to deal with them. This raises the second issue regarding human rights which is their difficult protection through efficient mechanisms.

The mechanisms permitting the protection of human rights and sanctions when they are violated lack enforceability. At a transnational and international level, there are major deficiencies in protecting human rights.
If the protection of human rights and compliance with the rule of law can be easily measured when it comes to States' actions, it becomes more complicated when it comes to multinationals and big corporations with investment arbitration as a protection mechanism. Nonetheless, it cannot be denied that "implementation of human rights has fallen far short of commitment made"[246]. It

[238] Bingham of Cornhill, *supra* note 3 at 68.
[239] Ssenyonjo, *supra* note 219 at 6–7.
[240] *Ibid* at 214.
[241] Peerenboom, *supra* note 209 at 816.
[242] Emma Truswell, "Thirst for profit: Water privatisation, investment law and a human right to water" in Chester Brown & Kate Miles, eds, *Evolution in investment treaty law and arbitration* (Cambridge; New York: Cambridge University Press, 2011).
[243] *ICESCR*, *supra* note 170 Article 7.
[244] *Ibid* Article 11.
[245] Petersmann, *supra* note 227 at 290.
[246] Robinson, *supra* note 200 at 22.

becomes more and more complicated to protect human rights at a state level but also on an international scale, especially through the mean of international investment arbitration.
One of the rule of law requirements is an effective redress mechanism for breaches of rights; in other words, "[t]he rule of law is the implementation mechanism for human rights, turning them from a principle into a reality."[247] It can be said that mechanisms to protect human rights face efficiency issues in terms of enforcement[248].

To conclude on the connection between human rights and the rule of law, the United Nations propose a good summary of the situation: "the rule of law and human rights are two sides of the same principle, the freedom to live in dignity. The rule of law and human rights therefore have an indivisible and intrinsic relationship"[249].
In the upcoming part of this chapter, we will discuss how that international investment arbitration is facing important rule of law issues concerning the legal certainty deriving from arbitral jurisprudence and the protection of human rights[250].

[247] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at 4.
[248] Justine Nolan, "The nexus between human rights and business: Defining the sphere of corporate responsibility" in Jeremy Matam Farrall & Kim Rubenstein, eds, *Sanctions, Accountability and Governance in a Globalised World* Connecting international law with public law (Cambridge: Cambridge University Press, 2009) at 222; Tomoko Ishakawa, "Counterclaims and the Rule of Law in Investment Arbitration" (2019) 113 33 at 452.
[249] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at 4.
[250] McCorquodale, *supra* note 2 at 47.

Chapter 3: The rule of law in international investment arbitration

The study of the rule of law through the lens of the State has been largely discussed among academics[251]. The same can be noticed about the rule of law at an international level, through the actions of many international organisations or recommendations of the United Nations[252]. The question of how it could be strengthened, protected and promoted by governments, laws or courts has attracted much attention since time immemorial[253]. However, much less has been written about the rule of law in transnational mechanisms such as international investment arbitration.
While some doctrine can be found on this topic, it mostly concerns the necessity to protect foreign investors' rights in the BIT concluded between the State and the investor[254], but the rule of law has been a tacit feature of this alternative mechanism to settle disputes[255], as demonstrated by the various statements of arbitration institutions[256]. This paper aims at raising some rule of law issues that are usually forgotten when talking about international investment arbitration.

First, the approach taken by investment arbitration regarding the rule of law will be analysed (1). Investor-state dispute settlement faces a rule of law crisis; indeed, the issue of legal certainty (2) regarding human rights of local population cases (3) is very problematic and clearly weakens the rule of law.

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[251] Bingham of Cornhill, *supra* note 3; Neuberger, *supra* note 1; Ma, *supra* note 4; Dicey, *supra* note 56; Fuller, *supra* note 112; Raz, *supra* note 112; Dworkin, *supra* note 139; Allan, *supra* note 141; Craig, *supra* note 56.
[252] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43; The rule of law and transitional justice 2004, Secretary General, *supra* note 123; Declaration of the UNGA on the Rule of Law 2012, note 43; note 236; Doss, *supra* note 154.
[253] Aristotle, *supra* note 48; Bracton, *supra* note 86; Tocqueville, *supra* note 56; Dicey, *supra* note 56; Carré de Malberg, *supra* note 131; Raz, *supra* note 112; Dworkin, *supra* note 139; Craig, *supra* note 56; Bingham of Cornhill, *supra* note 3 cs 3–9.
[254] Franck, *supra* note 11 at 338 and following; Lahra Liberti, "Investissments et droits de l'homme" in Philippe Kahn & Thomas W Waelde, eds, *Les aspects nouveaux du droit des investissements internationaux* (Leiden ; Boston: Martinus Nijhoff Publishers, 2007) 791 at 791: "l'élaboration d'outils de protection des investissements, notamment les traités bilatéraux et multilatéraux, dont le but principal est la défense de la propriété et la protection des investissements contre toute interférence illégitime des États".
[255] Schill, *supra* note 51.
[256] Kelly, *supra* note 177 at 265–266; Carrier, *supra* note 176; note 175; note 174.

Section 1: The rule of law in international investment arbitration: issues and duty to promote it?

It is widely acknowledged that the rule of law must be abided by states and that they must set up internal mechanisms to guarantee it. Furthermore, states very often make declarations emphasizing respect for the rule of law. However, when it comes to international and transnational mechanisms of dispute resolution, developed on an *ad-hoc* basis, this commitment is not as clear.

International investment arbitration largely developed after the Second World War[257]. It was an alternative dispute resolution mechanism aiming at promoting justice throughout the world[258]. This type of arbitration deals with investments, as defined in the *Salini* case[259], made in a host state. Therefore, it opposes a private party to a public one, a state. The 1959 Abs-Shawcross Draft Convention on Investment Abroad aimed at protecting investors' property against expropriation from the host State[260] and ensure "security of investment"[261]. Many BITs have followed this draft. In addition, another original goal of investment arbitration was to promote and protect the rule of law.[262]

However, the practice of ISDS shows that there are difficulties in achieving this task. Indeed, the system is facing an important legitimacy crisis reflecting several rule of law issues[263]. This crisis

[257] Bradlow, *supra* note 33 at 360.
[258] "Arbitration, which is meant to further justice, and is regarded by many as a key component of its [the rule of law] global administration" El Baradei, *supra* note 51 at 4; Thomas Buergenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22:4 Arbitration International 495 at 496: "Some of the reasons that motivated the creation of ICSID, including discriminatory governmental practice and laws, denials of due process, lengthy delays, corruption, etc."
[259] *Salini Construttori S.pA v Kingdom of Morocco (Decision on Jurisdiction)*, [2001] ARB/00/4 at para 52: "an investment must include "contributions" of money, assets, or know-how; with a "certain duration of performance", involving "participation in the risks of the transaction" and add "to the economic development of the host State of the investment."
[260] Hermann Abs & Lord Hartley Shawcross, "Draft Convention on Investments Abroad" (1960) 9:1 Emory LJ 115.
[261] Hermann Abs & Lord Hartley Shawcross, "Comment on the Draft Convention by its Authors" 9:1 Emory LJ 119 at 119.
[262] Mavluda Sattorova, *The impact of investment treaty law on host states: enabling good governance?*, Studies in international law (Oxford ; Portland, Oregon: Hart Publishing, 2018) at 137; Schultz & Dupont, *supra* note 187 at 1161.
[263] *Reforming international investment governance*, Gemeinsamer Bibliotheksverbund ISBN (New York: United Nations, 2015) at 128 [Reforming international investment governance 2015].

is, amongst other things, due to the perception of bias towards investors, inadequacy to protect human and procedural rights with issues of fairness, transparency, inconsistent arbitral awards etc.[264]

The relevance of the situation is due to the fact that more and more, international investment arbitration deals with issues concerning the public at large (especially in cases where human rights of local population are at stake) but the public has no say in the process, be it arbitrators' appointments, raising questions, being party to the proceeding etc. Indeed, it is questionable "whether measures in pursuit of public interest adopted by democratically elected governments should be adjudicated by foreign, unelected and unaccountable arbitrators in a process largely governed by commercial principles and lacking public input"[265]. The drafters of the Abs-Shawcross Draft Convention did not craft it "with the aim of providing investors with a right to affect social policy in areas like health, education and housing"[266].

Lee Williams argues that international investment law enables foreign corporations to harm domestic regulations and that investment-treaty arbitration amounts to an "inherent assault on democracy" because "unelected transnational corporations can dictate the policies of democratically elected governments"[267]. This thesis will discuss the provisions, or their absence, and role both of international investment agreements (IIA) and bilateral investment treaties (BIT) indifferently.

For the record, IIAs are concluded between several countries and are concerned with cross-border investments matters[268], especially FDI and the protection of foreign investments[269]. BITs involve only two parties and they are a form of IIAs[270]. BITs deal with private investment made by a natural or a legal person of one state in another state[271].

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[264] Sheetal Narayanrao Shinde, "Investment and Human Rights: Sensitizing the Arbitration Mechanism to Protect Human Rights in the Host State" (2019) 7:2 Indian J of Arbitration L 45 at 45; note 263 at 128.
[265] Sattorova, *supra* note 262 at 169.
[266] Bradlow, *supra* note 33 at 361.
[267] Williams, *supra* note 18.
[268] Charles Bjork, "Bilateral Investment Treaties (BITs)", (2019), online: *Georgetown Law Library* <//guides.ll.georgetown.edu/c.php?g=371540&p=4187393>; UNCTAD, ed, *International investment agreements: key issues* (New York: United Nations, 2004) at xxi [UNCTAD Report 2004].
[269] UNCTAD, *supra* note 268 at 2.
[270] UNCTAD, ed, *Bilateral investment treaties 1995-2006: trends in investment rulemaking* (New York: United Nations, 2007) at 1.
[271] *Ibid.*

Facing this rule of law crisis, one can wonder if there is a duty imposed on arbitration mechanisms and arbitrators to guarantee and promote the rule of law, as it would be stated in national constitutions. Lord Neuberger is of the opinion that "arbitration really was up there with litigation, not merely as a dispute resolution system, but as part of the rule of law."[272] Similarly, Schill writes that "the concept of the rule of law is itself a guiding principle for assessing investment treaties and investment treaty arbitration and in informing treaty and dispute settlement practice"[273].

It can be said that most of the time, arbitrators are lawyers, judges or legal academics. Their knowledge of the law enables them to understand the importance of the rule of law. Therefore, it is professor Park's opinion that "to some extent, arbitrators are expected to behave like judges in their concern for the public interest"[274] and the rule of law. In other words, while exercising their functions, the rule of law "has to inform arbitrators in how they conduct arbitral proceedings, exercise their procedural powers, and interpret investment treaties."[275]
Even though international arbitration documents do not create general obligations on these topics, Meshel says that protecting human rights is part of the mandate of arbitrators in respecting and implementing the rule of law[276]. Schill argues that "investment treaty arbitration serves as a mechanism to implement the rule of law standards laid down in investment treaties."[277] It also enables access to justice for foreign investors.[278]

Similarly, the 2015 World Investment Report states that "[t]he expected key function of IIAs [international investment agreements] is to contribute to predictability, stability and transparency in investment relations"[279]. It also specifies that "IIAs can help improve countries' regulatory and institutional frameworks, including by adding an international dimension to them

[272] Neuberger, *supra* note 1 at 184.
[273] Schill, *supra* note 51 at 85.
[274] WW Park, "Private Disputes and the Public Good: Explaining Arbitration Law" (2005) 20 American University International Law Review 903 at 905.
[275] Schill, *supra* note 51 at 100.
[276] Tamar Meshel, "Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond" (2015) 6 277 at 307.
[277] Schill, *supra* note 51 at 93.
[278] *Ibid* at 95.
[279] Reforming international investment governance 2015, note 263 at 125.

and, by promoting the rule of law and enhancing good governance."[280] This is an acknowledgement that international investment agreements can help in the promotion and protection of the rule of law, especially because they are legally binding. If IIAs promote this goal, then arbitrators should start considering it in the disputes they solve.

Therefore, it seems to be part arbitrators' mandate and arbitral institutions' role to foster respect for the rule of law. Indeed, they "are not only responsible towards the parties but also towards the populations of sovereign States whose interests are at stake in the dispute at hand"[281]. Investment treaties also have a role to play as binding documents, they could offer arbitrator a legal basis for the award they render, instead of relying on their general duty at the international level.

There are authors who believe that BITs have already fostered respect for the rule of law because they have created a safer and fairer environment for investments.[282] Schill explains that investment treaties promote investments, especially by guaranteeing their stability. The protection of investments "have the objective to lead to economic growth and, ultimately, human development"[283]. In other words, investment treaties grant security to FDI from arbitrary governments' conduct, a goal pursued by the rule of law[284]. This can explain why they help in the promotion of the rule of law.
Even though this can be true, those BITs have, sometimes, damaged human rights of local populations and therefore, jeopardized the rule of law[285].

Nonetheless, there is a recent trend showing that, more and more, BITs contain rule of law and/or human rights provisions. International investment agreements "are no longer limited to establishing few basic rights of protection for foreign investors, but also reflect public concerns,

[280] *Ibid*; Schultz & Dupont, *supra* note 187 at 1161.
[281] Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" (2018) 17 Chinese JIL 137 at 139; Stephan W Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011) 52:1 Va J Intl L 57 at 72.
[282] Yves Fortier, "Investment protection and the rule of law: change or decline?" in Robert McCorquodale, ed, *The rule of law in international comparative context* (London: British Institute of International and Comparative Law, 2010) at 121.
[283] Schill, *supra* note 51 at 87.
[284] *Ibid.*
[285] Liberti, *supra* note 254 at 798–799, 806.

for instance with regard to the protection of health, safety, the environment and core labour rights."[286]

BITs could be used as instrument to promote the rule of law as "investment treaties are not per se contrary to the rule of law, but can actually further it"[287].

Today, investment arbitration is facing criticisms because of the way it works. Indeed, "[t]he main criticism leveled at the arbitral model is that it fails to live up to the basic precepts of democracy and the rule of law"[288]. The system is facing a legitimacy crisis at several level highlight the fact that investment arbitration is threatening the rule of law. This is problematic; "*The Economist* has described the rule of law as the 'motherhood and apple pie of development economics'[289]. Respect for the rule of law can foster the economic world by rendering it more stable.

It needs to be recalled that even if a general duty for arbitrators to protect the rule of law was recognised and backed up by BITs provisions, there remain several problems concerning this topic. Undeniably, it is difficult to know to what extent the rule of law can be strengthened as the concept knows no consensus on the international scene. The wideness of the concept renders development of practical guidance difficult and the taking of actions is challenging.

It would be a considerable task to discuss all the rule of law issues existing in this field. This is the reason why the following part will focus on legal certainty questions in the protection of human rights.

Section 2: Legal certainty: a major rule of law issue in international investment arbitration

It has been explained in the first part of this chapter that legal certainty is one of the features of the rule of law. It has also been shown that investment arbitration and the rule of law are strongly

[286] Karl, *supra* note 16 at 229.
[287] Schill, *supra* note 51 at 98.
[288] Hachez & Wouters, *supra* note 8 at 421.
[289] McCorquodale, *supra* note 2 at 39.

connected and that ISDS faces a legitimacy crisis as some rule of law elements seem not to be complied with. Legal certainty in the awards rendered, as well as coherence of the decisions, are to be found among those issues.[290]

International investment arbitration is often criticized for rendering contradictory decisions lacking consistency[291]. Arbitrators have not found a way to solve issues of incoherence among investment awards[292] and this prevents legal certainty and stability in the system for its users[293]. Indeed, arbitrations has reached contradictory outcomes in similar cases"[294], especially in the cases revolving around the Argentinian crisis of 2000-2001 where the state adopted anti-crisis measures leading to breaches of investors' rights.

Investment arbitration has evolved very quickly in the last decades, El Baradei describes it as a "fast and unstructured evolution"[295]. Therefore, shortcomings regarding the interpretation of BIT and standards can be highlighted in the various awards rendered by tribunals.[296] Sometimes legal principle that appeared to have been established by one tribunal, is precluded by another[297]. This generates confusion and unpredictability for the system's users. It is not surprising that "arbitral practice is often inconsistent, even on some crucial issues."[298]

This can be explained by several factors. First-of-all, there is no rule of *stare decisis*[299]. Investment arbitration is a *sui generis* system, constituted by *ad-hoc* tribunals established for a specific dispute (even though there are now a number of international institutions to resolve investor-state disputes)[300]. In other words, arbitration is a "decentralised and non-hierarchic system of law"[301]. There is no system of binding precedent, as it was stated in the case of *Amco v*

[290] Kriebaum, *supra* note 19 at 205.
[291] Karl, *supra* note 16 at 236.
[292] Zarra, *supra* note 281 at 146: "coherence is still an unresolved issue, due to the fact that arbitrators have not yet found an univocal criterion to ensure coherence among investment awards".
[293] See Thesis note 122 Part 2, Chapter 3, Sections 1-2.
[294] Hachez & Wouters, *supra* note 8 at 421.
[295] El Baradei, *supra* note 51 at 5.
[296] Sattorova, *supra* note 262 at 134.
[297] Hobér, *supra* note 197 at 64.
[298] Emmanuel Castellarin, "Investment Arbitration and the International Rule of Law" in Martin Belov, ed, *Rule of law at the beginning of the twenty-first century* (The Hague: Eleven International Publishing, 2018) at 214.
[299] Zarra, *supra* note 281 at 163: "no binding precedent exists in international investment law".
[300] *Ibid* at 156: "Each tribunal award needs to carry out its work within the strict limits of the factual framework of the case and of the wording of the underlying treaty".
[301] Hobér, *supra* note 197 at 63.

Indonesia[302] and *Garanti Koza LLP v. Turkmenistan*[303]. Additionally, there is no system of binding precedent in ICSID[304]. Therefore decisions only have a horizontal influence on each other and there is only a sort of "functional duty" for arbitrators to consider previous awards on a similar matter[305]. As a consequence, arbitrators sometimes render awards that are completely inconsistent even though they had a similar factual background such as in the case of *CME v. Czech Republic*[306] and *Lauder v. Czech Republic*.[307]

In its current state, the only way for investment arbitration to be coherent is for arbitrator to render awards with a strong persuasive value.[308] As Reinisch explains, "[t]he absence of a system of binding precedent must also be regarded from the perspective of the rule of law and its inherent demands of predictability as well as equal treatment … It is a basic requirement of the rule of law that equal cases should be decided equally"[309].

Furthermore, transparency is not obvious in ISDS. The publication of awards and procedural documents is often subjected to parties' approval[310], confidentiality clauses can limit their availability[311], there is no appeal mechanism to ensure coherence of the law, decisions and the predictability of treaty interpretation[312] can explain further the lack of legal certainty in investment arbitration. Kriebaum explains that an appellate body would foster coherence of the law, prevent conflicting case law and guarantee the correctness of decisions.[313] The limited scope of annulment grounds[314], as well as the absence of appeal mechanisms[315] make it difficult to have

[302] *Amco v Indonesia*, [1996] ARB/81/1 at para 44.
[303] *Garanti Koza LLP v Turkmenistan (Award)*, [2016] ARB/11/20 at para 149: "The Tribunal cites to the decisions of other tribunals in other investment treaty cases […] but the Tribunal is not in any way bound by such decisions".
[304] August Reinisch, "The Rule of Law in International Investment Arbitration" in Photini Pazartzis et al, eds, *Reconceptualizing the Rule of Law in Global Governance, Resources, Investment and Trade* (Oxford: Hart Publishing, 2013) at 302.
[305] Zarra, *supra* note 281 at 163–164.
[306] *CME Czech Republic BV (The Netherlands) v Czech Republic*, 2003.
[307] *Ronald S Lauder v Czech Republic*, 2001.
[308] Castellarin, *supra* note 298 at 216.
[309] Reinisch, *supra* note 304 at 302.
[310] Gehring & Euler, *supra* note 38 at 8.
[311] *Ibid* at 17.
[312] Reforming international investment governance 2015, note 263 at 150.
[313] Kriebaum, *supra* note 19 at 206.
[314] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes* (entered into force 14 October 1966), 575 UNTS 159 1965 s 52.
[315] Tienhaara, *supra* note 26 at 614: "there is no appellate body to ensure consistent interpretation of investment treaties."

consistent and uniform arbitral decisions. Indeed, the annulment procedure does not constitute a review of the award and the annulment committees are established on an *ad hoc* basis[316], which does not enable permanence and certainty. This "situation is certainly at odds with a full-fledged protection of the rule of law."[317]

The facts that "inconsistencies can arise cultivates an impression that arbitration might at times rhyme with arbitrariness and that states, in accepting that they should submit themselves to arbitration, would in a sense be 'gambling' with the general interest"[318].

It should be added that the rapid evolution of investment law and ISDS practice has rendered it difficult for practitioners to keep up with all the developments and ensure a coherence in the decisions rendered.[319]

Consequently, contradictory awards and inconsistencies in arbitral tribunal positions have detrimental impacts. As Franck writes, "[r]ather than creating certainty for investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law"[320]. The issue of legal certainty within ISDS is problematic as, originally, the BIT is an economic agreement. Investment is supposed to promote economic development and increase the standards of living of the population and it is well-known that there is a necessity for predictability and certainty in the economic sphere. In other words, "[w]ithout the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy"[321]

Thus, "inconsistencies in arbitral awards constitute a problem for legal certainty and predictability and hence for the rule of law"[322] In the words of Benjamin Guthrie, this situation in

[316] Castellarin, *supra* note 298 at 216.
[317] *Ibid* at 215.
[318] Hachez & Wouters, *supra* note 8 at 422.
[319] Tienhaara, *supra* note 26 at 626–627.
[320] Franck, *supra* note 40 at 1521–1523.
[321] *Ibid* at 1584.
[322] Schill, *supra* note 51 at 97.

investment arbitration is "antithetical to several of [rule of law] requirements"[323]. Because of the dubious awards rendered there is "a lack of unity in the case law, and host states' interests may be threatened by the philosophy of the system. There is a feeling that going to arbitration, for a host state, can be like playing Russian roulette when public interest is involved."[324]

Nonetheless, it should be recalled that in many scenarios, the outcome of the award is slightly predictable. Some authors have noticed that arbitrators peruse each other's work; therefore, it seems that there is an emerging "investment treaty jurisprudence"[325]. Even if "the importance of inconsistency should not be exaggerated"[326], there is a paramount necessity to improve this situation and strengthen the rule of law. As Sattorova says, "unless investment treaty law ensures the clarity and internal coherence of its message – unless host states know what standards they will be held to, investment treaty prescriptions of good governance cannot be effectively internalised and transposed into the daily practices of national institutions."[327]

The need for legal certainty is even more acute when such behaviour from arbitration tribunals affects the protection of local population's human rights, as it will be detailed in the second chapter of this thesis.

Section 3: Human rights: a rule of law element growing in investment arbitration

International investment arbitration has shown increased preoccupation for cases dealing with human rights, not those of investors, but those of local populations. More and more, arbitrators have had to deal with issues regarding the human rights of local population that were infringed by an investor's conduct.

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[323] BK Guthrie, "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law" (2012) 45 NYU J Int'l L & Pol 1151 at 1196.
[324] Hachez & Wouters, *supra* note 8 at 434.
[325] Chester Brown & Kate Miles, "Introduction: Evolution in Investment Treaty Law and Arbitration" in *Evolution in investment treaty law and arbitration* (Cambridge: Cambridge University Press, 2011) at 3.
[326] Castellarin, *supra* note 298 at 215.
[327] Sattorova, *supra* note 262 at 136.

There is a growing number of BITs regarding public services[328]. For instance, in the last 20 years, numerous investment treaties have emerged "in relation to the water provision and sanitation industries"[329]. The increasing number of BITs is due to pressure exercised by international authorities or companies upon governments to privatise their water[330]. However, problems arise by the fault of the investor, concerning tariff increases or water quality issues, which ends up in a discriminatory access to water for population. The consequences of a difficult or impossible access to water lead to serious public health problems. Facing such situations, governments of host states often decided to end the contract concluded with the private investor, and are then sued before investment arbitration tribunals.

Here, the difficulty is that international human rights law only applies to human beings but no to legal persons[331]. There are debates as to whether corporations are subject to IHRL[332]; there is a growing number of corporate social responsibilities[333] but those instruments are not legally binding and do not belong to the applicable law of an investment arbitration. Nevertheless, there is "a trend that transnational companies are expected to assume certain extent of corporate social responsibilities in the host State"[334].

This situation can be explained by the fact that foreign direct investments have an impact on local population and states' regulation. Agirrezabalaga explains that behind investment arbitration disputes, there is a public background because of the consequences that investments can have on

[328] Monica Feria-Tinta, "Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay" (2017) 34:4 Journal of International Arbitration (Maxi Scherer (ed)) 601 at 613.
[329] Bree Farrugia, "The human right to water: defences to investment treaty violations" (2015) 31:2 Arbitration International 261 at 268.
[330] Truswell, *supra* note 242 at 577.
[331] Chang-fa Lo, "Normative and Operational Linkages between Human Rights Law and Bits - Building a Firmer Status of Human Rights in Investor-State Arbitration" (2015) 8:1 Contemporary Asia Arbitration J (CAA J) 1 at 6.
[332] *Ibid* at 11; José E Alvarez, "Are Corporations 'Subjects' of International Law?" (2011) 9 Santa Clara J Int'l L 1 at 3.
[333] *Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/11/04 (New York, Geneva: United Nations, 2011); *OECD Guidelines for Multinational Enterprises*, OECD Publishing (Paris: Organisation for Economic Co-operation and Development, 2011); Lo, *supra* note 331 at 13.
[334] Lo, *supra* note 331 at 11.

populations, especially regarding the right to property, access to water, right to a safe environment or freedom of expression[335].

Additionally, the relationship between IHRL and IIL was asserted in *Sempra Energy International v The Argentine Republic.*[336] The tribunal stated that there is a complex relationship between investment treaties and human rights law.[337]

Foreign direct investments very often lead to a situation of "regulatory chill" and "race-to-the-bottom" whereby population's rights are forgotten in front of regulations adopted in order to obtain better BITs[338]. Indeed, "some states, while welcoming the investment offered by corporations, have been unwilling or unable to react to corporate human rights abuses or heed the advice of the UN treaty bodies in pursuing their protection obligations"[339]. Because of States' policies towards the attraction of investors, it is possible that international investments impact human rights especially through lower regulatory standards[340]. The conclusion of investment treaties can "create positive conditions for improving peoples' lives, it can also carry the risk of negatively impacting on the environment, peoples' health and the enjoyment of their human rights (water, food, and other basic needs)"[341]. These can have serious effects if domestic regulations provide insufficient protection.

A lot has been written on this topic but it is beyond the scope of this thesis to elaborate on all the practical drawbacks of foreign direct investments on States' populations. Nonetheless, if States lose some of their power in terms of action and policy because of investment agreements, it

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[335] Iñigo Iruretagoiena Agirrezabalaga, "Derechos humanos en el arbitraje de inversión: la incidencia de los derechos de los pueblos indígenas en la protección del TLCAN" (2012) 5:2 Arbitraje: revista de arbitraje comercial y de inversiones 483–494 at 484.

[336] *Sempra Energy International v The Argentine Republic*, [2007] ARB /02/16 .

[337] *Ibid* at para 332.

[338] Sattorova, *supra* note 262 at 149: "foreign investors are well known for their lobbying and otherwise influencing the government to get the outcome they want, for instance a hands-off regulation of a relevant industry".

[339] Nolan, *supra* note 248 at 220.

[340] Julien Cazala, "Le respect des droits de l'homme comme justification de la violation d'un Traité d'investissement" in Walid Ben Hamida & Frédérique Coulée, eds, *Convergences et contradictions du droit des investissements et des droits de l'homme: une approche contentieuse = Convergences and contradictions between investment law and human rights law: a litigation approach* Publications de l'Institut international des droits de l'homme 35 (Paris: Pedone, 2017) at 319: "Il n'est pas exclu que les opérations internationales d'investissement puissent avoir un impact négatif sur la situation des droits de l'homme; spécialement si, dans le but d'attirer un maximum d'investisseur, l'État hôte assouplit sa réglementation en matière de protection des droits des travailleurs, de l'environnement etc."; See Thesis note 122 Introduction.

[341] Petersmann, *supra* note 227 at 292.

must be recalled that from a human rights perspective, "liberalization should not go so far as to compromise State action and policy to promote and protect human rights."[342]
It must also be recalled that in terms of human rights, "States have undertaken to respect, protect and fulfil human rights nationally which apply in all contexts, including the context of investment liberalization"[343]. As it has been explained, they are sometimes "overwhelmed by the situation". Therefore, it is the author's view that international investment arbitration can help to bring solutions to human rights violations by investors, where the State is failing in meeting such obligations.

The "[r]ecognition of the interconnection of human rights with business activities has progressed slowly but steadily from the fringe to become a mainstream position"[344]. Because of the impact of investment on local populations and their rights, there is a growing number of investment disputes that raise human rights questions.

As it has been explained, investments have an impact on local populations' rights. This leads to an increase in the number of arbitration proceedings that present human rights issues.[345] These cases and the issues they raise will be analysed in the second part of this thesis. "[H]uman rights issues will arise with increasing frequency in arbitral proceedings. A number of arbitral proceedings have already been brought under the Bangladesh Accord concluded in the wake of the Rana Plaza building disaster in Dhaka in 2013"[346]. The same can be said about the situation in Latin America, as demonstrated by the case of Argentina[347].

[342] Feria-Tinta, *supra* note 328 at 612–613.
[343] *Ibid* at 612.
[344] Nolan, *supra* note 248 at 218.
[345] Silvia Steininger, "What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration" (2018) 31 LJIL 33 at 35.
[346] Antony Crockett & Marco de Sousa, "Arbitrating Business and Human Rights Disputes: Viable for Victims?"" (2018) 20:3 Asian Dispute Review (Romesh Weeramantry and John Choong (eds)) 104 at 105.
[347] William W Burke-White, "Part IV Chapter 17: The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System" in Michael Waibel & Asha Kaushal, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 407 at 408: "More than 40 of the cases presently pending before ICSID have been brought against the Republic of Argentina and assert that the Argentine government's response to the catastrophic financial crisis that hit that country in late 2001 and 2002 impaired investor rights secured under several of Argentina's BITs".

The growing number of investment disputes highlights the thriving necessity for arbitrators, to operate a balance between the protection of investments and States' powers to regulate[348].

The violation of local populations human rights because of BITs goes against the rule of law, that is supposed to be promoted by States and arbitration. Indeed, the United Nations have acknowledged the interdependence of rule of law obedience and human rights' protection. In a resolution adopted in 2009, the General Assembly stated that "convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms…"[349].

Furthermore, investment arbitration does not only have human rights violations problem but the absence of a voice for the local populations in the investment mechanisms is also a critical issue[350]. This situation seriously attacks the rule of law as access to justice, transparency and openness of the proceedings are not guaranteed for the victims of the investments made[351].
This is due to the fact that an arbitral tribunal is set up to solve a dispute between an investor and a State and decide according to the power they are granted via a jurisdiction clause. Being an agreement established through a contract, the only parties that can participate in arbitration resulting from a dispute regarding the BIT are the ones who have signed that BIT. It is not possible for any other person to intervene in the proceedings, except if the parties themselves allow it, which is rare.[352]

This is problematic as investments have impact on both states' branches of power and its population. For instance, when an investment concerns the privatization of water services,

[348] Ursula Kriebaum, "Are investment treaty standards flexible enough to meet the needs of developing countries?" in Freya Baetens, ed, *Investment Law within International Law* (Cambridge: Cambridge University Press, 2013) 330 at 331.
[349] *The rule of law at national and international levels*, GA Res 63/128, UNGAOR, 63rd Sess, UN Doc A/RES/63/128 (2009).
[350] Alessandra Asteriti & Christian J Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).
[351] Schill, *supra* note 51 at 98.
[352] Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation" (2011) 29:1 BJIL 200 at 206.

electricity or distribution of cigarettes (examples are numerous), those investments impact the population. For instance, the case of *Aguas del Tunari* is among the "most dramatic example of the consequences of unaffordable water" because the investor (Bechtel) raised up the price up to 300%"[353]. Furthermore, state regulations and laws are very often modified to adapt to the investment made by the state. All the persons impacted had no say in the contractual negotiations that took place and leading to the BIT, but they are very often the first victims of this investment. As victims, they have no mechanism available to remedy the situation where their human rights are breached. Another consequence is that the arbitral tribunal cannot know what the impact of the investor's behaviour on those local populations was and cannot take into consideration the possible consequences of its award on these populations.

A mechanism of *amicus curiae* exists and enables NGOs representing local populations to inform an arbitral tribunal about the practical impacts of a BIT. Thanks to those briefs, arbitrators can be more aware of a particular situation created by a BIT. Nonetheless, as it will be analysed in chapter two, the filing of such briefs before arbitral tribunals is far from certain. Indeed, some arbitral tribunals are reluctant to admit *amicus curiae,* and when they are, the award does not always take them into consideration.[354]

Thus, the emergence of human rights questions in arbitration highlights the connection between international investment arbitration and the rule of law. There is a need to guarantee their protection and arbitration could help to fulfill that need. It is important that there be a "full recognition of international arbitration as a judicial process subject to the mandatory application of Rule of Law principles and of fundamental rights"[355], as this author believes. Finally, this discussion demonstrates that the world of investment is not immune from wider and crucial considerations such as human rights and the rule of law.

[353] Truswell, *supra* note 242 at 578.
[354] Levine, *supra* note 352 at 214, 221.
[355] El Baradei, *supra* note 51 at 11.

To end the first part of our thesis, it can be affirmed that the rule of law is an ancient concept that lies at the heart of the international legal order and any legal system[356]. It is rooted in the most important legal documents of our history[357] and it is in constant evolution. The rule of law enshrines fundamental legal principles that are clearly beneficial at an international level.[358] Initially created to be obeyed by state, the rule of law is not solely an obligation for public entities but interferes in the private sphere[359].

Nevertheless, "the state of the Rule of Law today is appalling and inexcusable"[360]. The lacuna of the UDHR drafters has dramatic consequences today as they "may not have foreseen the power and influence that business corporations would come to wield in our world"[361]. It has been explained that "[t]he body of human rights that have a clear nexus to business"[362] and it is necessary that private entities promote and respect human rights[363].

Investment arbitration is more and more confronted with cases involving business interests and human rights. It is often said that "investment law jurisprudence has not taken into account sustainable development dimensions and objectives, such as the protection of health, the environment, financial stability and other societal rights and interests"[364]. It also raises questions of legal certainty as it will be discussed in the second part of this thesis. There are consequences on the implementation of the rule of law and some commentators say that the international investment system reveals "ambivalence, if not outright disdain for the product of democratic processes"[365].

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[356] McCorquodale, *supra* note 2 at 32: "it is evident that the international rule of law has been identified as a goal for the international system"; James R Maxeiner, "Some Realism about Legal Certainty in the Globalization of the Rule of Law" (2008) 31:1 Hous J Intl L 27 at 28, 30.
[357] *Magna Carta*, *supra* note 78; *Bill of Rights*, *supra* note 92; *Habeas Corpus*, *supra* note 95; *United States of America: Constitution*, *supra* note 100; *DDHC*, *supra* note 99; *UN Charter*, *supra* note 42; *UDHR*, *supra* note 2; *ECHR*, *supra* note 42; *ICCPR*, *supra* note 169; *ICESCR*, *supra* note 170.
[358] Kriebaum, *supra* note 19 at 203.
[359] McCorquodale, *supra* note 2 at 35.
[360] El Baradei, *supra* note 51 at 4.
[361] Robinson, *supra* note 49 at 21.
[362] Nolan, *supra* note 248 at 218.
[363] Robinson, *supra* note 200 at 21.
[364] El Baradei, *supra* note 51 at 6.
[365] David Schneiderman, *Constitutionalising Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 114.

The way investment arbitration deals with the rule of law concepts of human rights and legal certainty in practice will be the focus of Part 2.

Part 2: Legal certainty in arbitral jurisprudence dealing with socio-economic human rights

The first Bilateral Investment Treaty (BIT) was signed between Germany and Pakistan in 1959[366]. However, international human rights law started to interfere with international investment arbitration recently[367], with IIAs becoming more and more human rights friendly. Indeed, the Secretary General of the UN warned that investment agreements were posing "grave dangers to the enjoyment of human rights"[368] because they have been silent on the human rights question for a long time[369].

In the last two decades, international investment arbitration has been confronted with several human rights issues. The first human rights considered were civil or political rights[370] such as due process, right to a fair trial, property rights, discrimination that are very often associated with investors' rights[371]. Tribunals managed to engage in interpretations of civil and political rights[372] but this discussion is beyond the scope of this thesis.

However, another type of rights interferes more and more with investment arbitration: those are economic, social, and cultural rights[373]. They can be found contained in the International Covenant on Economic, Social and Cultural Rights[374] which aims at a better standard of living for human beings. The number of cases dealing with human rights has increased and socio-economic rights "will occupy a prominent place in foreign investment dispute"[375].

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[366] *1959 Germany - Pakistan BIT* (entered into force 28 April 1962), 1959.
[367] *Selected Recent Development in IIA Arbitration and Human Rights: IIA Monitor No.2*, UNCTAD/WEB/DIAE/IA/2009/7 (2009) at 3 [UNCTAD Report 2009].
[368] de Zayas, *supra* note 35 at para 6.
[369] UNCTAD Report 2009, note 367 at 3.
[370] *ICCPR*, *supra* note 169.
[371] UNCTAD Report 2009, note 367 at 5.
[372] *ADC Affiliate Limited and ADC and ADMC Management Limited v Republic of Hungary (Award)*, [2006] ARB/03/16 at para 497; note 367 at 5.
[373] UNCTAD Report 2009, note 367 at 3–4.
[374] *ICESCR*, *supra* note 170.
[375] Simma, *supra* note 10 at 586.

The problem is that, on the one hand, States have submitted themselves to international instruments imposing human rights obligations, and on the other hand, they have entered into BITs that impose another type of obligations[376] and they can both involve human rights[377].
Consequently, it is difficult for States to abide by both types of obligations; affording protection so socio-economic rights often lead to breaches of an investment treaty, opening the doors of arbitration mechanism[378].
This new trend leads arbitrators to deal with issues that are outside of their original fields of competence. More and more, arbitrators are supposed to solve investment disputes and consider challenges that impact a whole community and public services[379].

The rapid evolution of ISDS[380] has left the system with lacunas regarding its ability to effectively deal with human rights. The jurisprudence studied in the following chapters will demonstrate that investment arbitration has difficulties to adapt to these news concerns. These deficiencies exist both at a procedural level and on a substantive law ground and they have consequences[381].

Procedurally speaking, it is difficult to develop a coherent jurisprudence when dealing with considerations outside of the scope of the BIT and where the victims are not even parties to the proceedings (i.e. local population)[382]. Host states face obstacles in justifying their actions that

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[376] Mehmet Toral & Thomas Schultz, "The state, a perpetual respondent in investment arbitration? Some unorthodox considerations" in Michael Waibel et al, eds, *The Backlash against investment arbitration: perceptions and reality* (The Hague: Kluwer Law International, 2010) 577 at 588.
[377] Jasper Krommendijk & John Morijn, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 421 at 424: "complexity of investor-state arbitration relates to the fact that both the interests of the state and those of the investor have human rights aspects: obligations with regard to human rights protection are relevant for both sides of the balance"; *General Comment 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNCESCR, 29th Sess, UN Doc E/C.12/2002/11 (2002) at para 33 [UN General Comment 15, 2002].
[378] Bradlow, *supra* note 33 at 362: "Companies have argued that certain government policies impermissibly threaten their property interests, even when those policies otherwise advance human rights".
[379] Feria-Tinta, *supra* note 328 at 605.
[380] Tienhaara, *supra* note 26 at 626–627.
[381] Lo, *supra* note 331 at 18: "Applicable laws in arbitration procedure can be categorized into procedural rules (to decide arbitration procedures) and substantive law (to decide the merit of the dispute)."
[382] UNCTAD Report 2009, note 367 at 5.

breach BITs, be it through counterclaims or defenses and third parties are gaining influence to afford protections to human rights as it will be seen in Chapter 1.
Then it will be necessary to emphasise on substantive law, and more precisely on arbitral tribunals integrate international human rights law as part of the law applicable to adjudicate (Chapter 2). There are underlying predictability and coherence matters in awards that need to be addressed regarding the protection socio-economic[383].
Finally, the stance of investment arbitration and its impact on legal certainty, human rights and the rule of law will be discussed in Chapter 3.

As a warning, the absence of important empirical data on the topic as well as the confidentiality inherent to arbitration[384] renders difficult the discussion around the lacunas and possible remedies available in ISDS. Nevertheless, "the integration of the law of human rights into international investment law is an important concern"[385] and cannot be ignored.

[383] El Baradei, *supra* note 51 at 5.
[384] Farrugia, *supra* note 329 at 276.
[385] Christoph Schreuer, "The view of investment tribunals: the relevance of human rights law for investment tribunals" in Walid Ben Hamida & Frédérique Coulée, eds, *Convergences et contradictions du droit des investissements et des droits de l'homme: une approche contentieuse = Convergences and contradictions between investment law and human rights law: a litigation approach* Publications de l'Institut international des droits de l'homme (Paris: Pedone, 2017) at 289.

Chapter 1 : Human rights questions facing procedural incoherence in ISDS

Investment arbitration has started to deal with the human rights of local populations since the beginning of the XXIst century[386]. Contrary to other dispute resolution mechanisms, such as national and international courts, it is a recent phenomenon[387]. There exist "a number of routes by which human rights issues can come before arbitral tribunals and it seems inevitable that tribunals will increasingly be called to grapple with these issues"[388]. Even though legal arguments raising human rights questions are recent, they become more and more important in investment arbitration[389]. However, arbitral tribunals are confronted with procedural difficulties to admit such claims.

As any new quickly growing phenomenon without precedent[390], it is not an easy task to tackle issues, such as human rights, that normally fall beyond the scope of international investment law. The rules of procedures in this matter have not always been adapted to give interest to fundamental rights questions, and the practice has been hesitant in driving investment arbitration towards human rights obligations. Incoherence exists and, as Feria-Tinta puts it, "dissonance […] may have arisen in the practice of investment arbitration. Dissonance, however, may not be a sign of failure but of growth."[391].

This chapter aims at shedding some light on the procedural issues raised by human rights claims because they can bar the admission of such issues during the proceedings. It will focus on

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[386] *SD Myers, Inc v Government of Canada*, 2002 UNCITRAL; *Técnicas Medioambiantales TECMED, SA v The United Mexican States*, [2003] ARB (AF)/00/2 [*Tecmed*]; *Methanex Corporation v United States of America*, [2005] UNCITRAL .
[387] Feria-Tinta, *supra* note 328 at 630: "It has taken some time for the practice of investment arbitration to address human rights law centrally in its analysis when relevant".
[388] Crockett & de Sousa, *supra* note 346 at 111.
[389] Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration" in *Human rights in international investment law and arbitration* (Oxford: Oxford University Press, 2009) at 96; Steininger, "Leiden Journal of International Law", *supra* note 345 at 34–35.
[390] Feria-Tinta, *supra* note 328 at 630; Charles N Brower & Stephan W Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law" (2009) 9:2 Chicago J Intl L 471 at 472.
[391] Feria-Tinta, *supra* note 328 at 630.

the main procedural obstacles faced by arbitrators and the ISDS regime at large, in the consideration of human rights of the local populations[392].

There are three types of procedural obstacles that can limit the taking into account of such questions by an investment tribunal. Firstly, the arbitration clause legitimizes the tribunal's existence and is decisive in determining the jurisdiction of the arbitral tribunal and the matters it can deal with, i.e. human rights.[393] If human rights provisions in the BIT are lacking and arbitral tribunals take the view that they do not have jurisdiction over such matters, they can be ignored in the award[394]. In this field, BITs are far from being consistent as some of them duly protect human rights whereas others are silent on the matter; this will be the focus of Section 1.

The second procedural hurdle limiting the consideration of human rights claims is the difficult and inconsistent participation of third parties, *amicus curiae,* in the proceedings. Their objective is to raise awareness about environmental or human rights questions[395]. As the case law shows, their regular admission is far from being achieved (Section 2).

Finally, host states also have the power to bring international human rights law at the heart of the dispute by raising it as a defence or submitting a counterclaim. Again, the attentiveness of tribunals on such questions is incoherent and hesitant as demonstrated by the jurisprudence (Section 3).

Those procedurals problem limit the admission of human rights claims in ISDS and the issue of legal certainty is recurrent.

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[392] Shinde, *supra* note 264 at 51: "In the present age, where there is a unanimous concern of all transnational institutions towards environment and human rights protection issues, the investment arbitration mechanism needs to imbibe a more encompassing value system to perceive these issues with the necessary sensitivity and deal with them in a systemic fair manner".

[393] Feria-Tinta, *supra* note 328 at 606.

[394] Patrick Dumberry & Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration" (2012) 13:3 J of World Investment & Trade 349 at 350: "The lack of obligations for investors under BITs is part of a broader debate about how to best address human rights violations committed by corporations doing business abroad."

[395] Ursula Kriebaum, "Privatizing Human Rights: The Interface between International Investment Protection and Human Rights" in *The Law of international relations: liber amicorum Hanspeter Neuhold*, eleven international pub ed (2007) 165 at 187: "One way to inform tribunals about the human rights implication of a case under consideration are amicus curiae petitions of civil rights groups and human rights NGOs".

Section 1: Extent of arbitration clauses and human rights provisions

Investment arbitration has been created to protect the investors' property in the host state as already mentioned[396]. BITs aimed at guaranteeing rights and security to investment in face of host states' actions. This is the reason why "[m]any BITs are seen to lack reciprocity, imposing obligations on states and granting rights to investors."[397] Where a dispute comes up, the parties can have recourse to the arbitration clause provided in the treaty.

Arbitration clauses are those clauses that will legitimize the arbitral tribunal's jurisdiction. They grant power to arbitrators to solve a dispute that arises between the parties. Many BITs contain arbitration clauses[398] but the type of disputes subject to arbitration vary. Indeed, "the parties are free to delimit their consent to arbitration by defining it in general terms, by excluding certain types of disputes, or by listing the questions they are submitting to arbitration."[399] Generally, these clauses are broad enough to refer to 'any dispute' or to 'all disputes' under the respective agreements[400]. However, those BITs are often quiet regarding human rights provisions consequently disputes regarding such issues hardly fall in the scope of the arbitration clauses[401].

As Farrugia explains, "[a]lthough the texts of these agreements provide individually varying degrees of protection for the investor, the absence of references to human rights has become more and more conspicuous"[402]. Indeed, there is an absence human rights provisions in BIT; mentions of economic, social and cultural rights, often involved in ISDS, are scarce.

Facing this legal vacuum in the contract, "[t]ribunals have not yet begun to grapple with many of these challenging questions and they will find little in the way of guidance in IIAs themselves –

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[396] Abs & Shawcross, *supra* note 260; Abs & Shawcross, *supra* note 261.
[397] Wynne Lawrence & Rosalyn Smith, "Combating Climate Change: The Role Of Investor-State Arbitration In Africa", (17 March 2020), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2020/03/17/combating-climate-change-the-role-of-investor-state-arbitration-in-africa/>.
[398] August Reinisch & Loretta Malintoppi, "Methods of Dispute Resolution" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 1219.
[399] Christoph Schreuer, "Consent to Arbitration" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 1408.
[400] *Ibid.*
[401] Ursula Kriebaum, "Human Rights of the Population of the Host State in International Investment Arbitration" (2009) 10:5 J of World Investment & Trade 653 at 662.
[402] Farrugia, *supra* note 329 at 262.

most of which are silent as to such considerations, including what tests and methods should be used"[403]. It is very difficult for arbitrators to find a legal basis to justify human rights considerations during their deliberations as, in theory, "a tribunal may not rule on questions that are not submitted to it"[404].

This section will briefly discuss the various procedural scenarios that can amount to a consideration of human rights issues in ISDS. Indeed, there are BITs that are completely defective in terms of human rights provisions (sub-section 1). On the other hand, some agreements open the doors to the protection of human rights, and it seems that there is a positive evolution on the matter (sub-section 2). Depending on the provisions of the contract, it is up to arbitrators to grapple with such issues, as it will be discussed in the following chapters. Where the BIT fails to provide elements to consider human rights, it is difficult to find a procedural vehicle to incorporate such discussion in the deliberations of arbitrators. It will be seen that the inclusion of human rights interests in investment treaties and agreements is not constant. This situation, among other things, is one of the reasons that explains why it is difficult to reach legal certainty in investment arbitration cases dealing with human rights.

Sub-section 1: BIT limited to treaty breaches or applicable law not determined in the BIT

It is regularly observed that BIT limit the scope of arbitration to breaches in relation to the treaty. Indeed, "[m]ost bilateral investment treaties do not include any human rights clauses"[405]. BITs usually contain provisions to prevent the disruption of an investment, such as fair and equitable treatment clauses, protections against discrimination or expropriation and many others, all pertaining to the field of international investment law. In other words, "[t]hose agreements only specifically explicate obligations of the host state vis-à-vis the foreign investor"[406].

[403] UNCTAD Report 2009, note 367 at 13.
[404] Ole Spiermann, "Applicable law" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 214.
[405] Lo, *supra* note 331 at 3.
[406] Krommendijk & Morijn, *supra* note 377 at 422.

For instance, a BIT can include clauses to "to avoid inequitable (discriminatory) interference with foreign investors' rights, but State action to combat climate change could give rise to such inequity (and therefore claims) regardless of the broader environmental legitimacy of state action."[407] Consequently, it is noticed by the United Nations that "the large majority of investment treaties appear not to touch upon this subject [human rights]"[408].
Nonetheless, where the BIT stipulates that the dispute should be decided "in accordance with the provision of the Agreement", arbitrators often apply such provisions in light with "the principles of international law" or "the applicable rules of international law"[409]. This decision is left at the discretion of the arbitrators and is not an obligation.

In the same vein, when the BIT contains provisions enabling the application of ICSID procedural rules, article 42(1) provides that:

> 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* (Emphasis added).[410]

As such, where the applicable law is not determined by the BIT[411], article 42(1) leaves discretion to arbitrators to use any international law rules if relevant. The wording "is deliberately used to refer not only to domestic law or international law, but also to the combination of domestic and international law rules."[412]
Similarly for BITs concluded under NAFTA, article 1131(1) provides that arbitrators must decide the cases according to the NAFTA provisions as well as "applicable rules of international law"[413].

[407] Lawrence & Smith, *supra* note 397.
[408] UNCTAD Report 2009, note 367 at 3.
[409] Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration (Chapter 9)" in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 191 at 197.
[410] *ICSID*, *supra* note 314 article 42(1).
[411] Spiermann, *supra* note 404 at 230: "only a minority of bilateral investment treaties are explicit as to applicable law."
[412] Lo, *supra* note 331 at 19.
[413] *North American Free Trade Agreement (NAFTA)*, 32 I.L.M. 289 and 605 1993 article 1131(1).

Two problem can be mentioned here: first the status of international human rights law, as it will be discussed in Chapter 2, is subject to debates. The second challenge is that arbitral tribunal does not have jurisdiction over concerns not contained in the BIT such as human rights and its body of laws. If arbitrators want to incorporate human rights in their analysis of the dispute, they have to go through treaty interpretation techniques as it will be developed the second chapter.
In reading clauses as the one from the ICSID Convention or NAFTA, "it is clear that international law is part of the applicable law and thus arbitral tribunals for investor-State arbitration can apply international law"[414]. In other words, if the host state "has undertaken treaty obligations relevant to the dispute, it can be taken for granted that they will be applied directly by an arbitral tribunal"[415].

The previously mentioned procedural rules open the doors for international human rights law to be incorporated into the applicable law of the BITs. This a way to bring human rights concerns to the attention of the tribunal through procedural law mechanism.

Contrary to those BITs that do not include human rights clauses, there are others that take into account their importance and include clauses to ensure that basic rights like health, environment or labour are not infringed.

Sub-section 2: Bilateral Investment Treaties opening doors to human rights considerations

In opposition to the BITs that completely disregard human rights provisions, there are, in practice, "very few BITs [that] refer to questions related to human rights. When they do, they clearly do not impose any binding human rights obligations on foreign corporations"[416]. It is

[414] Lo, *supra* note 331 at 21; Spiermann, *supra* note 404 at 231: "Even in the absence of a specific treaty provision, it is necessary to resolve treaty claims on the basis of international law."
[415] Spiermann, *supra* note 404 at 231.
[416] Dumberry & Dumas-Aubin, *supra* note 394 at 371.

observed that there is a new generation of BITs that include provisions concerning the protection of human rights, health, labour[417].

For instance, in the 2014 Canada Model BIT there are several human rights provisions concerning health, labour, environment and safety[418]. Furthermore, "Canada has included a voluntary corporate social responsibility ("CSR") provision in the BITs it signs"[419] , as in article 16 of its Model BIT[420]. This is not a binding statement but a mere encouragement; it highlights the difficulty to impose human rights obligations upon investors.

Similarly, the 2012 US Model BIT articles 12[421] and 13[422] promote internationally recognised labor rights and environmental regulations and oblige itself not to weaken such laws.

The DR-CAFTA (Dominican Republic-Central America Free Trade Agreement) involved, inter alia, in the case of *David Aven*[423] decided in 2018, contain provisions regarding health[424], labour rights[425] and environmental protection[426].

Those human rights elements are all enshrined in the ICESCR[427] and ICCPR[428]. Currently, there are approximately 3000 BITs[429]; considering the number of BITs that are in existence, human rights are expressly cited in a very small number of BITs[430] and they "generally do not provide

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[417] Simma, *supra* note 10 at 581.

[418] *2014 Canada Model Bilateral Investment Treaty* article 15: "the Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures", see also article 18.

[419] Rainbow Willard & Sarah Morreau, "The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?", (18 July 2015), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/>.

[420] *2014 Canada Model BIT*, *supra* note 418 article 16: "each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption."

[421] *2012 U.S. Model Bilateral Investment Treaty* article 12: "the Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws".

[422] *Ibid* article 13: "the Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws."

[423] *David R Aven and Others v Republic of Costa Rica*, [2018] UNCT/15/3 .

[424] *Dominican Republic, Central American Free Trade Agreement (DR-CAFTA)*, 2004 c 6.

[425] *Ibid* c 16.

[426] *Ibid* cs 10, 17.

[427] *ICESCR*, *supra* note 170 see, in particular, articles 8(3), 10, 11, 12.

[428] *ICCPR*, *supra* note 169 article 8.

[429] United Nations Conference on Trade and Development, *World Investment Report 2019: Special Economic Zones*, United Nations Conference on Trade and Development (UNCTAD) World Investment Report (WIR) (UN, 2019) at 17.

[430] Lo, *supra* note 331 at 4; Farrugia, *supra* note 329 at 262 footnote 2.

references to the residual regulatory rights of the state or the human rights of the host state population"[431].

In the same vein, "[t]he Morocco-Nigeria BIT, although not yet in force, is notable in that it contains binding provisions which promote climate change action."[432]. This new BIT imposes obligations, not solely on the host State, but also upon investors[433]. Article 15 of this BIT contain express human rights provisions; article 15(6) is particularly interesting and states as follow: "All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party." It is a remarkable provision in international investment law that expressly imposes human rights obligations on both parties. This BIT preserves the host state right to regulate[434] which particularly scarce in practice and also stipulates that investors should strive to comply with corporate social responsibility standards[435].

To ensure conformity with the BIT, a committee is supposed to monitor investors' compliance with the environmental provisions[436].

The Morocco-Nigeria BIT is an extremely good example of the type of provisions that should be included in BIT in order to facilitate human rights protection by ISDS. The fact that written provisions exist in the BIT would enable to develop legal certainty in the way they are considered and avoid discrepancies in the awards rendered.

There is another type of BITs that do not expressly contain human rights provisions, but which contain clauses that could enable for the incorporation of international human rights law. For instance, certain clauses provide that "any relevant rules of international law applicable", such as in NAFTA Article 1131(1)[437] , article 26(6) of the Energy Charter Treaty[438], article 40(1) of the

[431] N Jansen Calamita, "International human rights and the interpretation of international investment treaties: constitutional considerations" in Freya Baetens, ed, *Investment Law within International Law* (Cambridge: Cambridge University Press, 2013) 164 at 177.
[432] Lawrence & Smith, *supra* note 397.
[433] *2016 Morocco-Nigeria Bilateral Investment Treaty (signed)*, 2016 articles 13, 14, 15 .
[434] *Ibid* article 23.
[435] *Ibid* article 24.
[436] *Ibid* article 14.
[437] *NAFTA*, *supra* note 413.
[438] *Energy Charter Treaty (ECT)* (entered into force 16 April 1998), 2080 UNTS 100 1994.

ASEAN Comprehensive Investment Agreement[439], article 84(1) of the Japan Mexico Free Trade Agreement, and article XI of the 2007 Colombia Model BIT. It is generally admitted that IHRL is part of international law and therefore, could fall within the scope of application of these clauses[440].

To this list, article 7(1) of the 2008 Germany Model BIT and article 12(1) of the 2003 India Model BIT could be added. Similarly, the 2005 IISD Model International Agreement on Investment for Sustainable Development article 48(A) contains provisions regarding the applicability of principles of international law as well as corporate social responsibility obligations (Article 16). The EU-Russia Agreement on Partnership and Cooperation (2007) and the EFTA-Singapore Free Trade Agreement (2003)[441] open the door for the consideration of any applicable rule of international law that can be relevant to settle the dispute which, once again, would allow for the incorporation of human rights.

It is encouraging to note that human rights problems are sometimes heard by BIT drafters. In the World Investment Report of 2015, it has been observed that among 18 IIAs concluded in 2014 (11 BITs and 7 "other IIAs"), the majority have included provisions "safeguarding the right to regulate for sustainable development objectives"[442]. The report also mentions that "[a]nother 14 treaties contain a clause that explicitly recognizes that the parties should not relax health, safety or environmental standards in order to attract investment."[443] Among those treaties, 12 contain provisions regarding the "protection of health and safety, labour rights, the environment or sustainable development in their preambles"[444].

[439] *ASEAN Comprehensive Investment Agreement* (entered into force 24 February 2012), 2009 Article 40(1): "The tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State".
[440] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 45 at 56–59.
[441] *2003 EFTA-Singapore Free Trade Agreement* (entered into force on 1 January 2003), 2002 Article 61(5).
[442] Reforming international investment governance 2015, note 263 at 112.
[443] *Ibid.*
[444] *Ibid.*

Regarding those BITs that mention human rights, it is said that "the provisions are minimal in their substances"[445]. Furthermore, "IIAs give few instructions as to how such human rights are to be squared with the investment protections guaranteed to foreign investors"[446].
Dumberry believes that arbitral tribunals should intervene and consider human rights provided that "the BIT contains a broadly-worded dispute resolution clause and that violations are related to the investor's investment at the heart of the proceedings"[447].

Similarly, there are situations where the BIT is silent about the applicable law or provide for the ICSID Convention to be applied to the dispute. In these scenarios, article 42(1) of the Convention enables to consider any relevant rules of international law[448] and this encompasses international human rights law. Such incorporations of IHRL will be discussed in Chapter 2 where the mechanisms available to interpret those provisions will be discussed.

It should be added that, along with BITs not mentioning human rights, there are BITs that mention human rights but do not address the question of non-compensable expropriation. As Lo puts it, excluding compensation for some expropriations "should be the reasonable outcome of applying BITs so as to allow the host State to prevent serious human rights abuses. The problem is how serious the violation should be in order to enable the host State to effectuate an indirect expropriation."[449] In the Annex B.10(c) of the 2014 Canada Model BIT, it is said that "(c) except in rare circumstances […] a non-discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation."[450] It does not exclude the possibility of compensation from the host State.

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[445] Lo, *supra* note 331 at 3.
[446] UNCTAD Report 2009, note 367 at 8.
[447] Dumberry & Dumas-Aubin, *supra* note 394 at 371.
[448] *ICSID*, *supra* note 314 article 42(1): "(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."
[449] Lo, *supra* note 331 at 16.
[450] *2014 Canada Model BIT*, *supra* note 418 Annex B.10.

To end this section, it can be seen that human rights obligations in BITs are far from being common practice and it cannot be said that there is a consistent recognition of those interests in international investment law[451]. This situation is problematic for arbitrators who sometimes deal with such considerations, as it is part of the applicable law, and sometimes just ignore them. This is certainly an issue for legal certainty and consistency in the practice of ISDS. It must be recalled that human rights treaties and instruments are numerous and constitute an important part of international law. "Since human rights law is part of international law, it is reasonable to apply the human rights law as "applicable rules of international law" for the purpose of deciding an investment dispute."[452]

Lo suggest that "human rights law should be further built into the main body of BITs to guide the normative and operational relationships between human rights law and BITs"[453]. Indeed, "[w]ith amendments to BITs and local legislation promoting environmental and climate-resilient factors, ISDS could have an important role in combating climate change"[454]. If such provisions exist, arbitration tribunals "could hold investors to account for breaches of environmental legislation, prevent them from claiming in respect of states' legitimate policy changes, and enforce protective measures in favour of sustainable investments."[455] If they are improved, investment treaties could be seen as "an instrument geared towards furthering the rule of law"[456].

Leaving the stage of wishes to return to the state of practice, human rights questions face procedural hurdles to reach the doors of investment arbitration and "tribunals have faced difficulties in justifying the necessary application of international law to treaty claims"[457]. The legal vacuum of BITs is an example of the complexity to introduce them in ISDS. Some BITs offer the possibility to discuss human rights through their jurisdiction clauses, but they are not common

[451] Farrugia, *supra* note 329 at 278: "investment agreements are, with the exception of a notable few treaties, silent on positive human rights obligations (either for the state or the investor)." .
[452] Lo, *supra* note 331 at 21.
[453] *Ibid* at 4.
[454] Lawrence & Smith, *supra* note 397.
[455] *Ibid.*
[456] Schill, *supra* note 51 at 89.
[457] Spiermann, *supra* note 404 at 232.

practice[458]. Furthermore, as it will be explained, they require treaty interpretation and do not guarantee that human rights will be protected. Therefore, this demonstrates that the rule of law requirement of legal certainty is attacked; it is, indeed, difficult to ensure coherence and predictability where legal provisions are lacking. It is now necessary to focus on another procedural tool that could enable human right discussion in ISDS: *amicus curiae.* As it will be explained they, too, raise legal certainty challenges.

Section 2: Admission of *amicus curiae*

Human rights considerations are not common practice in international investment arbitration. Recently, Bradlow wrote that "to date, the potential for private parties to bring such claims [human rights claims] in the ISDS system has largely gone ignored"[459].

As it has been explained in the previous section, most of the time, human rights are not incorporated into the BIT or IIA. However, it is known that investments often have an impact on the host state population, amounting to human rights breaches[460]. When dealing with a case, arbitral tribunals are not always aware of the human rights considerations triggered by an investment[461], especially if they are not brought to their attention by the host state throughout the proceedings.

Therefore, in such situations, it is possible for *amicus curiae* to intervene so as to provide assistance to the tribunal in deciding the case. The *amicus curiae* briefs will provide information regarding the context in which the State has taken the measures impacting the investment[462].

[458] Kube & Petersmann, *supra* note 17 at 95: "The remaining uncertainties revolving around the jurisdictional clause may explain the reluctance of ISDS tribunals to engage in discussions about the concrete human rights obligations of the host state and to integrate HRL as a substantive, right-based, constitutional law regime".
[459] Bradlow, *supra* note 33 at 357.
[460] Kube & Petersmann, *supra* note 17 at 86–87: "investment agreement and their enforcement by investment arbitration can have severe impacts on the human rights of the host state's population."
[461] Shinde, *supra* note 264 at 55.
[462] Kriebaum, *supra* note 348 at 332: "[m]ost tribunals have not systematically examined the economic and political circumstances prevailing in host states when examining compliance with treaty standards."

An amicus has first been defined through the lens of state tribunals, as a "person who is not a party to a lawsuit but … has a strong interest in the subject matter"[463]. Lamb and others propose another definition that suits arbitration proceedings and that states as follow: "a "friend of the court", a person or organisation not a party to the dispute but with a perspective or an interest in interjecting from which a court or tribunal might benefit"[464]. These words must not be taken as gospel truth because "[i]n international law, however, no single definition exists for *amicus curiae*"[465].

An ICSID tribunal has proposed a more advanced definition: "[a]n *amicus curiae* is […] not a party to the proceeding […] The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide"[466].

Third parties are of different kinds; they do not only include NGOs but also political institutions such as the European Commission[467].

Amicus curiae can help host state's populations to have a voice in the arbitration proceeding where they have human rights complaints because of investments[468]. Without such third parties' interventions, "individuals of the host state who may otherwise and legitimately have human rights complaints […] do not have autonomous standing before an investment tribunal"[469]. The fact that a State is a party to the proceedings leaves arbitral awards to "affect a significantly broader range of actors than the two parties to the disputes"[470].

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[463] Bryan A Garner & Henry Campbell Black, eds, *Black's law dictionary*, 7th ed ed (St. Paul, Minn: West Group, 1999).
[464] Sophie Lamb, Daniel Harrison & Hen, "Recent Developments in the Law and Practice of Amicus Briefs in Investor-State Arbitration" (2017) 5 Indian J Arb L 72 at 72.
[465] Yen-Chiang Chang, "How Does the Amicus Curiae Submission Affect a Tribunal Decision" (2017) 30:3 Leiden J Intl L 647 at 648.
[466] *Suez, Sociedad General de Aguas de Barcelona S,A, and Interagua Servicios Integrales de Agua SA v Argentina (Order in Response to a Petition for Participation as Amicus Curiae)*, [2006] ARB/03/17 at para 13.
[467] Levine, *supra* note 352 at 209: "While third-party involvement originally centered on NGOs, in recent cases more varied amicus curiae have sought intervention rights."
[468] Kube & Petersmann, *supra* note 17 at 87.
[469] Farrugia, *supra* note 329 at 266.
[470] Levine, *supra* note 352 at 200.

Intervention of third parties in ISDS is a late phenomenon[471]; "[p]rior to 2001, *amicus* participation in international arbitration was unknown"[472]. Indeed, third parties' participation was found to be relevant for the first time in 2005, in the case of *Methanex v. USA*[473], in which the tribunal declared itself competent to admit *amicus curiae's* briefs[474]. Similarly, in *UPS v Canada* the tribunal admitted third parties' intervention under UNCITRAL Arbitration Rules Article 15(1)[475].

These first cases opened the doors for *amicus curiae's* interventions in investment arbitration and they influenced the changes that occurred few years later regarding the procedural rules that aimed at facilitating *amicus'* intervention.

Before discussing how *amicus curiae* are actually dealt with in practice and what the trend developed by arbitral jurisprudence regarding their intervention is (sub-section 2), it is necessary to have a brief look at the hurdles they must overcome in order reach the gates of arbitration tribunals (sub-section 1).

Sub-section 1: The procedural conditions to admit third parties

This section will focus on the procedural rules developed by the International Center for Settlement of Investment Dispute (ICSID) in 2006, and other recent rules of procedures. The changes occurred after several calls for more transparency and democracy in investment arbitration[476].

The ICSID also advocated for amendments to the existing provisions, as it can be highlighted in a Discussion Paper from the Secretariat: "[t]here may well be cases where the process could be

[471] Alexis Mourre, "Are amici curiae the proper response to the public's concern on transparency in investment arbitration?" (2006) 5:2 The Law and Practice of International Courts and Tribunals 257 at 258: "In the context of investment arbitration, amicus curiae have for a long time been quite unheard of".
[472] Lance Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 Non-State Actors and International Law 209 at 272.
[473] *Methanex Corporation v. United States of America*, *supra* note 386; Kube & Petersmann, *supra* note 17 at 87.
[474] Lamb, Harrison & Hen, *supra* note 464 at 80.
[475] *United Parcel Service of America Inc v Government of Canada (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae)*, [2001] UNCT/02/1 at para 73 [*UPS v Canada*].
[476] Christina Knahr, "The new rules on participation of non-disputing parties in ICSID arbitration: Blessing or curse?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 319 at 321; Lamb, Harrison & Hen, *supra* note 464 at 72.

strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitration, the other States parties to the treaties concerned"[477].

ICSID Rules of Arbitration have been changed in 2006 and the new rule 37(2) states as follow: "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute […]"[478].
This rule provides that non-disputing parties can make submissions to an investment tribunal. The same provisions can be found in article 41(3) of the ICSID Additional Facility Rules 2006.
The UNCITRAL Arbitration Rules were also amended; the new article 4(1) makes it possible to accept *amicus curiae* briefs[479]. The working group that aimed at introducing such improvements declared that third parties' intervention "could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the arbitration process"[480], a way to strengthen the rule of law.

Article 37(2) of the ICSID Rules establishes several conditions that must be met in order to accept *amicus curiae* briefs in an investment arbitration proceeding.
Fist-of-all, the tribunal must consult both parties; then the submission must be made in writing. Nonetheless, the arbitral tribunal has discretion in deciding which form the submission can take: oral or written briefs[481].
Article 37(2) requires that the submission assist the tribunal[482] and that it addresses "a matter within the scope of the dispute".

[477] *Possible Improvements of the Framework for ICSID Arbitration*, by ICSID Secretariat, ICSID Secretariat Discussion Paper (2004) at para 13.
[478] *Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules)*, ICSID/15 2006 Rule 37(2).
[479] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (entered into force 1st April 2014), 2013 article 4(1): "After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ('third person[s]'), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute."
[480] *Report of Working Group II (Arbitration and Conciliation)*, by UNCITRAL, 3rd Sess, UN Doc A/CN.9/712 (2010) at paras 46–51.
[481] Chang, *supra* note 465 at 650.
[482] *Ibid* at 649.

The amicus must also have an interest in the case; in other words, the submission must be relevant to the case[483]. The NAFTA Free Trade Commission (FTC) went even further by adding the "public interest condition" in the FTC Statement[484]. It was said that "[t]he FTC Statement was a major development in investor-state arbitration"[485].

In other words, it is possible for *amicus curiae* to be accepted under a substantive law ground: the public interest involved in the arbitration[486] . It is said that "[b]y their nature, every investment arbitration involves an element of public interest since a state is a party and any compensation payable to investor claimants is funded by its taxpayers"[487].

For instance, in *Biwater Gauff,* the tribunal acknowledged that the arbitration "raises a number of issues of concern to the wider community in Tanzania"[488] and that "the public interest in this arbitration arises from its subject-matter"[489].

Other investment arbitration institutions contain rules admitting amicus curiae submissions such as article 3(3) of SCC Arbitration Rules 2017[490]; rule 29.3 of the 2017 SIAC Investment Rules[491]; article 25(3) of the 2017 ICC Arbitration Rules[492]. They all contain, more or less, the same requirements to admit *amicis* in the proceedings.

In addition to procedural rules that enable third parties' intervention, there are BITs that contain specific provisions regarding *amicus curiae* submissions. For instance, article 32 of the Canada 2014 Model FIPA[493]; article 28(3) US Model BIT[494]. Yet, this is not common practice and

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[483] *Ibid.*
[484] *NAFTA Free Trade Commission's Statement on Non-disputing Party Participation* (2003) at para B(6)(d).
[485] Lamb, Harrison & Hen, *supra* note 464 at 73.
[486] Reiner & Schreuer, *supra* note 389 at 91.
[487] Amokura Kawharu, "Part III Chapter 11: Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae" in Michael Waibel, Asha Kaushal & Claire Balchin, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 275 at 283.
[488] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, [2008] ARB/05/22 at para 358; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Procedural Order No 5)*, [2007] ARB/05/22 at para 73.
[489] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at para 358; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Procedural Order No 5)*, *supra* note 488.
[490] *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber Of Commerce*, 2017 Article 3(3).
[491] *Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Edition)*, 2017 Rule 29.3.
[492] *International Chamber of Commerce Arbitration Rules*, 2017 Article 25(3) .
[493] *Agreement between canada and - for the promotion and protection of investments*, 2014 Article 32.
[494] *2012 US Model BIT*, *supra* note 421 Article 28(3) .

most of the BITs do not have provisions on third parties' participation[495]. Where such provisions are lacking, arbitral tribunals must rely on arbitration rules where applicable.

However, along with the several requirements mentioned earlier, third parties' submissions must not unduly burden or unfairly prejudice the proceedings or a party to the proceedings[496]. Indeed, admitting third parties will "generate additional administrative issues"[497], and extend the proceedings as parties must respond to their submissions. Arbitrators must find a balance between party autonomy and privacy, inherent to ISDS, and broader public policy considerations and third parties' interests[498].

This warning concerning the length of the proceedings is important as, originally, arbitration intends to be efficient and quick, by avoiding the recourse to state courts. On the other hand, transparency is essential[499].

If the watchword to describe investment arbitration is privacy, "which implies that only directly involved parties can participate in the proceedings"[500], investment arbitration involves State parties, which are public entities, and review their conduct on public matters[501]. Accepting third parties enables transparency as it renders the proceedings more opened and accessible for the people[502]; they must be able to know how public concerns are dealt with[503]. In addition, transparency legitimizes the ISDS system[504].

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[495] Lamb, Harrison & Hen, *supra* note 464 at 74.
[496] *Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules)*, *supra* note 478 Rule 37.
[497] Knahr, *supra* note 476 at 334; Lamb, Harrison & Hen, *supra* note 464 at 75.
[498] Levine, *supra* note 352 at 206.
[499] Transparency is Bingham of Cornhill, *supra* note 3 at 97; Mourre, *supra* note 471 at 265; note 3.
[500] Mourre, *supra* note 471 at 258.
[501] *Ibid* at 265"It is about reviewing governmental conduct. It fundamentally affects the public's interests".
[502] *Methanex Corporation v United States of America (Decision of the Tribunal on the Petition from Third Persons to Intervene as "Amici Curiae")*, [2001] UNCITRAL at para 49: "arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm"; *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)*, [2005] ARB/03/19 at para 22.
[503] Farouk El-Hosseny & Ezequiel H Vetulli, "Amicus Acceptance and Relevance: The Distinctive Example of Philip Morris v. Uruguay" (2017) 64 Neth Int Law Rev 73 at 75: "confidentiality has become increasingly untenable in public interest-related investment treaty arbitration".
[504] *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)*, *supra* note 502 at para 22: "Public acceptance of the legitimacy of international arbitral 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. It is this imperative that has led to increased transparency in the arbitral processes".

Another important requirement is that *amicus curiae* must, as far as possible, be independent: "[t]he Arbitral Tribunals[505] agree with the Claimants' observation that an NDP should also be independent of the Parties. This is implicit in Rule 37(2)(a)"[506]. This requirement has also been upheld in *Aguas Provinciales de Santa Fe S.A (2006)*[507].
This requirement is important as the independence of third parties has been questioned in several situations such as in the cases of *Von Pezold v. Zimbabwe*[508] and *Philip Morris v. Uruguay*[509].
However, it must be said that "some uncertainty remains as to the extent to which an amicus should be "independent" and precisely what this term means"[510].

Some tribunals have acknowledged the helpful work of third parties in the proceedings. For example, in *Biwater Gauff* the arbitral tribunal affirmed that it "has found the *Amici's* observations useful. Their submissions have informed the analysis of the claims […] and where relevant, specific points arising from the *Amici's* submissions are returned to in that context"[511]. Similarly, in *Glamis Gold* it was said that the "Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties"[512].

It is true that third parties can bring significant information to the tribunal[513]. Indeed, "[a]s experts within their fields, NGOs often have extensive research capabilities, technical information and specialist knowledge on areas outside the competence of either of the parties in dispute"[514]. Such expertise is particularly important for cases raising human rights issues such as water,

[505] The plural is used here as the Procedural Order No.2 was rendered for two cases: *Bernhard Von Pezold and ors v Republic of Zimbabwe (Procedural Order No 2)*, [2012] ARB/10/15 ; and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe (Procedural Order No 2)*, [2012] ARB/10/25 .
[506] *Bernhard Von Pezold and ors. v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505 at para 49.
[507] *Aguas Provinciales de Santa Fe SA, Suez, Sociedad 16 General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic (Order in Response to a Petition for Participation as Amicus Curiae)*, [2006] ARB/03/17 Cl. Obs. Tab 11.
[508] *Bernhard Von Pezold and ors v Republic of Zimbabwe*, [2015] ARB/10/15 at para 38.
[509] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, [2016] ARB/10/7 at para 55.
[510] Lamb, Harrison & Hen, *supra* note 464 at 88.
[511] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at para 392.
[512] *Glamis Gold Ltd v United States of America*, [2009] UNCITRAL at para 8.
[513] Knahr, *supra* note 476 at 335.
[514] *Ibid.*

environment, health where the arbitral tribunals could ignore the relevance of those questions in the proceedings. In *Philip Morris v. Uruguay,* the tribunal stated that "in view of the public interest in the case, granting the [applications] would support the transparency of the proceedings and its acceptability by users at large"[515] and that it required "particular knowledge and expertise of […] qualified entities"[516], which were World Health Organisation and the Pan American Health Organisation in the case.

Now that the major rules regarding third parties' admission in arbitration proceedings have been discussed, it is necessary to look at how arbitral tribunals have actually dealt with them.

Sub-section 2: Amicus curiae in the practice of investment arbitration

As it has been said, there was no mention of third parties' participation in ICSID rules before 2006, and such amendments to the rules stem from arbitral practice[517]. As a consequence of the procedural rules' changes, there has been an increase of *amicus curiae* participation in ISDS after 2006[518].

Some third parties, such as in *Aguas del Tunari*[519]*,* have argued that the right to a fair trial[520] was procedurally legitimizing their intervention. However, because they are not directly parties to the proceedings, "[i]t is doubtful whether the right to a fair trial is suitable to promote *amicus curiae* submissions"[521].

Except the ICSID arbitration case of *Aguas del Tunari (2005),* where the petition for amicus submission was rejected, the following jurisprudence will focus on the cases involving third parties after 2006. Nonetheless, *Aguas del Tunari* is the first case where a third party made an application

[515] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Procedural Order No 3)*, [2015] ARB/10/7 at paras 28–29.
[516] *Ibid.*
[517] Knahr, *supra* note 476 at 320; Mourre, *supra* note 471.
[518] Knahr, *supra* note 476 at 323.
[519] *Aguas del Tunari SA v Bolivia (NGO Petition to Participate as Amici Curiae)*, [2002] ARB/02/3 at paras 47, 48.
[520] *ICCPR*, *supra* note 169 Article 14.
[521] Reiner & Schreuer, *supra* note 389 at 91.

before an ICSID Tribunal. In this case, the "tribunal rejected requests from various NGOs and individuals to file amicus briefs because the disputing parties had not consented, the amicus briefs were unnecessary and the requests were beyond the tribunal's power and authority to grant"[522]. In addition, the proceedings occurred before ICSID arbitration rules were changed, so at that time, the ICSID rules did not foresee third party participation[523].

Even though the tribunal denied the request, this case enabled to highlight that investment arbitration can have a public dimension and influenced changes in ICSID rules[524].

It must be said that "NGOs attempted to participate as *amicus curiae* in several cases"[525] but they have not always been successful. *Amicus curiae's* submissions seem to be relevant particularly when economic, social and cultural rights are concerned, such health, water, environment, as arbitrators may not be expert in the field and do not have information about the local populations' complaints. In the case of *Suez/Vivendi* (previously named *Aguas Argentina*), the tribunal said that:

> Courts have traditionally accepted the intervention of amicus curiae in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case.[526]

The *Biwater Gauff* case is the first where *amicus curiae* was authorised under the new ICSID rule 37(2)[527]. The public interest involved by the case was important, as acknowledged by

[522] Lamb, Harrison & Hen, *supra* note 464 at 80.
[523] Kube & Petersmann, *supra* note 17 at 84.
[524] Heather Bray, "ICSID and the Right to Water: An Ingredient in the Stone Soup" (2014) 29:2 ICSID Review 474 at 478.
[525] Knahr, *supra* note 476 at 321; *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)*, *supra* note 502; *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad 16 General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Order in Response to a Petition for Participation as Amicus Curiae)*, *supra* note 507.
[526] *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)*, *supra* note 502 at para 16.
[527] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at paras 59, 62.

the tribunal[528], and there was a lot of mediatisation surrounding the case. Five NGOs have petitioned to participate in the proceedings, bringing experts in human rights and environmental issues. Nonetheless, the tribunal refused their attendance to oral hearings and access to key documents but accepted written submissions[529]. The new ICSID rule 37(2)[530] enabled third parties' participation even though the investor was against it[531]. This demonstrates the usefulness of the new rules.

In *Aguas Provinciales de Santa Fé,* concerning water services and sewage systems, the tribunal acknowledged the human rights law dimension and the public interest of the case, and that it justifies the acceptance of *amicus curiae's* submissions[532].

Amicus curiae's participation was also admitted in the case of *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*[533], where access to water issues were raised. The arbitral tribunal said that it had authority to admit third parties' submissions so it enabled joint briefs prepared by five NGOs.

The *Glamis Gold case*[534], decided under NAFTA rules, is also famous for the third party's intervention coming from the Quechan Indian Nation, expressing their views on the indigenous rights violations committed by the investor[535]. The tribunal admitted that "the submission satisfied the principles of the Free Trade Commission's Statement on non-disputing party participation"[536].

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[528] *Ibid* at para 147.
[529] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Procedural Order No 5)*, *supra* note 488 at para 50.
[530] *Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules)*, *supra* note 478.
[531] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at para 356.
[532] *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad 16 General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Order in Response to a Petition for Participation as Amicus Curiae)*, *supra* note 507 at para 18.
[533] *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No*, [2007] ARB/97/3 .
[534] *Glamis Gold Ltd. v. United States of America*, *supra* note 512.
[535] *Application For Leave To File A Non-Party Submission Glamis Gold Ltd. v United States Of America: Submission Of The Quechan Indian Nation* (2005); *Glamis Gold Ltd. v. United States of America*, *supra* note 512 at paras 268, 270, 273–274, 282.
[536] *Glamis Gold v United States (Decision on Application and Submission by Quechan Indian Nation)*, [2005] UNCITRAL at para 10.

In the discontinued case of *Piero Foresti et al v. South Africa,* commentaries from third party, the International Commission of Jurists, was admitted concerning, amongst other things, the apartheid regime[537].

In the *Suez/Vivendi* case[538], the *amicus curiae* raised "a causal link between Argentina's measures during the financial crisis and its obligation to ensure that its population's right to water is protected"[539] and the tribunal acknowledged the existence of such concerns[540]. Therefore, *amicus curiae* briefs were admitted even if investors were against it.

In *Pac Rim Cayman,* the tribunal authorised third parties' submissions[541]. However, the tribunal did not consider the argument of the third party. Indeed, the parties did not consent to accept CIEL's factual evidence nor their participation to the hearings. Furthermore, "the Tribunal's decisions in this Award do not require the Tribunal specifically to consider the legal case advanced by CIEL"[542]. For those reasons, "in the circumstances, it would be inappropriate for the Tribunal to do so"[543].

In *Philip Morris v Uruguay, amicus curiae's* submissions from the WHO, the PAHO, and WHO FCTC were accepted[544] to deal with right to health questions. The tribunal acknowledged that "granting the request would support the transparency of the proceeding and its acceptability by users at large"[545]. These comments highlight the concern of arbitrators for the rule of law.

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[537] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, [2010] ARB(AF)/07/1 at paras 25–29 [*Piero Foresti v South Africa*].
[538] *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, [2015] ARB/03/19 .
[539] Bray, *supra* note 524 at 482.
[540] *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic (Decision on Liability)*, [2010] ARB/03/19 at para 28: "a situation that raised concern in the public and the press with respect to the health and safety of the population."
[541] *Pac Rim Cayman LLC v The Republic of El Salvador*, [2016] ARB/09/12 at para 1.24, 3.28 and others.
[542] *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541 at para 3.30.
[543] *Ibid* at para 3.30.
[544] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at paras 38–46.
[545] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Procedural Order No 4)*, [2015] ARB/10/7 at para 30.

In this case, *amicus curiae* had a strong influence on the decision rendered by the tribunal[546]. Arbitrators made extensive references to third parties' briefs to discuss several points, from tobacco's health impacts to Uruguay's obligations towards health[547]. More importantly, the tribunal referred to WHO/PAHO submissions to find that the measure taken by Uruguay were necessary to protect its population's health, and did not amount to expropriation[548]. Here, *amicus curiae* clearly influenced the legal analysis of the tribunal[549].

Recently, an *amicus curiae* brief was authorised in *Infinito Gold v. Costa Rica*[550], raising environmental rights issues. The case is still pending and it remains to be seen whether their intervention will have an impact on the tribunal.

On the contrary, in *Von Pezold v. Zimbabwe,* when human rights issues were raised and the ICSID Arbitration Rules were applied to the case, the *amicus curiae's* interventions were refused[551]. In the *Von Pezold* award, Kube and Petersmann comment that "the tribunal saw the human rights relevance but was insecure how to engage specifically with arguments raised only by third parties"[552]. Similarly in *Chevron v Ecuador, amicus curiae* were not admitted as the parties refused to grant them permission to make submissions[553]. Both parties argued that the brief would not be "helpful" to the tribunal[554] and irrelevant during the jurisdictional stage which concerns legal issues[555]. Chevron and Ecuador explained that, in determining the tribunal's jurisdiction, it was not relevant to admit EartRight International's brief[556].

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[546] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at paras 391, 393–394.
[547] *Ibid* at paras 74–75, 138, 141, 306, 391, 393, 407; El-Hosseny & Vetulli, *supra* note 503 at 90: "The tribunal repeatedly cited in its award the amici's briefs (over 21 times)".
[548] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at paras 306–307.
[549] El-Hosseny & Vetulli, *supra* note 503 at 91.
[550] *Infinito Gold Ltd v Republic of Costa Rica (Procedural Order No 2)*, [2016] ARB/14/5 [*Infinito Gold v Costa Rica*].
[551] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508 at para 38; *Bernhard Von Pezold and ors. v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505.
[552] Kube & Petersmann, *supra* note 17 at 90.
[553] *Chevron Corporation (USA) v The Republic of Ecuador (Procedural Order No 8)*, [2011] UNCITRAL PCA Case No 2009-23 .
[554] *Ibid* at paras 18, 12.
[555] *Ibid* at paras 18, 13.
[556] *Ibid* at paras 13–14.

In both, *Von Pezold* and *Chevron* third parties' participation was refused whereas there was a lot of media pressure and public protests regarding the human rights involved[557].

In the recent environmental case of *Gabriel Resources v Romania*[558], third parties (Alburnus Maior, Greenpeace CEE, Romania and Independent Centre for the Development of Environmental Resources (ICDER)) sought to intervene as *amicus curiae*[559]. The tribunal admitted that it "enjoys a degree of discretion"[560] in admitting the submissions, even if opposed by one party.
However, the arbitrators explained that the submission did not provide an additional useful expertise on top of provided by the parties[561] but could bring factual expertise[562]. Applications for participation of all third parties were authorised but to a very limited extent[563]. They could observe the hearing, without participation[564]; they could only refer to factual questions but could not raise any legal arguments, nor rely on testimonies[565].

If a "greater tolerance of limited third party-participation" has been noticed a few years ago[566], it seems that the trend is recently changing with the cases of *Von Pezold, Chevron* and *Gabriel Resources*. Today, it seems that the state of the jurisprudence regarding third parties' intervention in situations where there are human rights complaints, lacks coherence. The admission of third parties is rather inconsistent and this raises concerns regarding legal certainty.

Before concluding on this section, it should be noticed that while *amicus* brief may have an informative or persuasive value, arbitral tribunals are not bound to consider them[567].

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[557] Kube & Petersmann, *supra* note 17 at 89–90.
[558] *Gabriel Resources Ltd and Gabriel Resources (Jersey) Ltd v Romania (Procedural Order No 19)*, [2018] ARB/15/31 at paras 17–23: The investor sought to build an open-pit gold mine using cyanide in a dense population area. It is argued that this practice would have serious impacts on health and the environment. It would also imply the displacement of entire communities and destruction of cultural heritage.
[559] *Ibid* at para 11.
[560] *Ibid* at para 50.
[561] *Ibid* at para 60: "the Tribunal has serious doubts as to whether the Applicants will assist the Tribunal 'by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.'" .
[562] *Ibid*: "do have a particular knowledge of factual issues relevant to this dispute that may assist the Tribunal".
[563] *Ibid* at para 75.
[564] *Ibid* at para 75.2.
[565] *Ibid* at para 75.1(b).
[566] Levine, *supra* note 352 at 208.
[567] Knahr, *supra* note 476 at 335: "("tribunal are certainly under no obligation to follow the arguments presented in amicus curiae briefs, they may still take them into consideration and this could potential lead to better-informed decisions." .

The absence of an obligation to consider *amicus curiae's* briefs leads to an absence of coherence as to whether an arbitral tribunal will be influenced by their arguments or not[568]. In other words, arbitrators have the discretionary power to consider *amicus* submissions. Such a fact was highlighted in the *Pac Rim Cayman v El Salvador*[569] decision*:* "Tribunal's decisions in this Award do not require the Tribunal specifically to consider the legal case advanced by CIEL"[570].

Some say that the consequence of this lack of consideration is that if the dispute is resolved in favour of the investor, the award "may threaten the public interest, for example, by increasing the cost of public welfare regulation or the operation of public services."[571] Similarly, Schadendorf is of the opinion that "[h]uman rights arguments provided by amici, sometimes detailed and well-founded were not observably employed by the tribunals in support of their findings and sometimes even explicitly ignored"[572].

It is said that "tribunals have been influenced to some degree by amicus briefs but that they have refrained from making express reference to amicus briefs in their awards"[573]. In light of recent cases involving human rights considerations with due consideration to *amicis'* intervention, it remains to be seen what the receptiveness of arbitral tribunals towards third parties' intervention in the future, will be.

It is hard to assess what the real impact of *amicus curiae* submissions on the arbitrators' reasoning actually is[574], as some awards mention while others don't and because not all cases are publicly available. In *Biwater Gauff*[575] the arbitral tribunal recognised the public interest question affecting the proceedings (right to water) and the usefulness of *amici's* submissions[576], but it did not make any further mentions of the human right to water, "nor any discussion of the of the consequences

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[568] Kawharu, *supra* note 487 at 280–295.
[569] *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541.
[570] *Ibid* at para 3.30.
[571] Kawharu, *supra* note 487 at 284.
[572] Sarah Schadendorf, "Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitration" (2013) 10:1 Transnational Dispute Management; Eric de Brabandere, "Human Rights Considerations in International Investment Arbitration" in Malgosia Fitzmaurice & Panos Merkouris, eds, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* Queen Mary Studies in International Law (Martinus Nijhoff, 2012) 183.
[573] Lamb, Harrison & Hen, *supra* note 464 at 86.
[574] *Ibid* at 85: "It is difficult to measure directly the influence of amicus briefs on the determinations of tribunals.".
[575] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488.
[576] *Ibid* at para 392: "the Arbitral Tribunal has found the Amici's observations useful." .

of such a right for investment law"[577]. In *Philip Morris*[578], it has been said that the third parties influenced the legal reasoning of the tribunal[579]; therefore their influence was greater than in most other cases[580].

This sub-section aimed at demonstrating that *amicus curiae* participation could lead arbitrators to deal with human rights and "contribute to the popular acceptance and legal coherence of investor-state dispute settlement"[581]. However, the practice demonstrates that their admission is far from being regular, coherent and certain. Indeed, "[a]rbitral practice has shown that the adoption of the new rules on participation of non-disputing parties in 2006 has not led to a situation where non-disputing parties have become 'regulars' in investment arbitrations"[582]. Considering the diverging positions of arbitral tribunals regarding *amicus curiae* participation, it can be said that "[t]here is no consistent practice and no clear guidance as to what role *amici* arguments should play in the judicial decision-making"[583].

It is true that "NGOs are indeed increasingly being granted *amicus curiae* status in investor-State arbitration proceedings, but this is by no means an automatic right"[584]. In addition, the "participation rights of third parties remain extremely limited"[585].

The consequence of this irregularity and incoherence is that there is no possibility to evaluate the length, costs and outcome of proceedings if there is no legal certainty on *amicus'* participation. The words of Levine written almost ten years ago, are still relevant today: "the current institutional and practical approach to amicus intervention in investment arbitration can be categorized as discretionary and largely not formalized"[586]. Such situation does not promote the

[577] Truswell, *supra* note 242 at 582.
[578] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[579] *Ibid* at paras 306–307.
[580] El-Hosseny & Vetulli, *supra* note 503 at 91.
[581] Kawharu, *supra* note 487 at 295.
[582] Knahr, *supra* note 476 at 337.
[583] Kube & Petersmann, *supra* note 17 at 91.
[584] Dumberry & Dumas-Aubin, *supra* note 394 at 371.
[585] Levine, *supra* note 352 at 214.
[586] *Ibid.*

rule of law, supposed to govern any dispute resolution mechanisms, which aims at ensuring a certain formalism, coherence and legal certainty.

The next will discuss how human rights issues can be brought to the attention of the tribunal by the host state. The mechanisms available will be studied and an analysis of the awards rendered will enable to understand whether there is legal certainty in the admission of such claims.

Section 3: The host state's objections: human rights as a defence or counterclaim

In international investment law, where a dispute[587] between the host state and the investor arises, the later has the possibility to bring a claim before an arbitral tribunal. It is a one-way action whereby "the claims always go in one direction, from the investor to the host state"[588]. The investor can either invoke a treaty claim or a contract claim. Farrugia writes that "the jurisdictional limits of an investment tribunal empower it only to decide on issues brought by 'investors' […] relating (either directly or indirectly) to an 'investment' (defined by the relevant treaty)".[589]

Consequently, it is impossible for a host state to bring a claim against an investor, particularly for breaches of human rights obligations[590]. This means that the state must find another way to raise these issues before an arbitral tribunal. This is of importance as "one of the state's primary functions is to protect its citizens from rights violations by third parties, and it has been commented that 'privatisation of essential goods and services does not mean privatization of international responsibility'"[591] . Given this obligation imposed on the state, it is necessary that it be allowed to raise issues where an international investment agreement, or a BIT has been violated. As a respondent in an arbitration case, the host case "could raise human rights arguments to *justify its own actions* taken against a claimant investor"[592].

Among the thirty-five available awards mentioning human rights dealt with in this paper, socio-economic rights considerations were brought to the attention of the arbitral tribunal by the host state twenty-eight times. To do so, the host state mentioned human rights in their pleadings, without really emphasising them. These cases will not be discussed in detail in the section below.

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[587] *Mavrommatis Palestine Concessions (Greece v UK)*, [1924] PCIJ (ser B) No 3 at para I.19: "disagreement on a point of law or fact, conflict of legal views or of interests between two persons".
[588] Ishakawa, *supra* note 248 at 33.
[589] Farrugia, *supra* note 329 at 266.
[590] Lo, *supra* note 331 at 11: "Thus if it arises that a foreign investor is infringing human rights of local people through investment activities, the host State does not have a position to bring arbitration claim under investor-State arbitration based on such violation".
[591] Farrugia, *supra* note 329 at 266; Fabrizio Marrella, "The Human Right to Water and ICSID Arbitration: Two Side of a Same Coin or an Example of Fragmentation of International Law" (2011) II Current Issue of Public International Law 11 at 24.
[592] Dumberry & Dumas-Aubin, *supra* note 394 at 360.

However, in other instances, host states used human rights as a defence (sub-section 1) or asserted a counterclaim (sub-section 2).

Sub-Section 1: Human rights as a defence for host states

As it has been explained, it is not possible for a host State to bring a claim against an investor for breaches of international human rights law obligations. Therefore, one of the ways to consider human rights breaches is to raise it as a defence[593]. In this scenario, the host State tries to justify that the measures taken were necessary to protect its population's human rights and to comply with its constitutional and international law obligations[594].

Most of the time, host State raised the necessity defence, arguing that human rights considerations would prevail over the BIT obligations[595]. The 2009 United Nations report notices that "human rights arguments raised by government in *defence* of alleged IIA breaches […] appears to be an emerging trend"[596].

The plea of necessity has mostly been invoked by Argentina in the arbitration proceedings brought after the financial crisis it faced in 2001-2002, known to be the worst economic and social crisis in the country[597]. Argentina used such arguments to justify the emergency measures taken regarding the protection of the right to water and right to health, at the expense of its BITs obligations. Argentina argued that its measures were necessary to protect the public order and

[593] Lo, *supra* note 331 at 15: There are "situations where human rights law is relevant for the host States to defend their measures or policies against possible allegations by foreign investors."
[594] UNCTAD Report 2009, note 367 at 8; Kube & Petersmann, *supra* note 17 at 89.
[595] *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica (Final Award)*, [2000] ARB/96/1 ; *Tecmed*, *supra* note 386; *CMS Gas Transmission Company v Argentina*, [2005] ARB/01/8 ; *Azurix Corp v The Argentine Republic*, [2006] ARB/01/12 ; *Siemens AG v The Argentine Republic*, [2007] ARB/02/8 ; *Sempra Energy International v The Argentine Republic*, *supra* note 336; *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No.*, *supra* note 533; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488; *Impregilo SpA v Argentine Republic*, [2011] ARB/07/17 ; *SAUR International SA c République Argentine*, [2012] ARB/04/4 .
[596] UNCTAD Report 2009, note 367 at 8.
[597] *Azurix Corp. v The Argentine Republic*, *supra* note 595 at para 400.

guarantee security[598] because it was in a state of emergency[599]. As explained in the case of *EDF v Argentina,* "the Emergency Tariff Measures guaranteed free enjoyment of certain basic human rights such as life, health, personal integrity and education, which were directly threatened by the socio-economic crisis suffered by Argentina"[600].
As a consequence of an emergency situation, *"*[t]he investor's expectations must be balanced against the host state's needs to take action in the public interest at a time of crisis"[601]. In practice, there are several cases where Argentina's laudable measures did not justify its violation of the BIT obligations.

Indeed, defences raised for the protection of human rights by a host State are dealt with in an incoherent manner by arbitral tribunals, especially in cases involving Argentina. There are few cases were arbitral tribunals have accepted the necessity defence as in *Continental casualty v. Argentina*[602] and *LG&E Energy Corp and others v. Argentine Republic*[603].

On the opposite, there are examples where the arbitral tribunal refused Argentina's defence based on necessity and human rights considerations, to justify governmental measures.
In the case of *CMS Gas Transmission Company v. Argentina*[604]*,* Argentina raised human rights protection as a defence to justify the interferences with the Argentina-United State BIT. It argued that the "economic and social crisis that affected the country compromised basic human rights"[605]. However, the tribunal rejected the defence raised.[606]

Another example is *Azurix case,* where water and sewage concession contracts were granted to the investor. Argentina sought to rely on the protection of human rights to justify the measures taken against the investor. The tribunal refused those arguments because they were not well justified nor

[598] Burke-White, *supra* note 347 at 413.
[599] *Ibid* at 415.
[600] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, [2012] ARB/03/23 at para 910.
[601] *Ibid* at para 1005.
[602] *Continental casualty v Argentina (Award)*, [2008] ARB/03/9 .
[603] *LG&E Energy Corp and others v Argentine Republic (Decision on Liability)*, [2006] ARB/01/1 .
[604] *CMS Gas Transmission Company v. Argentina*, *supra* note 595.
[605] *Ibid* at para 114.
[606] *Ibid* at para 121.

argued by the host State. Therefore, the tribunal failed to understand whether there were actual incompatibilities between the BIT and human rights treaties.[607]

In the case of *Sempra v. Argentina* the arbitral tribunal refused to apply the defense raised by the state[608] and refused to admit that the constitutional order during the crisis was in danger, even though an expert confirmed Argentina's obligations to maintain a constitutional order under the American Convention on Human Rights[609]. The tribunal nonetheless recognised the important human rights questions at stake[610].

Similarly in *Impregilo SpA*, the defence of necessity was raised by Argentina to justify the emergency measures taken for the human rights protection of its population. Such defence was refused by the tribunal[611].

Other host States have raised the necessity defence, facing times of crisis. Same holdings were rendered in *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*[612] and *Técnicas Medioambiantales TECMED, S.A. v. The United Mexican States*[613]. In those cases, the tribunal recognised that the reasons behind the measures were legitimate according to the State, but not relevant to assess potential BIT breaches. In *Biwater Gauff v Tanzania,* the host State raised as a defence the threat to welfare in a time of crisis[614], but it was rejected by the tribunal.

The decisions rendered in Argentina cases is particularly interesting. Indeed, all cases involved the same factual conditions, i.e. Argentina and the financial crisis, and often concerned the same human rights, i.e. health and water. Nevertheless, outcomes managed to be contradictory. It is right to affirm that "arbitrators have differed sharply as to the weight to be accorded to this

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[607] *Azurix Corp. v The Argentine Republic*, *supra* note 595 at 261.
[608] *Sempra Energy International v The Argentine Republic*, *supra* note 336 at para 355.
[609] *Ibid* at para 332.
[610] *Ibid*: "this debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners".
[611] *Impregilo SpA. v Argentine Republic*, *supra* note 595 at paras 353, 359.
[612] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Final Award)*, *supra* note 595 at para 72.
[613] *Tecmed*, *supra* note 386 at para 120.
[614] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at paras 434, 436.

generalised human rights defence by Argentina"[615]. In other words, while similar defences are raised, they are sometimes accepted, sometimes discarded. The contradictory findings in situations where similar facts are raised, cause concerns regarding the coherence of the jurisprudence developed by arbitral tribunals as well as concerns about legal certainty. It is also impossible for the host state and the investor to predict a possible outcome.

In addition to the reluctance regarding the acceptance of human rights defence, there are several instances, where the arbitral tribunals have refused the defence of necessity by saying that the host State arguments based on human rights, were too weak and not sufficiently developed to justify the necessity defence[616]. As Kulick explains, "[t]his murky and cryptic reference to broad human rights considerations appears to be somewhat of a pattern in Argentina's argumentation in several disputes involving the 2001-02 financial crisis"[617]. Perhaps the fact that a developing state is involved has an impact on the weakness of arguments.

Consequently, it can be seen that Argentina and other states often tried to bring the human rights' protection defence in order to justify emergency measures that impacted investors and BITs obligations[618]. "This line of argument has stressed the need to protect the human rights of citizens by ensuring basic order and/or access to those services which are instrumental to public health and welfare"[619] . However, there is also an incoherence when human rights arguments are raised as a defence by the host State; "[s]o far, tribunals did not seem to pay specific attention to the states' duty to mitigate and counteract threats for the human rights of populations suffering under an economic crisis."[620] It can be affirmed that "arbitrators have taken sharply different views when confronted with this generalized human rights defence"[621]. They often have refused to admit justifications for the protection of human rights. The incoherence of the jurisprudence in terms of defence raised by host states as well as poor human rights protection undermine the rule of law. It

[615] UNCTAD Report 2009, note 367 at 9.
[616] *Azurix Corp. v The Argentine Republic*, *supra* note 595; *Siemens A.G. v. The Argentine Republic*, *supra* note 595.
[617] Andreas Kulick, *Global public interest in international investment law* (Cambridge: Cambridge University Press, 2012) at 278.
[618] Kube & Petersmann, *supra* note 17 at 80.
[619] UNCTAD Report 2009, note 367 at 8.
[620] Kube & Petersmann, *supra* note 17 at 84.
[621] UNCTAD Report 2009, note 367 at 5.

is dubious whether the investment arbitration regime bolsters human rights and legal certainty, two core elements of the rule of law.

The use of defence mechanism to bring human rights considerations into ISDS has been discussed and seems to be unsuccessful most of the time. It is now the time to consider the other mechanism available to the host State: the counterclaim.

Sub-section 2: Difficulty to accept counterclaims based on human rights

During the proceedings, it is possible for a host state to make a counterclaim, but this possibility only exists for treaty claims. Not only does it work only for treaty claims but there must be an initiated arbitration proceeding. Therefore, if there is no undergoing arbitration proceeding, the state cannot address the human rights breaches from its own will. This is problematic as there is no other way for the State to sue the investor for treaty breaches, where the later has violated human rights provisions contained in the BITs. Admission of counterclaims is a recent phenomenon where human rights are concerned[622].

There are a few cases where the host states have used such a mechanism against the investor, where they had infringed their human or environmental rights commitments. The case having authority regarding counterclaims admission is *Saluka Investments BV v Czech Republic*[623]. Counterclaims can be admitted "where the arbitration clause is sufficiently broad and the rules/convention governing the arbitration contemplated counterclaims"[624].
However, Reiner notices that "invocations of human rights obligations by host states have been met with little enthusiasm"[625].

[622] Elena Burova, "Jurisdiction of Investment Tribunals Over Host States' Counterclaims: Wind of Change?", (6 March 2017), online: *Kluwer Arbitration Blog*.
[623] *Saluka Investments BV v The Czech Republic*, [2006] UNCITRAL .
[624] Farrugia, *supra* note 329 at 282.
[625] Reiner & Schreuer, *supra* note 389 at 90.

There are three recent cases where counterclaims were used. In the case of *Urbaser*[626], Argentina made a counterclaim by alleging that Urbaser failed "to provide the necessary investment into the [water] Concession, thus violating its commitments and obligations under international law based on the human right to water"[627]. The tribunal established that it had jurisdiction to hear the counterclaim after interpreting Article X(1) of the Spain-Argentina BIT[628]. It is the first time that an investment tribunal recognises its jurisdiction over human rights counterclaims[629]. In this case, Argentina was not successful in its counterclaim.

In the case of *Burlington v. Ecuador*[630], Ecuador brought two types of counterclaims, among which one concerned environmental right, because of soil contamination by the investor. First, the tribunal found itself to have jurisdiction over the counterclaim, which is rare[631]. Furthermore, based on Ecuador's Constitution of 2008, environmental harm is a strict liability offence and the investor was obliged to pay compensation for that[632]. Therefore, both Ecuador's counterclaims were successful.

The outcome of the counterclaim is laudable regarding human and environmental rights, as most of the time, counterclaims do not succeed on the merits[633]. This is an example of how procedural rules of ISDS could be used to protect human rights and hold investors accountable for their actions.

In the case of *David Aven*[634], Costa Rica submitted a counterclaim for the environmental damages caused by the investor for the building of tourist facilities. The tribunal admitted jurisdiction for

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[626] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v The Argentine Republic*, [2016] ARB/07/26 .
[627] *Ibid* at para 36.
[628] *Ibid* at para 1143.
[629] Edward Guntrip, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?", (10 February 2017), online: *EJIL: Talk!* <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>.
[630] *Burlington Resources Inc v Republic of Ecuador (Decision on Ecuador's Counterclaims)*, [2017] ARB/08/5 .
[631] Farrugia, *supra* note 329 at 281: "only a handful of cases exist, in published form, to give insight into the mechanics of how a tribunal handles state-initiated counterclaims"; Anne K Hoffmann, "Counterclaims in Investment Arbitration" (2013) 28:2 ICSID Review 438 at 452; Eric de Brabandere, "Human Rights Counterclaims in Investment Treaty Arbitration" (2018) Revue Belge de Droit International (Grotius Centre) .
[632] *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630 at para 1075.
[633] Ishakawa, *supra* note 248 at 37.
[634] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.

Costa Rica's counterclaim[635], under CAFTA-DR. However, the tribunal decided that it was inadmissible as lacking evidence from Costa Rica[636].

It is important to note that counterclaims are not brought on an automatic basis by host states and there is no obligation for them to use counterclaims to abide by their duty of protecting their population against private entities human rights violations.[637]

It can be seen that the recent practice of investment tribunals is more favorable towards counterclaims; "[t]he award in *Urbaser v Argentina* does create a precedent for a host state human rights counterclaim"[638]. The mention of "precedent" is of importance as it suggests the development of a trend to admit counterclaims which would bring coherence in the matter and improve legal certainty. Indeed, "*Urbaser* makes its contributions where human rights enter investment disputes as an element of the state's claims or defenses against the investor, as opposed to the investor's claims against the state"[639].
The thoughts of Reiner and Schreuer expressed earlier[640] need to be reconsidered in light of the recent evolution in the practice of counterclaims. As Farrugia puts it, "[t]hese tentative steps towards the admission, rather than rejection of counterclaims have interesting implications for human rights"[641] especially if the BIT contains water or environmental provisions, or says to comply to domestic law. Such elements could be used as a legal basis for authorising more counterclaims in ISDS. Ishakawa promotes the use of counterclaims when saying that it is a mechanism by which "host states could try to hold investors liable for any damage allegedly caused with respect to the investment."[642]

Nonetheless, there are still hurdles to go through in order to have a counterclaim admitted by an investment arbitration tribunal. As Cazala puts it, "il sera difficile pour l'État de présenter

[635] *Ibid* at para 742.
[636] *Ibid* at para 747.
[637] Ishakawa, *supra* note 248 at 36.
[638] Guntrip, *supra* note 629.
[639] David Attanasio & Tatiana Sainati, "International dispute settlement–investment arbitration–fair and equitable treatment–corporations as subjects of international law–human right to water and sanitation–rights and obligations of investors" (2017) 111:3 The American Journal of International Law 744 at 746.
[640] Reiner & Schreuer, *supra* note 389 at 90.
[641] Farrugia, *supra* note 329 at 282.
[642] Ishakawa, *supra* note 248 at 35.

devant un tribunal arbitral d'investissement, une demande reconventionnelle portant sur des allégations de violations de droits de l'homme par l'investisseur"[643]. This is so because the position of arbitration tribunals regarding states' counterclaims is very strict; "il est le plus souvent exigé que la demande reconventionnelle entretienne avec la demande principale un lien indivisible »[644]. The cases of *Urbaser*[645] and *Burlington*[646] show an improvement in the matter, as there is a departure in both cases from the strict interpretation of the connection criterion[647]. But, once the counterclaim is admitted, it does not mean that it will be successful. The host state will have to prove its allegations. There is no guarantee that the investor will be found liable for human rights breaches and forced to pay damages. In light of the state of the law regarding counterclaims, even if there have been recent improvements in practice, E. Gaillard is calling for a modification of the BIT to facilitate the use of counterclaims by the State party.[648]

Thus, evolution can be observed in the admission of counterclaims by investment tribunals, in cases raising human rights issues. Reiner notices that "[t]hese awards seem to indicate the tribunals' reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves"[649]. This uncertainty as to how and when counterclaims will be admitted by an investment arbitration tribunal threatens the rule of law, and the coherence and predictability that it supposes to guarantee. Such positive observations cannot be noticed regarding defence mechanisms based on human rights, as there is an important incoherence as to their admission. Furthermore, they are very often unsuccessful, which does not help to improve the human rights violation's situation.

However, it is a positive development that some arbitral tribunals accept counterclaims and especially those raising human rights concerns as it enables them to consider such issues and limit wrongful investors' actions. It also redresses an asymmetry inherent in investment arbitration and

[643] Cazala, *supra* note 340 at 334.
[644] *Ibid.*
[645] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[646] *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630.
[647] Burova, *supra* note 622: " the approaches of tribunals both in Burlington and Urbaser indicate a long-awaited move from the restrictive interpretation of connection criterion".
[648] Emmanuel Gaillard, "L'avenir des traités de protection des investissements" in Charles Leben, ed, *Droit international de l'investissement et de l'arbitrage transnational* (Paris: Pedone, 2015) at 1037–1041.
[649] Reiner & Schreuer, *supra* note 389 at 90.

BIT, whereby only the investor is afforded protection[650]. In other words, it is a way for a State to seek damages where an investor has violated international human rights law, where no other mechanism is available to victims[651]. Certainly, "admission of counterclaims in certain circumstances helps investment arbitration advance the rule of law on several counts"[652].
It remains that the procedural hurdles for counterclaims' admission must be overcome and it is not an easy task. Such improvement in the procedure would enable the protection of human rights by arbitration tribunals, which would also strengthen the rule of law[653].

Where the procedural obstacles are not overcome to bring human rights considerations before an investment arbitration tribunal, it is possible for the arbitrators themselves to take upon the matter by considering the substantive law at stake. The mechanism of treaty interpretation available to investment tribunals to incorporate international human rights law will be discussed in the following chapter. Far from being perfect, this mechanism faces the challenges attached to human rights law: its vagueness.

[650] Burova, *supra* note 622.
[651] Ishakawa, *supra* note 248 at 33: "neither host states nor individuals and communities injured by an investor's conduct may pursue the investor's responsibility in investment treaty arbitration."
[652] *Ibid.*
[653] *Ibid* at 36–37.

Chapter 2: The challenges of human rights substantive law in investment arbitration

The consideration of international human rights law for local population has not been of interest to arbitral tribunals for a long time. Indeed, "BITs exist primarily to investors more than for host States."[654] As Knhar writes, "[i]t is one of the particularities distinguishing investment arbitration from commercial arbitration that in most instances it is more than just the disputing parties' interest at stake in the disputes"[655]. Human rights considerations are a recent phenomenon but it is difficult to introduce them within an investment law disputes.

The previous chapter emphasised on the procedural problems that investment arbitration faces and that prevent a deeper consideration of human rights issues. It has been shown that on various procedural points, there are clear issues of legal certainty as no coherence neither predictability can be observed.

At a substantive level, there is an "interpretative presumption that treaties are intended to produce effects which accord with existing rules of international law"[656]. In other words, the BIT concluded must respect other rules of international law, which IHRL is part of. The 2006 International Law Commission recalled that Article 31(3)(c) is useful at enable to add material sources external to the treaty if relevant in its interpretation[657]. Furthermore, "[a]rticle 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning"[658].

Then it can be wondered why arbitration tribunals do not directly deal with human rights problems where it is clear that an investor's behaviour has seriously impacted the host state population because of its investment. It can also be questioned why arbitration tribunals, which are the only

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[654] Truswell, *supra* note 242 at 579.
[655] Knahr, *supra* note 476 at 337.
[656] Simma, *supra* note 10 at 583; *Case concerning the Right of Passage over Indian Territory (Preliminary Objections)*, [1957] ICJ Rep 142 ; *Corfu Channel Case (Judgement)*, [1949] ICJ Rep 24 ; *Anglo-Iranian Oil Co Case (Jurisdiction) Judgement*, [1952] ICJ Rep 104 .
[657] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, by ILC, 58th Sess, UN Doc A/61/10 (United Nations, 2006) at para 18.
[658] *Ibid* at para 21.

ones to deal with multinational corporations at a transnational and international level, do not take measures to condemned them for human rights breaches.
If the procedural hurdles are overcome, it is difficult to admit human rights arguments based on substantive grounds. Indeed, the dissection of awards raising local populations' fundamental rights issues enables to highlight two types of difficulties.

First-of-all, the article 31(3)(c) of the Vienna Convention on the Law of Treaty (VCLT), entered into force on the 27th of January 1980, is underused or used in a confused manner. Sometimes, this article enables the application of international human rights law in the dispute and sometimes, it completely discards it. However, as some authors have suggested, this article could be an entry point for arbitrators in the consideration of local populations' human rights[659]. Far from being perfect, the first section will emphasize on the usefulness of VCLT article 31(3)(c) (Section 1).

After providing an explanation of how IHRL can interfere in the field of ISDS, it will be necessary to discuss the difficulties faced by arbitrators in considering IHRL. Far from their original field of activity, this body of law knows difficulties in its meaning and application[660], especially when it comes to economic, social and cultural rights (ECOSOC rights). As it has been explained, the great majority of the case law dealing with human rights in ISDS concerns ECOSOC rights. However, they are very contested and the second section of this chapter aims at studying how they are dealt with by investment arbitration tribunals (Section 2)

[659] Anne van Aaken, "Defragmentation of Public International Law Through Interpretation: A Methodological Proposal" (2009) 16:2 Indiana Journal of Global Legal Studies 483 at 501–506; Simma, *supra* note 10 at 582; Lo, *supra* note 331 at 23.
[660] Noor Khadim, *Is a Spade always a Spade? The Protection of Basic Human Rights and Indigenous Rights under Investment Treaties* (University of Oxford, 2017); Jan Klabbers, Anne Peters & Geir Ulfstein, *The constitutionalization of international law* (Oxford: Oxford University Press, 2009) at 339–340: "it is no longer clear what exactly international law is."

Section 1: Treaty interpretation issues

Human rights discussions in investment disputes are still feverish as can be seen from an overview of the jurisprudence concerning local population's human rights. This can be attributed to the fact that, often, BITs contain ambiguous and vague provisions concerning human rights questions[661]. In the words of Van Harten, BITs generally establish "a set of broadly-framed ideals that have in run been assigned different and at times conflicting meanings when interpreted by arbitrators"[662] which make the outcome of investment disputes unpredictable[663].

In addition, international human rights law is often not part of the law applicable to the dispute so arbitrators would exceed their mandate by applying such rules of law. However, as Simma explains, arbitrators must find a way to connect human rights with the investment treaty and the situation that arises under the BIT[664]. Treaty interpretation means to achieve this objective; "[t]reaty interpretation is a process of finding out proper meaning of treaty terms through various interpreting methods"[665]. It is recognised that investment treaties must be interpreted in light of international law[666].

VCLT article 31(3)(c) would be very useful in enabling IHRL to reach the doors of investment arbitration. Arbitral tribunals could "rely on human rights law to help interpret BIT provisions"[667], to clarify its language and parties' obligations in terms of human rights (Sub-section 1). However, if article 31(3)(c) can bring some improvements, its meaning raises questions and it is a powerful (maybe too much) tool for arbitrators' intervention (Sub-section 2).

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[661] Castellarin, *supra* note 298 at 215.
[662] Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 629.
[663] Karl, *supra* note 16 at 231.
[664] Simma, *supra* note 10 at 583.
[665] Lo, *supra* note 331 at 22.
[666] *Asian Agricultural Products LTD v Republic of Sri Lanka (Award)*, [1990] ARB/87/3 at para 39; Bruno Simma & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology" in Christina Binder et al, eds, *International investment law for the 21st century: essays in honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) at 691.
[667] Lo, *supra* note 331 at 22.

Sub-section 1: Article 31(3)(c) VCLT as an entry door for human rights' consideration

Article 31(3)(c) of the Vienna Convention on the Law of Treaties states as follow: "[t]here shall be taken into account, together with the context: […] (c) Any relevant rules of international law applicable in the relations between the parties."[668]

In other words, it is up to those who apply the law to consider norms of international law to interpret a treaty[669], if it is of any relevance in the dispute at stake. Article 31(3)(c) lays down very few conditions: there must be an existing rule of international law, that is relevant to the dispute at stake and that is applicable between the parties[670]. It has been said that investment arbitration has a public interest in nature because it opposes States' interest and the private interests of an investment[671].

Where there is an important public interest issue and more specifically economic, social and cultural rights impacted by an investment, arbitrators could use the VCLT to bring international human rights law in the spotlight[672]. Article 31(3)(c) enables arbitrators to take into consideration international human rights treaties[673], especially if the State parties to the BIT are parties to these human rights treaties.

As Simma explains, "human rights law can only be taken into account if, and as far as, an investment tribunal is allowed to consider rules of international law whose source is not found in the treaty in question"[674]. Similarly, Van Aaken has argued that Article 31(3)(c) opens the door for the introduction of a proportionality principle in ISDS. Such a principle would enable arbitrators to balance obligations under the investment treaty and other international law rules such

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[668] *Vienna Convention on the Law of Treaties* (entered into force 27 January 1980), United Nations, Treaty Series, vol. 1155, p. 331 1969 s 31(3)(c).
[669] Simma & Kill, *supra* note 666 at 692: "Article 31(3)(c) may be invoked as the legal basis for considering external rules of international law only when a tribunal is actually engaged in the interpretation of a treaty".
[670] *Ibid* at 695.
[671] Agirrezabalaga, "Derechos humanos en el arbitraje de inversión", *supra* note 335 at 484; Petersmann, *supra* note 227 at 292; Truswell, *supra* note 242 at 577; Cazala, *supra* note 340 at 319.
[672] Zarra, *supra* note 281 at 173.
[673] Lo, *supra* note 331 at 23: "Human rights law should play two roles in the interpretation of BIT clauses. First, it should be able to inform the "ordinary meaning" of some BIT terms and, second, it should serve as the "relevant rules of international law applicable in the relations between the parties"".
[674] Simma, *supra* note 10 at 582.

as IHRL[675]. Having recourse to VCLT article 31(3)(c) to interpret investment treaties would not only enable international human rights law to be relevant to the dispute but, it could also shed some light on investment law and its relationship with human rights questions[676]. Consequently, where the BIT provides for the application of international law rules, the arbitral tribunal could have recourse to IHRL[677].

Nonetheless, it must be recalled that article 31(3)(c) of the VCLT cannot be used to modify the provision of a BIT but only to harmonize the interpretations: it has a role of "harmonization *qua* interpretation"[678]. Such behaviour lies in the hands of arbitral tribunals.

Along with the incorporation of IHRL to protect local populations into investment disputes, "[u]nder the recognised rules of treaty interpretation […] it may be possible to identify rights and interests beyond those expressed positively in the treaty"[679].

Therefore, in theory, the use of article 31(3)(c) would be a great mechanism to protect human rights populations as it would introduce IHRL in arbitrators' discussion of the relevant law applicable to a BIT. Applicable law is not limited to binding rules of law[680].
However, arbitral practice shows differently. Among the cases that concern economic, social or cultural rights, some awards have made express mention of the VCLT. There are only very few mentions of Article 31(3)(c) and it is clearly not used enough. Consequently and unfortunately, among those awards, only a very few numbers actually dealt with human rights considerations[681].

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[675] van Aaken, *supra* note 659 at 501–506.
[676] Calamita, *supra* note 431 at 168; Krommendijk & Morijn, *supra* note 377 at 422.
[677] Dupuy, *supra* note 440 at 56: "it is quite evident that the applicability of public international law raises no difficulty, including that part of general international law (namely, customary international law) which entails a set of obligations to protect fundamental human rights".
[678] Simma, *supra* note 10 at 584.
[679] Calamita, *supra* note 431 at 177.
[680] Simma & Kill, *supra* note 666 at 697: "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'".
[681] *S.D. Myers, Inc. v Government of Canada*, *supra* note 386; *Methanex Corporation v. United States of America*, *supra* note 386; *Parkerings-Compagniet AS v Republic of Lithuania*, [2007] ARB/05/8 ; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626; *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.

There are cases where human rights of local populations were not deemed to be relevant for the investment tribunal whereas article 31(3)(c) was effectively mentioned, often to interpret other BIT provisions. In other words, the awards do not give any relevance to human rights[682]. This shows that in almost half of the cases where article 31(3)(c) was considered, human rights of local population were ignored in the *ratio* of the award. Some examples will be developed now.

In the case *Methanex Corporation v. USA*[683], the state of California banned the sale and use of "MTBE" (methyl tertiary-butyl ether), a gasoline additive[684]. The U.S.A raised the question of health and environment as they have been impacted by MTBE[685].
In the award, the tribunal decided to apply the relevant rules of international law mentioned as mentioned by article 1131(3) NAFTA[686]. To do so, the tribunal accepted to rely on Article 38(1) of the ICJ Statute[687] to apply the relevant rules of international law.
Furthermore, the tribunal stated that "[i]t has also been necessary for the Tribunal to consider the application of Articles 31(3) and 32 of the Vienna Convention."[688]
However, even if the tribunal considered the protection of health and the environment, it did not use article 31(3)(c) to incorporate international human rights law instruments. There is no mention of the right to health, rather the notion of "public health" is raised[689] and no human rights consideration "straightaway".

In *Parkerings companies AS v. Lithuania* (2007), the arbitral tribunal had recourse to article 31(3)(c) VCLT to interpret the FET standard[690]. However, the tribunal did not mention cultural rights nor international human rights law instruments.

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[682] *Methanex Corporation v. United States of America*, *supra* note 386; *Parkerings-Compagniet AS v. Republic of Lithuania*, *supra* note 681; *Glamis Gold Ltd. v. United States of America*, *supra* note 512; *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, [2011] UNCITRAL ; *Impregilo SpA. v Argentine Republic*, *supra* note 595; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 600; *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508.
[683] *Methanex Corporation v. United States of America*, *supra* note 386.
[684] California Senate, *MTBE Public Health and Environment Protection Act of 1997*, Bill No 521, Bill No 521 (9 October 1997).
[685] *Methanex Corporation v. United States of America*, *supra* note 386 Preface .
[686] *Ibid* pt II, Chapter B, p. 1, para 2.
[687] *Ibid* pt II, Chapter B, p. 1, para 3.
[688] *Methanex Corporation v. United States of America*, *supra* note 386 Part II, Chapter B, para 18.
[689] *Ibid* pt II, Chapter 1, p. 22, para 45.
[690] *Parkerings-Compagniet AS v. Republic of Lithuania*, *supra* note 681 at paras 275 and followings.

The same use of the VCLT in *Glamis Gold Ltd v. United States of America (2009)*[691], where the State of California adopted stricter environmental standards and also affecting indigenous rights[692]. In their award, arbitrators admitted being guided by article 31 of the VCLT to interpret FET standards[693]. However, the arbitral tribunal found indigenous rights to be irrelevant[694] and not in their "case-specific mandate"[695]. Therefore, they were not discussed[696].

Similarly, in *Grandriver Enterprises v. USA (2011)*, issues regarding indigenous rights as well as the right to health were brought to the attention of the tribunal by both, the claimant and the respondent[697].
In the award, the tribunal said that it "understands the obligation to "take into account" other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation"[698] but carried on by saying that "[t]his is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA"[699]. It is curious that arbitrators have acknowledged their duty to interpret the BIT in light of international law without considering IHRL while it was relevant in the instant case. It is worth mentioning that discussion surrounding the right to health is non-existent.

The same attitude can be observed in *Impregilo SpA v. Argentine Republic (2011)*[700], where the arbitral tribunal had recourse to article 31 of the VCLT in order to interpret an MFN clause but it did not pay consideration to human rights provisions (i.e. the right to water). Moreover, it even rejected the necessity defence of Argentina that raised its human rights obligations under international law as well as the necessity to guarantee the right to water[701].

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[691] *Glamis Gold Ltd. v. United States of America*, *supra* note 512.
[692] *Ibid* at paras 166–185.
[693] *Ibid* at para 606.
[694] *Ibid* at para 8; Christina Binder, "Case Study: Glamis Gold Ltd. (Claimant) v United States of America (Respondent), NAFTA/UNCITRAL Award, 8 June 2009" (2016) SSRN Journal 1 at 8.
[695] *Glamis Gold Ltd. v. United States of America*, *supra* note 512 at para 8.
[696] Binder, *supra* note 694 at 8, 10.
[697] *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, *supra* note 682 at para 2.
[698] *Ibid* at para 71.
[699] *Ibid.*
[700] *Impregilo SpA. v Argentine Republic*, *supra* note 595.
[701] *Ibid* at paras 228, 230.

In the case *EDF International v. Argentina*, the arbitral tribunal referred to article 31(3)(c) of the VCLT[702] in order to interpret the France-Argentina BIT. The arbitral tribunal acknowledged the relevance of human rights in international investment law[703] but was not convinced by the fact that Argentina could not abide by its BIT obligations and IHRL ones."[704]

In *Bernhard von Pezold and ors. v. Republic of Zimbabwe*[705]*,* the arbitral tribunal, in its award, made references to article 31of the VCLT when it acknowledged that "it is helpful to refer to Article 31(3)(b) of the Vienna Convention, which notes that, together with the context, the decision maker shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation"[706].
However, in its Procedural Order No. 2, Dated 26 June 2012, the tribunal completely rejected its capacity to consider international human rights law provisions concerning indigenous people: "The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs. The Respondent has not yet filed a substantive pleading in these proceedings."[707]
A reference to Article 31(3)(c) and not solely article 31(3)(b) of the VCLT would have enabled the tribunal to consider other rules of international law. But it completely ignored this provision of the Vienna Convention.

There is an "in-between" case, the one of *Philip Morris v. Uruguay*[708]*,* where the tribunal protected human rights using international law but not through the direct use of article 31(3)(c). In this case, Uruguay adopted measures regarding the control of tobacco so as to protect public health and abide by its international and domestic obligations[709]. The arbitral tribunal referred to article 31(3)(c) to interpret the FET standard in light of other rules of international law[710]. However, it did not use

[702] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 600 at paras 891–892.
[703] *Ibid* at para 912.
[704] *Ibid* at para 914.
[705] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508.
[706] *Ibid* at para 407.
[707] *Bernhard Von Pezold and ors. v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505 at para 59.
[708] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[709] *Ibid* at para 305.
[710] *Ibid* at para 317.

this interpretative tool to incorporate human rights considerations in its reasoning. In discussing the right to health, the tribunal only relied on the World Health Organization Framework Convention on Tobacco Control (FCTC)[711] to which Uruguay is a party and Switzerland a signatory[712]. Tribunal made reference to human health[713] and recognised Uruguay's duty to guarantee the right to health[714]. The arbitral tribunal, by rendering an award favorable to the host state, participated to the protection of the human right to health, without expressly saying so.

It is interesting to note that the door opened by reference to article 31(3)(c), was not used to bring human rights considerations in the arbitration. Indeed, there are arbitral tribunals that were willing to use the VCLT to interpret BIT provisions but not to incorporate IHRL in the proceedings, especially in a situation of crisis. In the following cases, arbitrators have gone further in the consideration of human rights.

In the early case of *SD Myers v. Government of Canada*[715], Canada banned the export of PCB (polychlorinated biphenyl) wastes because of its negative impact on the environment and health."[716] In this case, the arbitral tribunal recognised that was "appropriate for the Tribunal to examine the international law rules of interpretation. The first port of call is the Vienna Convention on the Law of Treaties"[717]. However, the tribunal only relied on article 31(3)(a) and (b)[718] and examined some international law instruments[719]. Arbitrators have discussed NAFTA in light of the North American Agreement on Environmental Cooperation[720] and the Basel Convention[721], under which "State parties to the Basel Convention accept the obligation to ensure that hazardous

[711] *WHO Framework Convention on Tobacco Control* (entered into force 27 February 2005), United Nations, Treaty Series, vol. 2302, p. 166. 2003.
[712] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at para 85.
[713] *Ibid* at paras 158, 304, 394.
[714] *Ibid* at 304.
[715] *S.D. Myers, Inc. v Government of Canada*, *supra* note 386.
[716] *Ibid* at para 95.
[717] *Ibid* at para 200.
[718] *Ibid* at para 201.
[719] *Ibid* at para 204.
[720] *North American Agreement on Environmental Cooperation* (entered into force 1 January 1994), 32 I.L.M. 1480 1993; *S.D. Myers, Inc. v Government of Canada*, *supra* note 386 at paras 216, 250.
[721] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (entered into force 5 May 1992), 1673 U.N.T.S. 126 1989.

wastes are managed in an environmentally sound manner"[722]. The tribunal, in using the interpretation rules provided by the VCLT recalls that "[t]he drafters of the NAFTA evidentially considered which earlier environmental treaties would prevail over the specific rules of the NAFTA in case of conflict. Annex 104 provided that the Basel Convention would have priority if and when it was ratified by the NAFTA Parties."[723]
It is a rare case where there is an extended discussion surrounding the interpretation of a BIT in light of international environmental provisions.

Recently, an arbitral tribunal effectively put words of this thought regarding the use of article 31(3)(c). The case of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*[724], concerning water and sewage services[725][726], the tribunal admitted that it was its role to interpret the convention by taking into account the rules of the VCLT, more particularly article 31(3)(c)[727]. It emphasised on its role to duly consider other rules of international law: "[t]he Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights"[728].

The *Urbaser* tribunal expressly recognised the possibility to incorporate human rights considerations in investment arbitration through Article 31(3)(c) but more importantly, that arbitrators had the duty to do so. It accepted that such considerations were within its powers. The tribunal discussed the relevance of the human right to water and sanitation for the dispute, in light of Article 31(3)(c)[729].

[722] *S.D. Myers, Inc. v Government of Canada*, *supra* note 386 at 106.
[723] *Ibid* at para 214.
[724] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[725] *Ibid* at para 34.
[726] *Ibid* at paras 68–69.
[727] *Ibid* at para 1200.
[728] *Ibid.*
[729] *Ibid* at paras 1204–1205.

The UN Committee on Economic, Social and Cultural Rights says that "States parties should ensure that the right to water is given due attention in international agreements"[730]. According to the *Urbaser* tribunal, such comment "includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements"[731]. This decision demonstrates the usefulness of Article 31(3)(c) in ensuring that human rights are considered and relevant in ISDS.

The case of *David R. Aven and Others v. Republic of Costa Rica*[732]*,* is also noteworthy and involved environmental concerns. During the dispute, the tribunal noted that "both Parties are in agreement that the customary international law rules of treaty interpretation constitute "applicable rules of international law" under Article 10.22(1) DR-CAFTA and that such rules are reflected" in the VCLT[733]. The arbitral tribunal considered article 31(3)(c) of the VCLT in order to construe the meaning of DR-CAFTA provisions[734] that concerned environment protection. Tribunal acknowledges that the parties to the treaty at stake must "act in line with principles of international law"[735]. In this case, the arbitral tribunal effectively relied on article 31(3)(c) to incorporate environmental provisions[736].

As shown in *SD Myers, Urbaser* and *David Aven,* it is possible for arbitrators to use the VCLT to construe the meaning of a BIT by adding environmental and international human rights law provisions. It moves from a theoretical concept to a practical tool is ISDS. It is a great step forward compared to the decisions rendered in the past where arbitrators usually found IHRL irrelevant or not within their jurisdiction.

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[730] UN General Comment 15, 2002, note 377 at para 35: it also adds that "Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water".
[731] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at para 1209.
[732] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.
[733] *Ibid* at para 375.
[734] *Ibid* at para 411.
[735] *Ibid* at 412.
[736] *Ibid* at paras 417, 418; *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (entered into force 21 December 1975), 996 U.N.T.S.245 1971; *Convention on Biological Diversity* (entered into force 29 December 1993), 1760 U.N.T.S. 69 1992.

It must also be mentioned that there is a case where the VCLT was used to introduce human rights elements, but it concerned civil and political rights of the investor. In the case of *Al Warraq*[737], the tribunal makes an extensive discussion of the obligations covered by the ICCPR[738]. The tribunal recalled that by being a State party to the ICCPR, it "undertakes to refrain from doing anything injurious to human rights and do everything to ensure respect for human rights of the individual person concerned. It is the failure to honour this obligation that amounts to a violation of the principle of good faith"[739].

It can be seen that the recognition of States' obligation to protect civil and political rights is clearer than regarding the protection of economic, social and cultural rights.
Indeed, in situations where similar human rights of local populations (i.e. economic, social and cultural rights) are concerned, the reference to article 31(3)(c) is hazardous and irregular. "There are certain interpretive tools available to arbitrators, including provisions of the Vienna Convention on the Law of Treaties (VCLT) which have been underutilized by IIA arbitrators to date".[740] Arbitrators deal with the treaty interpretation rules in a very unpredictable manner and it impacts legal certainty. The parties to the BIT cannot know when the VCLT will be used to incorporate human right provisions in the arbitration proceedings. It can be said that "[b]ecause of its general applicability, Article 31(3)(c) provides a potential gateway for reference to human rights instruments in the interpretation of investment treaties"[741].

Finally, there are investment cases where arbitrators have referred to human rights obligations, more precisely economic social and cultural rights, without using article 31(3)(c)

[737] *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, 2014.
[738] *Ibid* at paras 177, 202, 556 and following.
[739] *Ibid* at 558, 559, 560.
[740] UNCTAD Report 2009, note 367 at 13; Moshe Hirsch, "Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective" in Yuval Shany & Tomer Broude, eds, *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, 2008) at paras 323–343.
[741] Calamita, *supra* note 431 at 178.

VCLT[742]. Two of these cases involved environmental as well as health issues[743] and the other four cases involved the human right to water [744].

For instance, in the case of *Azurix Corp*[745]*,* the arbitral tribunal affirmed that the BIT must be interpreted in accordance with the VCLT[746] made a reference to article 31(1) of the VCLT in order to interpret the fair and equitable treatment (FET) standard[747] but not to article 31(3)(c).
Similarly, in the case of *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*[748]*,* involving access to water, the tribunal acknowledged that it had to interpret the BIT in light of article 31(1) of the VCLT[749] to interpret certain BIT provisions like the FET standard. However, it did not mention article 31(3)(c) in order to take into account other relevant rules of international law. The tribunal's reference to the Vienna Convention did not serve the purpose of considering IHRL.
In *SAUR International,* the tribunal went as far as stating that: "human rights in general, and the right to water in particular, are one of the various sources that the tribunal should take into account to resolve the dispute."[750] Again, human rights were not further dealt with by arbitrators in order to reach a decision.

Where there is no mention of article 31(3)(c) VCLT, human rights consideration is inconsistent. Unless human rights are actually part of a BIT, VCLT should be used consistently to deal with these issues.

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[742] *Azurix Corp. v The Argentine Republic*, *supra* note 595; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488; *SAUR International S.A. c. République Argentine*, *supra* note 595; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, *supra* note 538; *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541; *Burlington Resources Inc v República del Ecuador*, [2017] ARB/08/5 .
[743] *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541; *Burlington Resources Inc. v. República del Ecuador*, *supra* note 742.
[744] *Azurix Corp. v The Argentine Republic*, *supra* note 595; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488; *SAUR International S.A. c. République Argentine*, *supra* note 595; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, *supra* note 538.
[745] *Azurix Corp. v The Argentine Republic*, *supra* note 595.
[746] *Ibid* at para 307.
[747] *Ibid* at paras 307, 359.
[748] *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No.*, *supra* note 533.
[749] *Ibid* at para 7.4.2.
[750] *SAUR International SA c République Argentine (Decision on Jurisdiction and Liability)*, [2012] ARB/04/4 at para 330.

Furthermore, this analysis of IHRL considerations shows that there is a lack of coherence in the awards rendered where economic, social and cultural rights are relevant. There is a trend highlighting that VCLT is not used in a consistent manner where there are human rights issues. In many cases where it is mentioned, it does not serve the purpose of protecting human rights by bringing IHRL to the dispute. Article 31(3)(c) VCLT is a tool that could be used "for reconciling different international law norms in the areas of foreign investment and human rights"[751]. Indeed, "through the normative substance of economic and social rights recognised in the Covenant as they could inform the interpretation of investment treaties by arbitral tribunals *qua* article 31(3)(c)"[752].

Therefore, it can be said that article 31(3)(c) is the tool that "covers both of the relationships opening the interpretation of an investment treaty to human rights considerations"[753]. Clearly, "investment arbitrators are equipped with sufficient interpretative tools to achieve the idea of a thick rule of law and to ensure sufficient policy space for host states to regulate in the public interest"[754]. But there is a serious issue of predictability and legal certainty that weakens both the arbitral system and the rule of law. Arbitrators, in fulfilling their duties, must now address those recurring cross-cutting issues of investment and human rights law[755]. Through a better application of Article 31(3)(c), arbitrators could develop a trend of interpretation that would be coherent and predictable so as to ensure legal certainty[756]. There are some defects concerning article 31(3)(c) that need to be mentioned.

Sub-section 2: The problems of Article 31(3)(c)

[751] UNCTAD Report 2009, note 367 at 13; Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection" (2008) VVII Finnish Yearbook of International Law 91 at 91–130.
[752] Simma, *supra* note 10 at 591.
[753] *Ibid* at 584.
[754] Schill, *supra* note 51 at 101.
[755] Simma & Kill, *supra* note 666 at 707.
[756] *Ibid* at 703: "The practice of referring to external rules to determine the meaning of generic terms would seem to be a fruitful field for the harmonization of human rights and international investment law".

The reference to article 31(3)(c) of the VCLT can be a tool for arbitrators to develop the protection of local population's human rights in ISDS. However, it is a mechanism that has some flaws.

First-of-all, the content of article 31(3)(c) rises debates as to what it actually is. As it stands, "[t]here shall be taken into account, together with the context […] (c) Any relevant rules of international law applicable in the relations between the parties"[757], the VCLT provides no guidance how as how the interpretation should be done. Similarly, it does not explain what "take into account" means, neither what are the "relevant rules of international law". As Calamita explains, "the meaning of 'take into account' is of particular interest as it raises global question about what role the introduction of human rights treaties via the mechanism of Article 31(3)(c) might have in the interpretative process"[758].
Furthermore, the absence of precision regarding the "relevant" international law rules leaves it difficult to arbitrators to know the extent to which international human rights law is to be taken into account when interpreting a BIT[759]. Normally, this is a reference to the sources contained in article 38 of the ICJ Statute[760]. In considering certain human rights, arbitrators must establish that they are actually rules of law[761].

This is a situation that creates a paradox because this provision of the VCLT is supposed to provide guidance for treaty interpretation but the tool itself is vague and unclear as to its meaning[762]. It highlights, again, legal certainty issues.

Additionally, by enabling arbitrators to bring new norms, that were not considered by the parties into ISDS, it grants them considerable power and discretion[763]. Article 31(3)(c) is "a tool of interpretation not explicitly vested with the power to modify"[764].

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[757] *VCLT*, *supra* note 668 s 31(3)(c).
[758] Calamita, *supra* note 431 at 178.
[759] Simma & Kill, *supra* note 666 at 695; Richard K Gardiner, *Treaty interpretation*, The Oxford international law library (Oxford: Oxford University Press, 2008) at 258, 260.
[760] *Statute of the International Court of Justice* (entered into force 24 October 1945) Article 38.
[761] Simma & Kill, *supra* note 666 at 695.
[762] Calamita, *supra* note 431 at 178.
[763] Simma, *supra* note 10.
[764] Simma & Kill, *supra* note 666 at 694.

Bringing human rights law during the phase of the proceedings is an *ex post* approach; it does not correspond to what the parties initially intended, especially if there is no mention at all of any human rights provisions in the BIT.[765]

This raises questions as to the powers of arbitrators. They must not go too far in exceeding it as they are under the threat of seeing their award annulled by an ad-hoc Committee established under the rules contained in the ICSID Convention[766]. If the award is not submitted to the ICSID Convention, the parties can seek judicial review in the national courts of the state where the arbitration took place[767]. This procedure can be useful because the arbitration clause limits arbitrators' jurisdiction which means that if they go too far in their interpretation and exceed the mandate that was given to them, either party can request annulment of the award[768].

Nonetheless, it seems that the consideration of human rights is a growing trend in ISDS especially because of their essential nature. As Farrugia writes, "[i]t is now accepted as perfectly permissible for a tribunal to draw upon […] general human rights considerations when applying international law […] to investment agreements provided that such consideration takes place in the context of the investment dispute"[769].

All this being said, it would be better if BIT provisions were clearer when signed by States. Clear provisions would bring better legal certainty than relying on treaty interpretation provisions[770]. It would avoid relying on arbitration awards only because they are of persuasive value in the field of investment law.

This section has focused on how international human rights law could serve arbitral tribunals where problems regarding human rights of local populations are raised. The awards studied show that the mention of article 31(3)(c) is not systematic and that it is clearly underused for the purpose of protecting human rights[771]. It has been explained that it is possible for arbitrators,

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[765] Simma, *supra* note 10.
[766] *ICSID*, *supra* note 314 s 52(1)(b).
[767] Juan Fernandez-Armesto, "Different Systems for the Annulment of Investment Awards" (2011) 26:1 ICSID Review 128 at 134.
[768] *Ibid* at 139–140.
[769] Farrugia, *supra* note 329 at 264.
[770] Calamita, *supra* note 431 at 168.
[771] Zarra, *supra* note 281 at 173: "investment tribunals do not often make reference to such a principle, and they merely apply the rules of international law that, on a case-by-case basis, appear to be relevant".

indeed necessary, to introduce such considerations by the means of the VCLT on a regular basis[772] so as to enable the protection of local populations and the promotion of legal certainty[773]. Obviously, "international law includes 'a set of obligations to protect fundamental human rights' just as much as it includes investment protections and investment law"[774]. Even if the use of the VCLT can be improved, international human rights laws and more particularly economic, social and cultural rights, are known to be vague. Their protection by arbitral tribunals is difficult and hardly consistent. The following section aims at discussing what problems arbitral tribunals face when seeking to introduce IHRL considerations into their reasoning.

[772] *Ibid* at 174.
[773] Simma & Kill, *supra* note 666 at 694, 707: "The capacity of these interpretative methods to effectively transmit the normative content of external rules in a way that promotes coherence among legal regimes should not be discounted".
[774] Farrugia, *supra* note 329 at 264.

Section 2: The uncertainty of socio-economic rights in investment arbitration

Human rights are often considered to be civil and political rights; "[h]owever, within international law, human rights refer to both civil and political rights as well as socioeconomic rights"[775]. There is an important number of cases that concern the right to water, to health, to culture and environmental rights. Those as economic, social and cultural rights; "[a]s such, this is the set of rights that the ISDS regime most urgently needs to protect"[776].
Those rights are second or third generation rights; they are considered not to be clear enough and their definitions and status are still controverted[777]. Environmental rights have for their part slowly been elevated, in the last decade, to the rank of human right[778].

Where the investor, who obtained a contract to deliver public services fails to abide by its obligation, the State has a duty to ensure that its population benefit from the public service. Indeed, "[f]ailure to effectively regulate and control water services providers" amount to a breach of the right to water from the State[779]. However, regarding economic, social, and cultural rights "the States' obligations necessary to operationalize the rights are themselves the subject of debate."[780]

The most important legal instrument for this discussion is ICESCR[781]. Most of the governments of the world, 170 States exactly, are parties to this Convention[782]. By being party to this Convention, States must take steps " […] with a view to achieving progressively the full

[775] Bradlow, *supra* note 33 at 359; Jack Donnelly, *Universal human rights in theory and practice*, 3rd ed (Ithaca: Cornell University Press, 2013) at 40–54.
[776] Bradlow, *supra* note 33 at 360.
[777] Marcelos Neves, "The symbolic force of human rights" (2007) 33:4 Philosophy and social criticism 411 at 421: "This very extensive view of human rights, including so-called third- and even fourth-generation rights, has drawn criticism for vagueness, not to mention innocuousness".
[778] Francesco Francioni, "International Human Rights in an Environmental Horizon" (2010) 21:1 EJIL 41 at 42–43: "Recent practice shows that the protection of the natural environment in special socio-cultural contexts is a sine qua non for the enjoyment of human rights by members of the relevant group or community."
[779] UN General Comment 15, 2002, note 377.
[780] Simma & Kill, *supra* note 666 at 706.
[781] *ICESCR*, *supra* note 170.
[782] "International Covenant on Economic, Social and Cultural Rights", online: *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>.

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"[783].

The ICESCR is relevant when States sign treaties with international corporations that tend to ignore human rights[784].

The work of arbitrators in incorporating human rights law in their decisions is facilitated if the host state is party to the ICESCR. The convention can form part of the relevant law to be applied.[785] The U.N. reaffirmed that "[j]udges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions."[786]

Therefore, there is a general duty to ensure that economic, social and cultural rights are guaranteed throughout the world[787]. In the previous section, it has been argued that ISDS should seriously take into considerations international human rights law so as to limit investors' misconduct towards human rights and uphold States' measures that seek to protect them.

Once arbitrators manage to incorporate IHRL as relevant law into the dispute thanks to treaty interpretation, they face another issue: the vagueness of socio economic rights.

Those rights are at the origin of a lot of debates and known to be nebulous and uncertain (sub-section 1). These difficulties impact the inclusion of such rights as well as the coherence of arbitration decisions in the matter (sub-section 2).

[783] *ICESCR*, *supra* note 170 s 2(1).
[784] UN General Comment 14, 2000, note 231 at para 50: violation of the Covenant can be constituted by "the failure of the State to take into account its legal obligations regarding the right to health when entering into […] agreements with [...] multinational corporations" .
[785] Simma, *supra* note 10 at 586–587.
[786] UN General Comment 15, 2002, note 377 at para 58.
[787] Lo, *supra* note 331 at 14: "There are certain categories of human rights which require States to ensure that their people will be able to enjoy minimum standards of health and livelihood."

Sub-section 1: Vagueness of international human rights law

International human rights law is said to be vague, containing ambiguous human rights that are difficult to apply because of their indeterminate status.[788] The vagueness of human rights "implies dissent about the material, personal and temporal scope of validity of such rights."[789] This is blatant regarding economic, social and cultural rights[790]. These rights, essential to the realisation of any human beings[791], such as the right to water, the right to health, the right to a safe environment, cultural rights and many others are not easily ascertainable. As Lord Bingham puts it, "[i]t must be accepted that the outer edges of some fundamental rights are not clear-cut."[792]

Petersmann explains that international human right law is incomplete in nature[793]. ECOSOC rights are difficult to characterize in their substance also because they contain other implicit rights declared by international organisation. Sometimes, U.N. bodies have recognised other human rights that were not originally contained in the ICESCR.

For instance, "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights" was developed from article 11 of the ICESCR[794]: the right to an adequate standard of living and the right to life.[795] The Committee on Economic, Social and Cultural Rights provided an explanation as to what constitutes the right to water. It stated that "[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use"[796]

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[788] John Tobin, "Seeking to persuade: A Constructing Approach to Human Rights Treaties Interpretations" (2010) 23:1 Harvard Human Rights Journal 201 at 201: "Human rights protected in international treaties are invariably vague and ambiguous".
[789] Neves, *supra* note 777 at 420.
[790] Calamita, *supra* note 431 at 182.
[791] *ICESCR*, *supra* note 170 Article 2(1).
[792] Bingham of Cornhill, *supra* note 3 at 68.
[793] Petersmann, *supra* note 227 at 290.
[794] *ICESCR*, *supra* note 170 s 11.
[795] *The human right to water and sanitation*, GA Res 64/292, UNGAOR, 64th Sess, UN Doc A/RES/64/292 (2010); *Human rights and access to safe drinking water and sanitation*, HRCOR, 15th Sess, UN Doc A/HRC/RES/15/9 (2010); note 377; *The human right to safe drinking water and sanitation*, HRCOR, 18th Sess, UN Doc A/HRC/RES/18/1 (2011) at 2: "the right to an adequate standard of living and inextricably related to [...] the right to life and human dignity".
[796] UN General Comment 15, 2002, note 377 at para 2.

It would be too long to discuss the question of vagueness regarding socio-economic rights. Therefore, there will be a focus on the human right to water to highlight this problem. Also, it has been the subject of many investment arbitration cases.

The human right to water is not expressly enshrined in the ICESCR neither it is in other binding international human rights law instruments[797], except for women[798], children[799], and prisoners of war[800]. This loophole is curious because it is a "biological fact that every person needs water to survive. Unlike other resources, water can be neither substituted nor artificially produced"[801]. Truswell explains this gap by the fact that "water is so obviously vital to human life that early drafters of human rights instruments did not feel that a right to water needed to be stated"[802]. It is an old prerequisite for realizing any other human right[803].

The reality is that the human right to water sounds inferior to civil and political rights:

> In practice, economic, social and cultural rights are treated as distinct and often subordinate to civil and political rights. These differences and inequalities between the two groups of rights are reflected in the differently worded obligations, implementation and enforcement mechanisms contained in the ICCPR and the ICESCR[804].

The ICESCR "merely requires" whereas the ICCPR imposes obligations; "international human rights treaties are themselves largely indeterminate and lack sufficiently clear normative content to serve as a principled interpretative guide to the rights and obligations in other treaties"[805]. As a consequence, "the international community has inadvertently perpetuated the belief that the right to water is inferior to or less fundamental than other human rights"[806]. Only forty-one countries

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[797] Bray, *supra* note 524 at 475.
[798] *Convention on the Elimination of All Forms of Discrimination against Women* (entered into force 3 September 1981), 1249 U.N.T.S. 13 1979 Article 14(2h).
[799] *Convention on the Rights of the Child* (entered into force 2 September 1990), 1577 U.N.T.S. 3 1989 Article 24.
[800] *Geneva Convention Relative to the Treatment of prisoners of War* (entered into force 21 October 1950), 75 UNTS 135 1949 Article 26.
[801] Truswell, *supra* note 242 at 572.
[802] *Ibid*; Rebecca Brown, "Unequal burden: Water privatisation and women's human rights in Tanzania" (2010) 18:1 Gender and Development 59 at 59.
[803] Bray, *supra* note 524 at 476; Aristotle, *Metaphysics*, translated by Hugh Tredennick (Cambridge: Harvard University Press, 1933) at 983b.
[804] Bray, *supra* note 524 at 476–477.
[805] Calamita, *supra* note 431 at 182; Ryan Goodman & Derek Jinks, "How to Influence State: Socialization and International Human Rights Law" (2004) 54 Duke Law Journal 621 at 676; Tobin, *supra* note 788.
[806] Bray, *supra* note 524 at 477.

have guaranteed the right to water in their domestic legislation or constitution[807]. It can be noted that such a guarantee does not exist in most of the countries. Even though it is repeatedly affirmed by various authorities, the human right to water is not internationally accepted[808].

The guidance given by the ICESCR concerning the realisation of socio-economic rights is poor. It states that the rights it contains must be "realised progressively on the basis of the resources available to States"[809]. In practice, it is difficult to assess what "realised progressively" actually means and how judges and arbitrators should apply such statement.

The international disagreement regarding the status of the right to water is also noticeable regarding the adoption of the UNGA resolution which proclaim the right to water as a human right[810]. Forty-one countries abstained from voting this resolution and among them the U.S.A, Canada, Japan, U.K, Australia. Such behaviour has consequences; "[t]he reluctance of powerful countries (and major aid donors) to define access to fresh water as a human right will delay the rights-based treatment of water access under international law"[811]. This highlights the absence of consensus and incoherence regarding the right to water. The controversy also exists regarding the right to a safe environment: "[t]he exact scope of those human rights obligations continues to fuel animated discourse".[812]

The status of economic, social and cultural rights is often opened to debates as noticed by the U.N.: "there is sometimes vigorous debate *within* the human rights law field as to whether there is a hierarchy of human rights"[813].

[807] Farrugia, *supra* note 329 at 267.
[808] Truswell, *supra* note 242 at 572; Will Schreiber, "Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" (2008) 48:2 Natural Resources Journal; Fitzmaurice, Malgosia, "The human right to water" (2006) 18 Fordham Environmental Law Review 537; *The Right to Water*, by OHCHR, Health and Human Rights Publication Series 3 (Geneva: WHO, 2003).
[809] *ICESCR*, *supra* note 170 s 2; Truswell, *supra* note 242 at 573.
[810] UN Doc A/RES/64/292 note 795 at 2: "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".
[811] Truswell, *supra* note 242 at 574.
[812] Farrugia, *supra* note 329 at 282.
[813] UNCTAD Report 2009, note 367 at 13.

The fact that human rights provisions in international treaties are ambiguous, very general, and open to debates render their implementation complicated[814]. The application of socio-economics rights raises difficulties for international human rights bodies and national courts, even though they are more familiar with this practice. This situation can explain why it is complicated to raise these rights in international investment arbitration and why there is a lack of consideration and enforcement of those rights by investment arbitrators. It is hard for adjudicators to apply vague provisions.

Facing socio-economic rights claims, arbitrators must assess the standards of realization as it depends on the country in question and the economic, political, and judicial situation surrounding it. Article 2(3) of the ICESCR provides that "[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals"[815].
In investment arbitration cases, the defending State is often a developing country (either from South America or Africa). The legal materials are vague on the topic and it does not facilitate the work of arbitrators to consider IHRL, especially if they are experts in international investment law. It is necessary that they become able to grapple these issues as "constitutional and legal protection of economic and social rights remains weak in many common law countries and less-developed countries, effective protection of 'freedom from poverty' […] often remains a cosmopolitan dream"[816].

In conclusion, there are still international debates on the meaning and recognition of certain human rights, such as the right to water or the safe environment. Calamita and Tobin express the view that the imprecision of terms in human rights treaties, and the fact that it lacks "delegation mechanisms for binding, authoritative interpretation […] is chosen to facilitate textual agreement"[817]. It seems that there is political desire to leave things vague so as to enable to adoption of binding international human rights law instruments.

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[814] Louise Doswald-Beck & Sylvian Vité, "International Humanitarian Law and Human Rights Law" (1993) 293 International Review of the Red Cross 94 at 106: "[t]he major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty language".
[815] *ICESCR*, *supra* note 170 s 2(3).
[816] Petersmann, *supra* note 227 at 293.
[817] Calamita, *supra* note 431 at 182; Tobin, *supra* note 788.

Nevertheless, McCorquodale rightly writes that "human rights – civil, political, economic, social, cultural and collective that might be considered to be included in a rule of law"[818] and they should be protected, especially in States where there is governmental and economic instability (Argentina, Bolivia, Tanzania and others). ISDS is confronted with these questions and must be a mechanism to strengthen their protection on a regular basis. The following sub-section will demonstrate that IHRL's vagueness has consequences on the coherence of the jurisprudence developed by investment arbitrators.

Sub-section 2: Inconsistent considerations of IHRL as a consequence of vagueness

The absence of binding precedent or "jurisprudence constante" in international investment arbitration, together with the fact that it is an *ad-hoc* mechanism, impact the consistency and coherence of the decisions that are rendered. This is particularly true in cases where economic, social and cultural rights are involved as they derive from a body of law known to be vague.
This sub-section will focus on how the arbitral jurisprudence consider international human right law as part of substantive law, and whether there is consistency.

Arbitrators have considered that international human right law was irrelevant to investment arbitration, as in *Biloune v Ghana*[819]. The tribunal said that its "competence is limited to commercial disputes" and that it would "arbitrate only disputes "in respect of" the foreign investment"[820]. The tribunal added: "while the acts alleged to violate international human rights of Mr Biloune […] this Tribunal lacks jurisdiction to address […] a claim of violation of human rights"[821].
Similar statements occurred in cases involving socio-economics rights of local populations, where serious disregards of human rights had occurred. For instance, in *Von Pezold v Zimbabwe,* the

[818] Robert McCorquodale, "Defining the international rule of law: defying gravity?" (2016) 65:2 ICLQ at 282.
[819] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (Award on Jurisdiction and Liability)*, 1989 Ad-hoc Arbitration.
[820] *Ibid* at para 61.
[821] *Ibid.*

arbitral tribunal said that IHRL was not within its jurisdiction[822] and "it did not feel competent to interpret indigenous rights and did not find human rights to be applicable"[823]. The tribunal also refused to recognise the connection between international investment law and IHRL[824].
Similar statements can be found in *Border Timbers Limited*[825], *Siemens*[826], and *Sempra*[827], in which the arbitral tribunal found that international human rights law was not relevant to the dispute, nor in its mandate and did not mention it in its reasoning.

Contrary to this tendency, there have been arbitrators who found international human rights law to be relevant for the case they were adjudicating. These decisions will be discussed in order to see how they consider and protect human rights in their decisions.

In *National Grid PLC v. Argentine Republic*[828], the Tribunal acknowledged the importance of Argentina's obligations under international law[829] and stated that Argentina "had as an objective the protection of social stability and the maintenance of essential services vital to the health and welfare of the population, an objective which is recognized in the framework of the international law of human rights."[830] However, the tribunal did not consider human rights in reaching its decision and IHRL did not really impact the reasoning and the award rendered.

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[822] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508 at para 59: "The Arbitral Tribunals are not persuaded that consideration of the foregoing [human rights obligation under international law] is in fact part of their mandate under either the ICSID Convention or the applicable BITs".
[823] Kube & Petersmann, *supra* note 17 at 90; *Bernhard Von Pezold and ors. v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505 at para 57.
[824] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508 at para 58: "The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent".
[825] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505 at paras 58–59: "The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent [...] The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs".
[826] *Siemens A.G. v. The Argentine Republic*, *supra* note 595 at paras 79, 121.
[827] *Sempra Energy International v The Argentine Republic*, *supra* note 336 at para 332; Kulick, *supra* note 617 at 281: "There is little doubt as to the Tribunal's eagerness to avoid considering human rights implications".
[828] *National Grid plc v The Argentine Republic (Award)*, [2008] UNCITRAL .
[829] *Ibid* at para 136.
[830] *Ibid* at para 245.

Similarly, in the case of *EDF International,* the tribunal did "not call into question the potential significance or relevance of human rights in connection with international investment"[831]. It added that "the Tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights"[832] but it was not persuaded that the respondent's actions were necessary to protect human rights[833].

In both cases, human rights were considered in the tribunal's reasoning but not afforded any protection.

There is, here, an illustration of the inconsistency arbitral tribunals concerning the relevance of human rights law in ISDS. This incoherence is particularly noticeable in awards dealing with the human right to water.

Sometimes tribunals have not considered, nor given protection to the right to water[834]. In *Azurix v. Argentina,* the tribunal stated that "[a]ccording to Argentina's expert, a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider"[835] but then, the Tribunal concluded that consumers' rights had not been violated. "The Tribunal fails to understand the incompatibility" between BIT's obligations and human rights ones[836].

In *Suez v Argentina*[837]*,* the tribunal admitted the severity of Argentina's financial crisis. Nonetheless, it affirmed that "Argentina is subject to both international obligations, i.e. human rights and 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,

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[831] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 600 at para 912.
[832] *Ibid* at paras 192–193.
[833] *Ibid* at para 914.
[834] *Aguas del Tunari SA v Bolivia (NGO Petition to Participate as Amici Curiae)*, *supra* note 519; *Azurix Corp. v The Argentine Republic*, *supra* note 595; *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No.*, *supra* note 533; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488; *Impregilo SpA. v Argentine Republic*, *supra* note 595; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, *supra* note 538.
[835] *Azurix Corp. v The Argentine Republic*, *supra* note 595 at para 254.
[836] *Ibid* at para 261.
[837] *Suez, Sociedad General de Aguas de Barcelona S,A, and Interagua Servicios Integrales de Agua SA v Argentina (Decision on Liability)*, [2010] ARB/03/17 at para 235.

contradictory, or mutually exclusive[838]. IHRL was not relevant in the discussion and the tribunal decided in favour of the investor.

Again, this can be seen in the *Suez/Vivendi case*[839] where the tribunal recognised the "fundamental role of water in sustaining life and health and the consequent human right to water"[840] but "Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment"[841].

In *Biwater Gauff,* the tribunal acknowledged that "the arbitration raises a number of issues of vital concern to the local community […] water or other infrastructure services"[842]. The tribunal was aware of the challenges for local population and the potential impact of the award[843], but the right to water received little relevance in the decision. The *Biwater* decision is more nuanced than the previous awards regarding the consideration of international human rights law.

However, there are cases were arbitrators took into account human right to water issues and human rights law at large[844]. However, they did not guarantee human rights protection in all these cases.

In the case of *SAUR International*, the tribunal made very interesting comments regarding the right to water:

> Les droits de l'homme en général, et le droit à l'eau en particulier, constituent l'une des diverses sources que le Tribunal devra prendre en compte pour résoudre le différend car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels et, de plus, ils font partie des principes généraux du droit international.[845]

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[838] *Ibid* at para 240.
[839] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic (Decision on Liability)*, *supra* note 540: "The provision of water and sewage services to the metropolitan area of Buenos Aires certainly was vital to the health and well-being of nearly ten million people".
[840] *Ibid* at para 252.
[841] *Ibid* at 260.
[842] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Procedural Order No 5)*, *supra* note 488 at para 50.
[843] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at 358: "this arbitration raises a number of issues of concern to the wider community in Tanzania."
[844] *Methanex Corporation v. United States of America*, *supra* note 386; *SAUR International S.A. c. République Argentine*, *supra* note 595; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[845] *SAUR International S.A. c. République Argentine (Decision on Jurisdiction and Liability)*, *supra* note 750 at para 330.

It added that the right to water amounts to "un droit fundamental" for citizens[846]. However, few lines later, it said that "[l]e droit fondamental à l'eau et le droit de l'investisseur à bénéficier de la protection offerte par l'APRI opèrent sur des plans différents"[847]. It is an odd statement considering that the tribunal acknowledged the importance of guaranteeing the human right to water and recognized that it has a duty to take them into account. Then, the tribunal affirmed that the States human rights obligations were compatibles with the ones deriving from the BIT[848].

Like *Biwater* decision, there is a move from absence of human rights considerations to an acknowledgment of the existence of human rights problems. Nevertheless, the interest for IHRL remains poor and not consistent. Arbitrators do not have a clear position on the matter, like in *SAUR International.* "The actual impact of this recognition on the Tribunal's decision remains unclear"[849], it goes from the admission fundamental rights questions to their absence of guarantee in their reason. They admit IHRL without deeply engaging in the matter. In the end, the case was settled in favour of the investor. It cannot be said that human rights were protected rendered the tribunal and that local population having their right to water breached were helped by the arbitrator's decision. Therefore, the right to water in ISDS cases "often only played a marginal role in the judicial reasoning"[850].

It is only in *Methanex*[851] and *Urbaser*[852] that the tribunals actually dealt with IHRL and granted protection to the right to water.

In *Urbaser,* it was said that "investors can be subject to the duties prevailing under different branches of international law, including human rights"[853]. The tribunal affirmed that the right to water is a recognised human right and that the obligation to respect human rights is put both on

[846] *Ibid.*
[847] *Ibid* at para 331.
[848] *Ibid.*
[849] Lorenzo Cotula, "Human Rights and Investor Obligations in Investor-State Arbitration" (2016) 17:1 J of World Investment & Trade 148 at 153.
[850] Kube & Petersmann, *supra* note 17 at 81.
[851] *Methanex Corporation v. United States of America*, *supra* note 386.
[852] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[853] Shinde, *supra* note 264 at 54.

the State and the investor[854]. Private parties are not exempted from complying with human rights obligations[855].

This case law regarding the human right to water shows that the relevance of IHRL incoherent. The same right is concerned, sometimes the host state is the same (i.e. Argentina) but the attitude of arbitral tribunals is very different. There are cases where host state's measures were protected by the tribunals and others where it was not.

The right to health is regularly raised in ISDS[856]. It is often associated with investments impacting water or the environment. There are cases were health and human rights issues were not relevant for the tribunal.

In *SD Myers,* both parties acknowledged that PCBs raised serious health concerns[857]. However, the arbitrators held that Canada "could have satisfied any health or environmental concerns it had in a manner that did not impair open trade"[858] and decided for the investor.

In *Grandriver*[859]*,* the regulation of tobacco in the USA under the MSA (Master Settlement Agreement) was discussed. The arbitral tribunal went as far as saying that "the evidence before it leaves open to question whether the MSA scheme has in fact produced substantial health benefits for the participating states"[860]. The right to health was not further discussed.

Again, in *Tecmed v. Mexico,* the tribunal did not establish that the investment, requiring a waste dumping license, actually threatened health and considered the State measures to be an obvious expropriation[861]. Questions of human rights law were avoided by the tribunal.

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[854] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at paras 1193, 1205.

[855] *Ibid* at paras 1193, 1199: "an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights"; Attanasio & Sainati, *supra* note 639 at 746.

[856] Lo, *supra* note 331 at 15: "The problem is whether a measure taken by the host State to fulfill the requirements of the right to health will not be subject to compensation requirements as required by the BITs even if an investment is thus seriously affected." .

[857] *S.D. Myers, Inc. v Government of Canada*, *supra* note 386 at para 153.

[858] *Ibid* at para 298.

[859] *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, *supra* note 682.

[860] *Ibid* at para 185.

[861] *Tecmed*, *supra* note 386 at para 144.

There is a limited number of cases where actual consideration was granted to the right to health[862]. In *Methanex*[863], the tribunal granted protection to the right to health in an implicit manner, relying on the State police powers. It recognised that the MTBE (methyl tertiary butyl ether), a derivative of methanol, was contaminating water sources, harming the environment and endangering health. It found that the United States adopted "a non-discriminatory regulation for a public purpose" that could not amount to an expropriation[864]. Nevertheless, there was no real discussion of IHRL.

In *Chemtura v Canada*[865], the tribunal affirmed that the host State measure was "motivated by the increasing awareness of the dangers presented by lindane for human health and the environment"[866]. The tribunal was more inclined to afford protection to the right to health[867].

Recently, *Philip Morris v Uruguay*[868] is famous for its express human right to health's[869] considerations and prevalence[870]. The issue of public health was raised regarding the plain packaging for tobacco products. The arbitral tribunal reaffirmed the police powers doctrine enabling a host State to adopt measures for public health reasons, particularly the consumption of tobacco[871]. The tribunal also said that the BIT could not prevent the host State to regulate in the protection of public health[872]. "[T]ighter tobacco control is basically to enhance the protection of human rights, especially the right to health"[873].

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[862] *Methanex Corporation v. United States of America*, *supra* note 386; *Chemtura Corporation v Government of Canada (Award)*, [2010] UNCITRAL ; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[863] *Methanex Corporation v. United States of America*, *supra* note 386.
[864] *Ibid* at para 7.
[865] *Chemtura Corporation v Government of Canada (Award)*, *supra* note 862.
[866] *Ibid* at para 266.
[867] *Ibid* at para 135.
[868] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[869] *Ibid* at para 304.
[870] Zarra, *supra* note 281 at 171–172: "for the first time a tribunal fixed a clear hierarchy between the protection of public concerns and private interest of the investor".
[871] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at para 287.
[872] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Decision on Jurisdiction)*, [2013] ARB/10/7 at para 174; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at para 291: "Protecting public health has since long been recognized as an essential manifestation of the State's police power as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments "for reasons of public security and order, public health and morality".
[873] Lo, *supra* note 331 at 17.

Moving to another important fundamental right, investments often have an impact on the environment (i.e. gold mining operation, mining exploitation operations, water treatment and provision etc.) bringing right to a safe environment matters in ISDS. There was a time were environmental questions did not interest investment arbitration[874]. In *Compañia de Desarrollo* where the tribunal stated that "[t]he international source of the obligation to protect the environment makes no difference"[875] and added "no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures"[876].

In *SD Myers*, the tribunal concluded that the Canadian ban of exports of PCB waste aimed firstly at protecting the waste industry and not the environment[877]. In *Vattenfall*[878] environmental measures were adopted by Germany after a report highlight the negative impact of the coal-power plant on the environment and river's health[879]. Germany agreed to settle the case and lowered its environmental standards to fit the investor. Germany was referred to the European Court of Justice by the European Commission for its failure to protect the river's wildlife[880].

These cases highlight the absence of socio-economic rights mentions in investment arbitration awards. They are example of how the system fails in the protection of environmental rights.

Some improvements in the matter is noticeable in *Glamis Gold v USA*[881]. The arbitral tribunal studied the impact of California's environmental resolutions on investor's rights under NAFTA and decided in favour of the host State. This award "is a good example for demonstrating

[874] *Aguas del Tunari SA v Bolivia (NGO Petition to Participate as Amici Curiae)*, *supra* note 519; *Tecmed*, *supra* note 386.
[875] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Final Award)*, *supra* note 595 at para 71.
[876] *Ibid* at para 72.
[877] *S.D. Myers, Inc. v Government of Canada*, *supra* note 386 at para 162.
[878] *Vattenfall AB v Federal Republic of Germany (Request for Arbitration)*, [2009] ARB/09/6 .
[879] *Ibid* at para 40.
[880] European Commission, "Germany in Court for inadequate nature protection", (26 March 2015), online: *European Commission* <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4669>.
[881] *Glamis Gold Ltd. v. United States of America*, *supra* note 512.

that the indirect influence of human rights considerations is beginning to stretch beyond the confines of compensation"[882].

In the *Chemtura* award, there was increasing awareness of the dangers presented by lindane for the environment. The tribunal stated that "[a] measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"[883].

In *Pacific Rim Cayman v. El Salvador*, the country was sued for not delivering the mining concession to the investor as it did not meet the environmental regulatory requirements[884]. In the award, environmental issues were discussed, especially the fact that the mining concession would render water sources contaminated[885]. The investor's claim was dismissed. The tribunal granted protection to the environment by recognising that El Salvador did not breach any of its obligations under CAFTA[886].

Burlington v. Ecuador[887] raised other environmental concerns, where Ecuador adopted Law 42, increasing taxes for oil companies on windfall profits and subsequently breached by the investor. In the decision on counterclaims, arbitrators discussed the notion of environmental harm at length[888] and found Burlington liable for the "costs of restoring the environment" (i.e. environmental damages)[889]. The tribunal recognized "the public interest that underlies Ecuador's environmental counterclaim, namely the protection of the Amazon rainforest, which represents a major stake in the survival of mankind."[890] This case showed that "BITs are not international investment law in isolation, fully independent from other sources of law (both national and international)"[891].

[882] Kulick, *supra* note 617 at 303.
[883] *Chemtura Corporation v Government of Canada (Award)*, *supra* note 862 at para 266.
[884] *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541 at para 3.9 and following, 6.21.
[885] *Ibid* at para 8.33.
[886] *Central America Free Trade Agreement (CAFTA)*, 43 I.L.M. 514 2004.
[887] *Burlington Resources Inc. v. República del Ecuador*, *supra* note 742.
[888] See in particular *ibid* at para 273.
[889] *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630 at para 1099.
[890] *Burlington Resources Inc. v. República del Ecuador*, *supra* note 742 at para 632.
[891] Burova, *supra* note 622.

Recently, in *David Aven*[892], due consideration was granted to environmental issues. Investors decided to build tourist facilities. Costa Rican authorities issued injunctions to end the works of investors, building tourist facilities[893], as it led to felling of trees and impacted wetlands, therefore damaging the environment. Arbitrators accepted "giving preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed"[894]. The tribunal recalled that "Under Article 10, Section A of DR-CAFTA, foreign investors have the obligation to abide by and comply with the measures taken by the host State to protect the environment"[895].

Even if there was a contrast between human rights and environmental cases where arbitrators were more inclined to take international environmental law into account[896], this belief is evolving in light of the recent cases that grapple with other human rights questions[897].

There are few cases where indigenous rights were raised before arbitral tribunals like in *Glamis Gold,* which acknowledged the existence indigenous rights problems in the disputes but found it irrelevant to consider them[898].

Recently, in the *Von Pezold* case, the tribunal after indigenous rights have been raised to its attention, said that it was "not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs"[899].

Contrary to the other two cases, in *Grandriver Enterprise*, the claimant alleged that the measures taken by the USA to regulate the sale of tobacco were violating its rights as indigenous, because tobacco production was part of its culture[900]. Even if the tribunal briefly discussed the issue, it dismissed the claim, giving precedence to US health protection's measures[901].

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[892] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.
[893] *Ibid* at paras 93 and following.
[894] *Ibid* at para 412.
[895] *Ibid* at paras 736–739.
[896] Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 97 at 106.
[897] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[898] *Glamis Gold Ltd. v. United States of America*, *supra* note 512 at para 8.
[899] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508 at para 59.
[900] *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, *supra* note 682 pt II.
[901] *Ibid* at paras 209, 221, 234.

Indigenous rights are not good arguments to raise in front of investment tribunals as arbitrators usually find them of little interest.

Finally, cultural rights do not seem to be problematic for arbitral tribunals. Both in the case of *Southern Pacific Properties*[902] and in *Parkerings companies*[903], the arbitral tribunals have duly considered and granted protection to cultural rights violated by the investors[904]. In the few available cases concerning cultural rights, the position adopted by arbitrators is consistent.

There are pending cases which involve human rights considerations such as environmental rights[905] and health[906]. It remains to be seen how arbitrators will deal with these issues and if they will grant them some importance. The case of *Gabriel Resources* has already caused a lot of ink to flow in the media. In order to have their voices heard, local populations impacted by the investment are being represented by various NGOs[907].

It can be seen that the position of arbitral tribunals regarding the relevance of international human rights law in cases where economic, social and cultural rights are impacted by the investment, is oscillating[908]. Arbitrators do not provide any coherence in their statements regarding the relevance of IHRL. It should also be noted that it is complicated for them to address human rights issues. It is hard to understand how arbitrators in cases with similar factual background, similar respondents and the same human rights at issue, can reach completely opposite solution[909],

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[902] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award)*, [1992] ARB/84/3 .
[903] *Parkerings-Compagniet AS v. Republic of Lithuania*, *supra* note 681.
[904] *Ibid* at paras 382, 383, 465.
[905] *Infinito Gold v Costa Rica*, *supra* note 550; *Chevron Corporation (U.S.A.) v The Republic of Ecuador (Procedural Order No. 8)*, *supra* note 553; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v Romania (Procedural Order No. 19)*, *supra* note 558.
[906] *Chevron Corporation (U.S.A.) v The Republic of Ecuador (Procedural Order No. 8)*, *supra* note 553.
[907] "Gabriel Resources seeks damages from Romania in intl. arbitration over blocking gold mine due to environmental & access to water concerns", (2015), online: *Business & Human Rights Resource Centre* <https://www.business-humanrights.org/en/gabriel-resources-seeks-damages-from-romania-in-intl-arbitration-over-blocking-gold-mine-due-to-environmental-access-to-water-concerns-0>; Lisa Kadel & Christian Schliemann, "Gabriel Resources v. Romania: Local Residents as Third Parties in Investor-State Dispute Settlement?", (19 April 2019), online: *Oxford Human Rights Hub* <https://ohrh.law.ox.ac.uk/gabriel-resources-v-romania-local-residents-as-third-parties-in-investor-state-dispute-settlement/>.
[908] Schreuer, *supra* note 385 at 289: "The attitude of investment tribunals towards human rights considerations is not uniform. In a number of decisions, tribunals have shown a reserved or even negative attitude towards arguments based on human rights".
[909] Tienhaara, *supra* note 26 at 614: "there have been cases where several awards have been issued addressing the same facts where panels have reached diverging conclusions."

thereby creating such inconsistency within the jurisprudence. This challenges the concept of legal certainty[910].

In the cases discussed, human rights terminology is scarce. In other words, it appears that arbitral tribunals would rather mention the "public interest", "public health" rather than use the word "human right". As noticed by Cazala, "la pratique générale des tribunaux ne semble pas accorder de poids aux considérations de protection des droits de l'homme dans cet exercice"[911].

In addition, the "combination of imprecise, ambiguous standards and *ad hoc* arbitral resolution has led to a lack of coherence in the development of a 'system' of international investment treaty-based law"[912]. Indeed, the "formulation et l'autorité parfois incertaine de ces droits ne favorisent sans doute pas leur prise en compte la plus large par les tribunaux d'investissements".[913]

Thus, the vagueness of human rights law impacts ISDS and the awards rendered on the matter challenge legal certainty[914].

Therefore, it is necessary to conduct a deeper analysis of the tendency emanating from investment arbitration jurisprudence. This is the objective of the following chapter which will also address the impacts of the current state of ISDS on legal certainty, human rights, and the rule of law.

[910] Paunio, *supra* note 182 at 51; Hobér, *supra* note 197 at 64.
[911] Cazala, *supra* note 340 at 331.
[912] Calamita, *supra* note 431 at 167.
[913] Cazala, *supra* note 340 at 321.
[914] Calamita, *supra* note 431.

Chapter 3: Consequences of arbitral jurisprudence on legal certainty, human rights and the rule of law

In the last two decades, environmental and human rights issues have interfered with investment arbitration and ISDS cannot ignore these questions anymore. We have demonstrated that it is difficult to bring human rights claims before investment arbitration tribunals, both at the procedural and substantive stages. The system needs to adapt and evolve in light of the global changes and societies' development.
It is necessary to analyse what are the consequences of this on the jurisprudence of arbitral tribunals and its impact of legal certainty and the rule of law.

Therefore, this chapter aims at analyzing the trend developed by arbitral tribunals in cases involving human rights and what can be inferred from their decisions (Section 1). The jurisprudence of investment arbitration has consequences on legal certainty and it is necessary to understand what the effects of an absence of legal certainty in ISDS are, more precisely on human rights (Section 2). Finally, the impact of international investment arbitration on the rule of law, through the human rights and legal certainty elements, will bring the final thoughts to this thesis (Section 3).

Section 1: The trend of investment arbitration jurisprudence

Ten years ago, Toral and Schultz wrote that investment arbitration "seems to be leaning toward separation of human rights and investor's rights like oil and water"[915]. Is it still the case ? This section will focus on analysing the investment arbitration jurisprudence concerning human rights.

Host states taking measures to protect their local communities from an investment are often found to be in breach of an investment treaty in arbitration. "Human rights scholars and civil society, argue that foreign investors and governments do not prioritize the obligation to respect and protect fundamental human rights, thereby systematically undermining human rights standards"[916]. Human rights issues are often confronted with expropriation and FET standards and "these two obligations have the greatest potential to place limit upon state action for the protection and promotion of human rights while favouring commercial interests of foreign investors"[917].

If human rights and the environment are recurring issues, one must not ignore the "'thinness' of jurisprudence" regarding human rights[918]. Awards rendered are still very much silent regarding human rights law.[919]

This section will discuss the consistency in the jurisprudence developed by investment arbitration tribunals (sub-section 1) and then show that evolution is actually occurring in this field (sub-section 2). Bringing public international law matters into international investment law nonetheless remains a difficult task and ISDS is still confronted with difficult adjustments (sub-section 3).

Sub-section 1: An obvious inconsistence in investment arbitration awards involving human rights

[915] Toral & Schultz, *supra* note 376 at 589.
[916] Steininger, "Leiden Journal of International Law", *supra* note 345 at 34.
[917] Barnali Choudhury, "Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights" (2009) 46:4 Alta L Rev 983 at 995.
[918] Simma, *supra* note 10 at 578.
[919] Kube & Petersmann, *supra* note 17 at 67.

Because of procedural and substantive problems, there is inconsistency in affording protection to human rights. This has been demonstrated in the two previous chapters. The vagueness of economic, social and cultural rights clearly impacts how arbitrators consider them. Guntrip suggests that "the next stage in introducing human rights into ICSID arbitration will be to determine, with more precision, which rights are capable of forming the basis of host state human rights counterclaim"[920].

In jurisprudence involving socio-economic rights, *amicus curiae* are emerging and bringing transparency[921]: but they are not consistently admitted. "There is scope for more expansive amicus intervention. Whether more intense intervention will materialise in all the circumstances is far less clear"[922]. Third parties are often confronted to several admissibility criteria and they cannot fully participate in the proceedings[923]. The unsuccessful participation of third parties affect the opportunity for tribunals to consider human rights[924] and do not establish a stable and predictable environment for the parties, the tribunals and the third parties. Similar problems exist regarding counterclaims or the defence of protecting human rights; they are often dismissed and the relevance of IHRL does not meet unanimity among arbitral tribunals[925].

From this demonstration, it can be affirmed that arbitral tribunals "have not developed a coherent methodology for evaluating the human rights dimensions of investment disputes"[926]. Indeed, investment tribunals did not establish consistent body of rules in dealing with human rights[927] and this seriously impacts the rule of law.

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[920] Guntrip, *supra* note 629.
[921] Mourre, *supra* note 471 at 270: "there is certainly a trend towards increased transparency in investment arbitration, and the admission of amicus curiae briefs is part of that tendency".
[922] Lamb, Harrison & Hen, *supra* note 464 at 91.
[923] Mourre, *supra* note 471 at 270.
[924] *Ibid* at 266: "letting amici curiae enter the dark room will show the world how concerned international arbitrators are about issues like the environment, welfare or public health".
[925] Cazala, *supra* note 340 at 334: "il sera difficile pour l'État de présenter devant un tribunal arbitral d'investissement, une demande reconventionnelle portant sur des allégations de violations de droits de l'homme par l'investisseur"; Gaillard, *supra* note 648 at 1037–1041; See Thesis note 122 Part 2, Chapter 1, Section 3.
[926] Kube & Petersmann, *supra* note 17 at 86.
[927] Hirsch, *supra* note 896 at 107.

The Argentinian crisis is a blatant example of inconsistency in arbitral tribunals dealing with socio-economic rights. All claims arose out of the 2001-2002 financial crisis and the measures taken by Argentina to stabilize its situation but harming investors[928]. The cases often involved the right to water and the right to health. At a procedural level, there are cases where third parties were admitted and other not[929]. In addition, the necessity defense was sometimes accepted to justify emergency measures and sometimes refused[930]. The problem is that different arbitral tribunals "when confronted with the same facts, evidence, and argumentation would reach very different interpretations of the law and diametrically opposite holdings is, by itself, sufficient to call into question the legitimacy and viability of the ICSID arbitral system"[931].

In substance, consideration of human rights was frugal[932]. Most of the time arbitration tribunals swept away its argumentation as it was only "cursory reference to "human rights" without any further specification and elaboration"[933].

There is a spectacular incoherence regarding Argentina's decisions leading to completely contradictory outcomes from arbitral tribunals. Burke-White writes that the decisions are "deeply problematic, due in part to poor legal reasoning and questionable treaty interpretation and, also, to the contradictory holdings in the awards"[934].

Argentina's cases can be contrasted with the Tanzanian one[935], involving access to water and environmental questions. The state was not required to pay damages for breaching the BIT and the importance of those problems on local populations was acknowledged[936]. It is optimistic that "the outcome reached by the tribunal effectively supported the decision by a State to take drastic measures to regain control of its water supply from a private supplier whose performance had been poor"[937].

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[928] Burke-White, *supra* note 347 at 410.
[929] See note 122 Part 2, Chapter 1, Section 2.
[930] See Thesis *ibid* Part 2, Chapter 1, Section 3.
[931] Burke-White, *supra* note 347 at 425.
[932] See Thesis note 122 Part 2, Chapter 2, Section 2, Sub-section 2.
[933] Kulick, *supra* note 617 at 279.
[934] Burke-White, *supra* note 347 at 408.
[935] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488.
[936] Bray, *supra* note 524 at 481.
[937] Truswell, *supra* note 242 at 582; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488 at para 486; See also Kulick, *supra* note 617 at 300: "the Biwater award appears to have internalized the relevance of Global Public Interest considerations to an even higher degree than Azurix".

The vagueness and imprecision of economic, social and cultural rights render their protection by arbitral tribunals difficult. However, "dialogue about whether access to water is a human right, should not distract from the central fact regarding the necessity of water. Indeed, this fact alone should be sufficient to influence the treatment of water contracts by investment tribunals"[938].

Pellet regrets that, "comme c'est trop souvent le cas dans le droit des investissements, la jurisprudence est loin d'être homogène – fragmentation au sein d'un sous-système, conséquence difficilement évitable du mécanisme très décentralisé de règlement des différends relatifs aux investissements existant tant à l'intérieur qu'à l'extérieur du CIRDI"[939].

It seems that the *Urbaser case*[940] is at the origin of some positive evolution in the investment arbitration jurisprudence, as the case put some light on the arbitrators' capacity to consider human rights and impose obligations upon investor.

In 2016, the *Urbaser case* broke the pattern established by ISDS case in recognizing that investors could be subject to human rights obligations[941]. Indeed, the tribunal clearly "held that international human rights condition the treatment that an investor is entitled to receive from a state and that human rights impose obligations on the investor itself"[942]. The tribunal "attempted to integrate human rights obligations with investment protections and generate a consistent set of state obligations"[943]. The tribunal also stated that the investor knew about Argentina's obligations

[938] Truswell, *supra* note 242 at 575.
[939] Alain Pellet, "Notes sur la 'fragmentation' du droit international: droit des investissements internationaux et droits de l'homme" in Denis Alland et al, eds, *Unité et diversité du droit international: ecrits en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014) at 765.
[940] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[941] *Ibid* at para 1196: "in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights".
[942] Attanasio & Sainati, *supra* note 639 at 744; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at para 1209.
[943] Attanasio & Sainati, *supra* note 639 at 747; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at paras 618–624, 720.

regarding the right to water[944] and that it should have framed its expectations in light of this framework[945].

The case is innovative as it qualified both IHRL and IIL "as integrated and complementary parts of the international legal system"[946] in opposition to other *SAURI*[947] or *Suez*[948] *cases* which stated that these areas of law could not operate together.

In *Urbaser*, the arbitrators made a step forward as they admitted that the UDHR[949] and ICESCR established a right to water[950]. The tribunal acknowledged that obligations were deriving from the right to water. It is clear that "individuals and entities necessarily have obligations not to act in disregard of the rights enshrined in these [international human rights law] instruments"[951].

This position is new as "[h]istorically, international has not imposed any direct obligation on corporations"[952]. The "*Urbaser* tribunal recognized corporate human rights obligations. It may seem surprising that an investment tribunal, rather than a human rights body, **was the first to do so**"[953]. The *Urbaser case* "proves the increasing convergence of human rights with investment law"[954] and this is of utmost importance as "these two sets of legal regimes belong to the same legal order, namely this international one"[955].

The following cases involving similar human rights and environmental problems have been inspired by the decisions rendered in *Urbaser*[956]

[944] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at paras 720–723.
[945] *Ibid* at para 624; Attanasio & Sainati, *supra* note 639 at 745.
[946] Attanasio & Sainati, *supra* note 639 at 750.
[947] *SAUR International S.A. c. République Argentine*, *supra* note 595.
[948] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, *supra* note 538.
[949] *UDHR*, *supra* note 2.
[950] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at paras 1196–1197.
[951] Attanasio & Sainati, *supra* note 639 at 745.
[952] *Ibid* at 749; Dumberry & Dumas-Aubin, *supra* note 394 at 356.
[953] Attanasio & Sainati, *supra* note 639 at 749.
[954] Zarra, *supra* note 281 at 172.
[955] Dupuy, *supra* note 440 at 61.
[956] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.

The *Philip Morris'* decision is important in the implicit protection afforded to the right to health and host state regulations on plain packaging for tobacco productions[957]. The tribunal recognised that the case raised an important public interest issue[958]. The case also acknowledges the relevance of third parties' intervention, as in *Pacific Rim Cayman* and *Infinito Gold* cases[959]. It shows that "the increasing receptiveness towards amicus briefs continues"[960].

Similarly, in the *David Aven case,* the tribunal repeated that investors' obligations towards environmental standards and breaches of these obligations incur liability[961]. The tribunal made reference to the *Urbaser* and *Burlington v Ecuador* cases in order to justify its jurisdiction to consider environmental right claim[962]. It agreed with *Urbaser's* decisions that investors do not have immunity for environmental rights breaches nor *erga omnes* obligations (i.e. human rights)[963].

The decisions in *Philip Morris*[964]*, Urbaser*[965] but also recently *David Aven*[966]*,* "squarely go against the decisions in which tribunals expressly dismissed human rights argument stating that [their] competence is limited only to the commercial merits in the disputes"[967]. These decisions demonstrate an evolution in the system of ISDS where human rights law can play a role in the resolution of the disputes.

The outcome of *Burlington v Ecuador*[968] is also positive for the protection of the environment. In that case, the tribunal granted protection to respondent's right both under Ecuador domestic and international law[969]. However, such position should not be taken for granted as the award lacks

[957] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509 at paras 9–12.
[958] *Ibid* at paras 39, 338.
[959] *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541; *Infinito Gold v Costa Rica*, *supra* note 550.
[960] Lamb, Harrison & Hen, *supra* note 464 at 87.
[961] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423 at para 734.
[962] *Ibid* at para 736.
[963] *Ibid* at paras 737–739.
[964] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[965] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[966] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.
[967] Zarra, *supra* note 281 at 172.
[968] *Burlington Resources Inc. v. República del Ecuador*, *supra* note 742 at paras 631–632; *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630.
[969] Burova, *supra* note 622.

harshness regarding human rights and also fails to impose binding obligations on the investors regarding environmental protection of the Amazon rainforest. The case has some positive impacts and it continues the trend showing that ISDS can be a mechanism for protection against violations of rights from investors.

Given the above, it is fair to say that "there is a recent tendency of arbitrators to integrate non-economic concerns between the law applicable to decide the merits of a dispute, giving due (and primary) consideration to the host State's regulatory powers on matters that affect public needs"[970]. Nevertheless, there is still a long way before it is rooted in the practice of arbitral tribunals as there are also recent cases that go against this movement[971].

The review of the cases noted above demonstrates that human rights and environmental issues are more and more often dealt with by arbitrators. Having said that, it is far from being a consistent practice. It also seems that "tribunals have been more willing to consider human rights issues in another context, namely that of *amicus curiae* submissions"[972]. Nevertheless, the reluctance of arbitrators to engage in such discussions remains obvious.

Sub-section 2: Difficulties of ISDS to admit changes

It has been explained that change seems to occur in the field of ISDS with arbitral panels being slowly inclined to grant due consideration to human rights and environmental questions. Human rights and environmental arguments are gaining importance within the system. Nonetheless, the case law discussed in Chapter 2 demonstrates that "human rights as a multilevel legal system protecting substantive entitlements continue to play only a marginal role in ISDS arbitration"[973].

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[970] Zarra, *supra* note 281 at 172.
[971] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, *supra* note 538; *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508.
[972] Reiner & Schreuer, *supra* note 389 at 90.
[973] Kube & Petersmann, *supra* note 17 at 86.

As developed in Chapter 2[974], the reference to human rights is scarce. There is an absence of socio-economic rights terminology and no direct reference to the ICESCR, except in *Urbaser*[975]. References to article 31(3)(c)[976] to incorporate human rights are poor and *amicus'* submissions are not common practice[977]. Considering the number of awards discussed, "we can here observe a similar pattern of reluctance to directly refer to or consider human rights argumentation in the analyzed case law"[978].

The general overview of investment arbitration demonstrates a reluctance of arbitrators to duly regard human rights and environmental problems in deciding a case[979]. Cazala notices « l'absence d'enthousiasme des membres des tribunaux d'investissements pour se confronter à des questions de protection des droits de l'homme »[980]. Hirsch justifies this situation by the fact that "structural differences [between public international law and international investment law] have led investment tribunals to grant precedence to the contractual or consensual rules that have been agreed upon by host states and investors […]"[981]. Tribunals would, therefore, give prominence to what has been agreed by the parties and the information available to them[982].

On the opposite, arbitral tribunals "are more open towards human rights as due process … and as principle of procedural fairness … Other substantive human rights, e.g., indigenous rights or the right to water are hardly taken into consideration in substantive terms"[983]. For instance, in the *Phoenix Action Ltd v. Czech Republic*[984]*,* the tribunal affirmed that there was no protection for "investments made in violation of the most fundamental rules of protection of human rights, like

[974] See Thesis note 122 Part 2, Chapter 2.
[975] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626 at para 1209.
[976] *VCLT*, *supra* note 668 Article 31(3)(c).
[977] See Thesis note 122 Part 2, Chapter 1, Section 2.
[978] Kulick, *supra* note 617 at 300.
[979] Feria-Tinta, *supra* note 328 at 601: "The international law of investments and the law of human rights appear to have, in the practice of arbitration, an uneasy, tense, strained relationship"; See Thesis note 122 Part 2, Chapter 2, Section 2.
[980] Cazala, *supra* note 340 at 330.
[981] Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 319 at 344.
[982] *Ibid.*
[983] Kube & Petersmann, *supra* note 17 at 69.
[984] *Phoenix Action Ltd v Czech Republic (Award)*, [2009] ARB/06/5 .

investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs"[985]. Similarly, in *EDF v Argentina,* the tribunal acknowledged that protection of *jus cogens* norms could justify any treaty breaches, but this is not the case for any human rights' protection[986]. Therefore, "BITs must not be interpreted to prevent governments from fulfilling their obligations, for example, to prevent torture and slavery"[987].

The difficulty of applying economic social and cultural rights[988], as well as the international acceptance and recognition of first generation rights can explain this difference of treatment. Consequently, incoherence in investment awards where *jus cogens* norms are infringed is scarce, probably because they are recognised to be the highest laws of humanity.
Nonetheless, such difference of treatment should not remain. As Alain Pellet explains, « on peut considérer que les droits humains, qui ne sont pas reconnus comme *cogens* ni même obligatoires au plan universel, sont impératifs dans les cercles plus « intégrés » comme l'Europe et l'ensemble des démocraties « occidentales » »[989]. It is necessary to stop granting protection to investments that infringe fundamental rights, they are necessary for the life of any human being[990].

It is possible to draw another comparison with the position of arbitral tribunals concerning corruption where "contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal"[991]. Bribery effectively threatens the rule of law and international society[992]. It is interesting to question whether fundamental human rights could be afforded the same type of protection where they are violated by an investor[993]. They, too, are threats to human life and infringement of the rule of law. Therefore, "to extent that recent tribunals have denied

[985] *Ibid* at para 78.
[986] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 600 at para 914.
[987] Simma & Kill, *supra* note 666 at 705.
[988] See Thesis note 122 Part 2, Chapter 2, Section 2.
[989] Pellet, *supra* note 939 at 763.
[990] Truswell, *supra* note 242 at 585: "Even before access to safe water is universally recognised as a human right, the biological necessity of fresh water is sufficient reason for private water contracts to receive special treatment under investment law".
[991] *World Duty Free Company Limited v Republic of Kenya (Award)*, [2006] ARB/00/7 at para 157.
[992] World Justice Project, note 3; *Metal-Tech Ltd v Republic of Uzbekistan (Award)*, [2013] ARB/10/3 at paras 116, 389: "ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act".
[993] Dumberry & Dumas-Aubin, *supra* note 394 at 365: "when fundamental human rights abuses have been committed. In our view, these are precisely the kind of investments not worthy of protection under a BIT".

admissibility of claims based on misrepresentations made by the claimant and bribery, it is submitted that they should do the same when faced with human rights violations"[994].

There are authors who explain that the reluctance, *Berünhrungsangst* [995], of arbitrators to intervene concerning human rights interests in investment arbitration, can be justified by their professional background. As Simma puts it, "[t]his might be in the investment arbitrators' genes, because what is probably the large majority of them has a private or commercial law rather than a public law or public international law background"[996]. It is clear from the jurisprudence in ISDS that "[l]es tribunaux arbitraux ont en effet, en règle générale, tendance à suivre une logique d'investissement plutôt qu'à se fonder sur les règles protectrices des droits humains"[997].

Nonetheless, the reluctance of arbitrators to tackle human rights questions seems to be subject to positive evolution.[998]. It can be hoped that the trend developed after *Urbaser*[999] will continue to influence other arbitral tribunals and not remain dead letter[1000]. As Burke-White rightly puts it, "[w]ithout an appellate review, those repeat precedents gain perhaps undue weight and authority within the system"[1001].

The inconsistency that remains in the human rights jurisdiction challenges legal certainty and consequently the rule of law. The absence of legal certainty in the law and the case law has serious impacts, be they at the legal, environmental, economic level. It is necessary to focus on some of the consequences of legal certainty's deficiencies in ISDS.

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[994] *Ibid.*
[995] Simma, *supra* note 10 at 576.
[996] *Ibid.*
[997] Pellet, *supra* note 939 at 770.
[998] Farrugia, *supra* note 329 at 282: "The evidence suggests that, at the very least, human rights considerations are in the ascendancy generally".
[999] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[1000] Attanasio & Sainati, *supra* note 639 at 750: ""Urbaser lays the framework for addressing international human rights obligations in the context of international investment protections. Whether other tribunals will build upon this framework to impose liability on a corporation for human rights violations remains to be seen".
[1001] Burke-White, *supra* note 347 at 427.

Section 2: The consequences of insufficient legal certainty

The rapid evolution of international investment law and arbitration, the growing number of cases and human rights issues in ISDS, in a field normally hermetic to such issues, have made it difficult for arbitrators to keep up with legal certainty[1002]. However, "[c]oherence is an undeniable feature of any credible method of dispute settlement"[1003]. For a legal system and a dispute settlement mechanism to be efficient, it is necessary that it renders coherent decisions, with a consistent understanding of the law especially where factual situations are similar and ensure predictability for its users. It must provide legal certainty. However, this is far from being achieved in ISDS and the case law studied highlight important inconsistencies. Prof Saverio Di Benedetto offered an interesting metaphor about the legal certainty problems in the system:

> the image which best synthesizes [international investment law and arbitration] is that of a patchwork, given its fragmentation into a multiplicity of autonomous legal instruments and, by the same token, the settlement of investment disputes by independent investment tribunals. This patchwork provides [the] notion of fragmentation in the international law on foreign investments, and if taken to its extreme consequences, would even prevent scholars from construing international investment law in a unitary manner[1004].

Insufficient legal certainty in ISDS the system and its users; it creates a serious problem of predictability and security for investors and host states, but also for arbitrators themselves (sub-section 1). Unsatisfactory legal certainty does not enable investment arbitration to effectively protect human rights (sub-section 2) and neither promote coherence among the international mechanisms of dispute resolutions and international judges (sub-section 3).

[1002] Tienhaara, *supra* note 26 at 627.
[1003] Zarra, *supra* note 281 at 184.
[1004] Saverio Di Benedetto, *International Investment Law and the Environment* (Cheltenham: Edward Elgar Publishing, 2013) at 22.

Sub-section 1: Legal consequences

The absence of a strict legal certainty can have few positive impacts as it avoids the development of strict and rigid jurisprudence in ISDS. The system is able to adapt to every case before it[1005]. Furthermore, it is said that inconsistency is valuable as "it keeps the investment arbitration community vigilant and contributes to the development and refinement of substantive and procedural standards"[1006].

However, the negative consequences of insufficient legal certainty are far more numerous. The first ones to be affected by poor legal certainty are the users of the ISDS system, i.e. the host State and the investor. For instance, the introduction of human rights considerations at the stage of the arbitral proceedings by *amicus curiae* or arbitrators in their reasoning, whereas the BIT was silent on the matter, is "a surprise" for both parties. Very often, the parties have not introduced legally binding provisions regarding environment and human rights protection in their agreements. Unfortunately, "[t]he language used in IIAs has generated unanticipated (and at times inconsistent) interpretations by arbitral tribunals, and has resulted in a lack of predictability as to what IIAs actually require from States."[1007] Therefore, it creates a serious problem of predictability and legal certainty for ISDS users[1008].

This is problematic as commercial and international transactions require the utmost degree of stability and therefore, legal certainty[1009]. Insufficient legal certainty in the awards cumulatively with "the imprecision of human rights treaty terms (and the absence of authoritative interpretation) raises further concerns about the indeterminacy of the parties' rights and obligations and the *ex ante* ability of affected parties to know the law"[1010]. In other words, it is "producing a piecemeal,

[1005] Wrbka, *supra* note 186 at 13–14.
[1006] Irene M Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration" (2013) 51:2 Colum J Transnat'l L 418 at 471.
[1007] Reforming international investment governance 2015, note 263 at 126.
[1008] Simma, *supra* note 10 at 579–581.
[1009] *Dell Computer Corp c Union des consommateurs*, [2007] 2007 CSC 34, [2007] 2 RCS 801 at para 145: "This movement towards harmonization can be explained by the importance of legal certainty for commercial and international transactions" .
[1010] Calamita, *supra* note 431 at 182.

horizontal jurisprudence"[1011] and parties to a BIT cannot be secured about the meaning and duties under a BIT[1012].

On the one hand, investors have legitimate expectations deriving from the contract they obtained under a BIT[1013]. Consistency and predictability "is likewise fundamental for confidence building vis-à-vis foreign investors and for creating stable investment conditions in the host country"[1014]. Contractual certainty requires that investors know the regulations and State's position regarding human rights protection as it was reaffirmed in *Azurix v. Argentina*: "it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view"[1015].
On the other hand, States become unsecured about the measures that can be adopted because "[i]mprecision in investment treaties can lead to unwelcome and unforeseen challenges to state regulatory action"[1016]. The UNCTAD noticed the complexity of this situation in its 2012 Report when it stated that "if the State and its subnational entities do not know in advance what type of conduct may be considered a breach of a treaty, then it cannot organise its regulatory and administrative decision-making processes and delegation in a way that ensures that its conduct will not incur liability"[1017].

The way in which human rights are considered by arbitral tribunal is problematic. It is known that "companies have used the ISDS regime to deter States from adopting policies that advance socioeconomic rights"[1018].

[1011] N Jansen Calamita, "The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime" (2017) 18 The Journal of World Investment & Trade 585 at 587.
[1012] Fortier, *supra* note 24 at 189: participants of the system are "unable to known or determine with any certainty their rights and obligations in a given situation".
[1013] Julia Motte-Baumvol, "Le comportement de l'investisseur" in Walid Ben Hamida & Frédérique Coulée, eds, *Convergences et contradictions du droit des investissements et des droits de l'homme: une approche contentieuse = Convergences and contradictions between investment law and human rights law: a litigation approach* Publications de l'Institut international des droits de l'homme 35 (Paris: Pedone, 2017) at 203: "l'investisseur est censé connaître l'ampleur des risques liés à son investissement".
[1014] Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining sovereignty in international economic law*, Studies in international trade law v. 7 (Oxford ; Portland, Or: Hart, 2008) at 241.
[1015] *Azurix Corp. v The Argentine Republic*, *supra* note 595 at para 408.
[1016] Calamita, *supra* note 431 at 184.
[1017] *Fair and Equitable Treatment: A Sequel*, UNCTAD/DIAE/IA/2011/5, by UNCTAD, UNCTAD Series on Issues in International Investment Arbitrations II UNCTAD/DIAE/IA/2011/5 (New York, Geneva: United Nations, 2012) at 17.
[1018] Bradlow, *supra* note 33 at 362.

Additionally, human rights law is irregularly considered as relevant rules of international law applicable in the relations between the parties[1019]. However, this should not be opened to debate anymore[1020]. In other words, it should be established that human rights law forms part of the applicable law in a dispute and parties should be able to act upon such elements. For instance, "consistent treatment of water contracts could emerge from the awards of international investment tribunals"[1021]. The outcome of the proceedings would be more predictable.

Furthermore, legal certainty would be further strengthened by clear BIT provisions[1022]. Shinde argues that "unless any specific provision is included in the treaty […], the remedies can neither be uniform, nor effective"[1023]. Therefore, Lo suggests that "[f]or future BITs, incorporating human rights protection should be made as a standard practice. For existing BITs, a proper way is to renegotiate the treaties so as to explicitly include human rights"[1024]. This practice must be encouraged because the current situation leaves arbitrators to deal with human rights claims in a conflicting manner as both the jurisprudence and the BIT provisions are inconsistent[1025].

If arbitrators were consistent in the manner in which they deal with environmental and human rights, it would bolster consistency and predictability for the parties. This is a role that arbitrators should take up, especially because the arbitration awards are often enforced in practice[1026]. Investment tribunals are not completely ignoring other decisions[1027] but this practice should be further strengthened.

[1019] *ICSID*, *supra* note 314 Article 42(1).
[1020] Lo, *supra* note 331 at 23: "It should be clear that human rights law can be operationally linked with BITs through treaty application and interpretation so as to have the human rights law to guide the operation of BITs".
[1021] Truswell, *supra* note 242 at 584.
[1022] Paunio, *supra* note 182 at 53: "clear and unambiguous legal rules are for instance said to produce the legal certainty and predictability required for a well-functioning market".
[1023] Shinde, *supra* note 264 at 57.
[1024] Lo, *supra* note 331 at 24.
[1025] Shinde, *supra* note 264 at 57.
[1026] *ICSID*, *supra* note 314 Article 54(1): "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award with its territories as if it were a final judgement of a court in that State".
[1027] Zarra, *supra* note 281 at 163: "international investment tribunals do not behave as if they are isolated from all other arbitration panels and that, therefore, a certain degree of horizontal consistency exists between investment decisions".

Recently, an arbitral tribunal re-emphasized that it had "a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of States and investors towards legal certainty and the rule of law"[1028].

It is clear that an absence of consistency renders the outcome of arbitration proceedings unpredictable "and thereby ultimately undermine the legitimacy of investor-state dispute settlement procedures"[1029]. "It is obviously the *sensibility* of every single arbitrator that should drive them to grant a coherent approach to decision making"[1030]. This is important considering that human rights could be badly impacted by an absence of coherence in ISDS awards.

Sub-section 2: A difficult protection of environmental and human rights

Insufficient legal certainty in investment arbitration jurisprudence renders the protection of human rights difficult.

The position of arbitral tribunals finding IHRL irrelevant to ISDS[1031] is unfortunate in cases where investors increased water prices, rendering impossible the access to water for local populations. The right to water was not granted protection by arbitrators, whereas there is "an increasing and vocal global consensus points to the right to water as a fundamental human right specifically, if not already part of customary international law"[1032]. Such position from arbitrators is controversial considering that there is a global water crisis and that, at least, 1.1 billion people in the world lack access to sufficient and sufficiently clean drinking water[1033]. Investors' interests are confronted with basic water rights and "it is likely that the interaction between international investment law

[1028] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia (Award)*, [2016] ARB/12/14 and 12/40 at para 253.
[1029] Karl, *supra* note 108 at 237.
[1030] Zarra, *supra* note 281 at 183.
[1031] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (Award on Jurisdiction and Liability)*, *supra* note 819; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *supra* note 488; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe (Procedural Order No. 2)*, *supra* note 505; *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508; See Thesis note 122 Part 2, Chapter 2.
[1032] Farrugia, *supra* note 329 at 282.
[1033] *Ibid* at 266; *WHO Global Water, Sanitation and Hygiene: Annual Report*, WHO/CED/PHE/WSH/19.147 (2018) at VI.

and the provision of water services will continue to generate controversy, especially as a human right to water becomes more broadly recognised"[1034].

Arbitrators must intervene because "[w]ater is a biological necessity, scarce environmental resources, valuable commodity"[1035].

Consequently, it is time to guarantee a human right to water to all in an internationally binding agreement that apply to arbitration[1036]. If there is a clear internationally recognised human right to water, then "States would be under an obligation to afford water access to their citizens"[1037] and it would facilitate the work of investment arbitrators to consider it.

On the contrary, the human right to water "has been asserted in a number of investor-state disputes both as general 'context' to be taken into account in the interpretation of the investment treaty's terms, and more directly as an affirmative defence to the state's performance of its investment treaty obligations"[1038]. Additionally, there are several cases where human rights have been protected by arbitral tribunals, such as in *Urbaser*[1039], *Philip Morris*[1040] or *David Aven*[1041]. The case law is obviously inconsistent.

The silence of arbitrators in cases where human rights are infringed, does not strengthen their protection. It is understood that arbitrators do not have the role of criminally sanctioning investors violating human rights. They may nonetheless order the termination of a practice that is non-human rights friendly and impose IHRL obligations on the investor[1042]. In addition, "fear of costly claims for breach of investment treaties may curb states' appetite for pro-climate legislation

[1034] Truswell, *supra* note 242 at 585.
[1035] *Ibid* at 571, 576: "access to affordable potable water helps to prevent disease by ensuring hydration and improving hygiene".
[1036] Neuberger, *supra* note 1 at 184: "if fundamental rights were to become part of arbitration's mandatory law, it would reinforce the idea that fundamental rights really are universal".
[1037] Truswell, *supra* note 242 at 572.
[1038] Calamita, *supra* note 431 at 179.
[1039] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[1040] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509.
[1041] *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423.
[1042] Burova, *supra* note 622; *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630.

and policies"[1043] as well as human rights regulations[1044]. The fact that investment arbitration usually seeks to preserve private business interests, "governments typically consider ISDS as a factor against pursuing a pro-human rights policy that will negatively impact corporate concerns"[1045].

The lack of coherence of investment arbitration in admitting third parties' intervention where human rights are relevant means that, in certain cases local populations' concerns have a chance to be heard and considered by arbitrators and in other cases not. Sometimes, *amicus curiae* status is "the sole possibility for affected communities to be heard" by a tribunal[1046]. The fact that human rights are ignored by the tribunal is a serious problem and infringes the rule the law[1047].

It is necessary for arbitrators, investors and host states to work together to encompass human rights and environmental questions in the investment field. Investors need to work closer with host state and domestic movements because "[f]ailure to do so risks the possibility that foreign investors will impose their vision of human rights on the domestic communities most directly affected"[1048].

In addition, "States and arbitral tribunals will also have to take human rights protection into account so as to have healthier and human rights friendlier development of BITs"[1049]. Legal certainty in investment arbitration jurisprudence could benefit local population's economic, social, and cultural rights.

The United Nations' Guiding Principles on Business and Human Rights encourages States to adopt policies that enable them to fulfill their human rights obligations when they conclude investment treaties[1050]. Consequently, qualified investment protection standards would render host states capable of guaranteeing human rights[1051].

[1043] Lawrence & Smith, *supra* note 397; Bradlow, *supra* note 33 at 364.
[1044] Stephan W Schill, "System Building in Investment Treaty Arbitration and Lawmaking" (2001) 12 German Law Journal 1083 at 1085.
[1045] Bradlow, *supra* note 33 at 386.
[1046] *Bernhard Von Pezold and ors. v Republic of Zimbabwe*, *supra* note 508 at para 24.
[1047] See Thesis note 122 Part 1, Chapter 1, Section 2.
[1048] Bradlow, *supra* note 33 at 389.
[1049] Lo, *supra* note 331 at 24.
[1050] *Human rights, Trade and Investment: Report of the High Commissioner for Human Rights*, UNCESCR, 55th Sess, UN Doc. E/CN.4/Sub.2/2003/9 (2003) at para 35; note 333 Principle 9.
[1051] Cotula, *supra* note 849 at 152.

Another consequence of insufficient legal certainty is the lack of coherence with other international tribunals. Discrepancies among international mechanisms of dispute resolutions undermine the international rule of law.

Sub-section 3: Problems of uniformity in the jurisprudence of international tribunals regarding human rights

The position espoused by investment arbitration tribunals and other international courts are contradictory. In the former, the protection of investments is prevailing at the detriment of the host state's populations whereas in the latter, human rights are highly guaranteed. Indeed, international courts emphasise human rights' protection in cases of investments[1052]. The legal certainty problem of ISDS renders coherence and consistency difficult at an international level.

The Inter-American Court of Human Rights said that the American Convention on Human Rights must be abided by when enforcing a BIT. In the case of *Sawhoyamaxa Indigenous Community v. Paraguay,* the Court held that:

> The enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, 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[1053].

It is clear that the court requires that BIT's application respect human rights law.[1054] The absence of multilateral rules in international investments law and arbitration gives rise to gaps, overlaps and inconsistencies between investments agreements and international law

[1052] Pellet, *supra* note 939 at 777: "Une enquête empirique montre que les Cours de droits de l'homme tiennent sans doute davantage compte que les tribunaux transnationaux des intérêts supérieurs de l'État et de la marge d'appréciation dont les autorités publiques bénéficient pour les faire prévaloir".
[1053] *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs)*, [2006] Inter-Am Ct HR (ser C) No 146 at para 140.
[1054] *Ibid.*

instruments and "IIA reform therefore should seek coherence in these various relationships"[1055].

This lack of uniformity regarding human rights considerations by international legal bodies must be mitigated because in some situations international courts have influenced investment arbitrators. Sometimes, tribunals considered international human rights law and other courts' rulings such as ECtHR to construe the meaning and apply principles for protecting investors' rights[1056]. They have made references to human rights law jurisprudence[1057] in order to interpret "investment protection standards, or in addressing States defenses based on IHRL"[1058]. The rulings provide arbitrators with some answers on how to deal with environmental and human rights questions and it promotes consistent interpretation across international bodies[1059].

Other tribunals have paid attention to the decisions rendered in similar cases: "[a]lthough not bound by previous decisions of other international tribunals, the Tribunal has given them due consideration with the aim of enhancing consistent interpretation of comparable treaty language as applied to similar fact patterns"[1060]. Therefore, "[t]he risk of total incoherence in the interpretation and application of the vast network of investment treaties is ameliorated somewhat by adjudicative dialogue whereby different arbitral tribunals and adjudicative bodies, aware of one another's activities, exchange ideas and views"[1061]. Similarly, in *Fireman's Fund v. Mexico,* the tribunal expressed its willingness to consider other arbitral awards in order to understand the what customary international law expropriation actually means[1062].

[1055] Reforming international investment governance 2015, note 263 at 128.
[1056] UNCTAD Report 2009, note 367 at 6; *Tecmed*, *supra* note 386 at paras 121–122; *Azurix Corp. v The Argentine Republic*, *supra* note 595 at para 312.
[1057] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic (Decision on Liability)*, *supra* note 540 at paras 252, 256, 262; *SAUR International S.A. c. République Argentine (Decision on Jurisdiction and Liability)*, *supra* note 750 at paras 328–332.
[1058] Cotula, *supra* note 849 at 153.
[1059] Kube & Petersmann, *supra* note 17 at 71: "there is need for promoting mutually consistent interpretations through judicial comity among diverse national, regional, worldwide courts and alternative dispute settlement proceedings".
[1060] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 600 at para 897.
[1061] Calamita, *supra* note 431 at 183; Gabriel Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23 Arbitration International 357.
[1062] *Fireman's Fund Insurance Company v United Mexican States (Award)*, [2006] ARB(AF)/02/01 at paras 171–173.

These examples show that arbitrators acknowledge the benefits of developing a coherent jurisprudence and are willing to consider arbitral awards from other tribunals. It is unfortunate that they are more confident with the practice regarding investors' rights interpretation, rather than socio-economic rights. When they have done so, "references to IHRL have tended to be brief and not to significantly affect arbitration outcomes, particularly where States raised human rights arguments as defenses for alleged BIT violations"[1063].

A trend must develop among those adjudicators to establish a consistent jurisprudence to protect local population's human rights. In practice, "tribunals could take advantage of existing jurisprudence to allow host States to assert human rights defenses, or to oblige investors to better understand the human rights obligations of host States before undertaking an investment"[1064]. Better legal certainty would not only improve human rights' importance in ISDS but also bolster the rule of law.

[1063] Cotula, *supra* note 849 at 153.
[1064] Bradlow, *supra* note 33 at 367; Simma, *supra* note 10 at 575.

Section 3: The protection of the rule of law by international investment arbitration

The rule of law must be obeyed by any actor in international and domestic law, be they institutions, corporations or individuals, public or private[1065]. In other words, investors are under a duty to comply with the rule of law and its core feature[1066]. The lack of legal certainty in investment arbitration jurisprudence involving human rights impacts the rule of law and creates injustice[1067]. There is no perfect system of dispute resolution[1068] but this section will also discuss possibilities of improvements in this field.

First of all, legal certainty is far from being achieved in ISDS[1069] and this situation does not ensure the protection of human rights as it fails to tackle investors' misconduct. This situation "is likely to reinforce the existing skepticism towards the rule of law, and further entrench the existing perception of international treaties as a protective mechanism for a select group of actors"[1070]. The ISDS regime is challenging two important rule of law components, namely human rights guarantee and legal certainty[1071]. Nevertheless, "the public nature of international investment arbitration requires, among other things, that a certain amount of predictability of decisions is granted by decision makers"[1072] especially because of the repercussions of an awards on the public at large.

Therefore, "arbitration can be said to be at odds with democracy and the rule of law"[1073]. ISDS cannot remain hermetic to environmental and human rights law anymore; "even if it is undeniable

[1065] Strengthening and Coordinating United Nations Rule of Law Activities 2014, Secretary General, *supra* note 43 at 13: The Guiding Principles on Business and Human Rights "constitute the authoritative global framework for ensuring that the private sector not only benefits from, but also adheres to, the rule of law".
[1066] McCorquodale, *supra* note 2 at 41: "With human rights as part of the international rule of law, businesses will continue to be affected by it".
[1067] *R v. Ferguson*, *supra* note 201 at para 72; Bingham of Cornhill, *supra* note 47.
[1068] Franck, *supra* note 40 at 1610.
[1069] *Ibid* at 1521–1523, 1584.
[1070] Sattorova, *supra* note 262 at 165.
[1071] Maxeiner, *supra* note 356 at 28, 30: "Legal certainty is a central tenet of the rule of law as understood around the world"; Zolo, *supra* note 46 at 24–25.
[1072] Zarra, *supra* note 281 at 140.
[1073] Hachez & Wouters, *supra* note 8 at 434.

that international investment law has developed a certain degree of specificity and coherence, it is not possible *today* to consider it as an autonomous system of law (i.e. a self-contained regime)"[1074]. Improvement of human rights protection on a regular basis would promote the implementation of the rule of law.

Strengthening the rule of law in investment arbitration would benefit the users of the system as there is "empirical evidence showing that the rule of law does contribute to a nation's wealth and its rate of economic growth"[1075]. Three hundred years ago, Adam Smith said that business could develop where there is, among other things, security, stability which are features of the rule of law[1076]. Indeed, it is widely acknowledged in the business world that the rule of law is essential for "securing investment, defining property rights, forming contracts, and preventing default on debts, and otherwise to aid in reducing the avoidable risks of investments"[1077]. Respect for the rule of law "has beneficial economic results, and is critical to developing the trust and certainty needed for entrepreneurship activity"[1078]. Lord Neuberger recently recalled that the rule of law was also essential for the 'diplomatic world'[1079] which also reaches the doors of investment arbitration. The rule of law must be abided by in order to ensure an investment-friendly environment and 'protect the orderly resolution of disputes'[1080].

Furthermore, it must not be neglected that international investment arbitration would be an efficient mechanism to protect human rights. It is obvious that "international investment protection and human rights are not 'separate worlds'"[1081]. They must work together and participate in the enforcement of the rule of law in a coherent and consistent manner, in line with other legal bodies.

[1074] Zarra, *supra* note 281 at 162.
[1075] Richard A Posner, "Creating a legal framework for economic development" (1998) 13:1 The World Bank Research Observer 1 at 3.
[1076] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London, 1776) c III.
[1077] A Gerson, "Peace Building: The Private Sector's Role" (2001) 95 AJIL 101 at 111; McCorquodale, *supra* note 2 at 36.
[1078] McCorquodale, *supra* note 2 at 38.
[1079] Neuberger, *supra* note 1 at 181: "arbitrators resolve disputes between business people or national entities; in both the commercial and diplomatic worlds, the rule of law is essential".
[1080] Ileana M Smeureanu, "Conference report on Wendy Miles' keynote speech at the YAF/YAPP conference in Vienna (28 March 2015): 'The Role of Young Arbitrators in the Rule of Law'", (2015), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2015/04/23/conference-report-on-wendy-miles-keynote-speech-at-the-yafyapp-conference-in-vienna-28-march-2015-the-role-of-young-arbitrators-in-the-rule-of-law/>.
[1081] Simma, *supra* note 10 at 576.

It is also the role of arbitrators to protect human rights[1082]. To achieve this objective, investment arbitration "can serve as rare international legal tools that provide a private, enforceable cause of action. To date, investors have used claims to convince governments to abandon otherwise pro-human rights policies"[1083].

There are cases where the system has proved to be efficient in terms of environment and human rights guarantees[1084] . For instance, "the ICSID arbitration institution is a vital participant in the water cooperation story – one that has been adding its own ingredients to the stone soup"[1085]. Besides, "ensuring the rule of law in the exploitation of natural resources is essential to ensuring inclusive and sustainable economic growth and development and in respecting, protecting and fulfilling the human rights of persons"[1086].

This needs to be further implemented[1087] as international law lacks mechanisms to hold corporations accountable for their human rights breaches[1088]. This is why arbitral tribunals "are thus uniquely positioned to arrive at novel conclusions about international law as it applies to corporations"[1089]. It should be noticed that "[i]t is in the interests of business to uphold human rights and to work within the law. It is also in their interests … for there to be an international rule of law to enable them to operate effectively around the world"[1090]

[1082] Neuberger, *supra* note 1 at 181: "they [arbitrators] administer justice and so must act in accordance with the law and be seen to do so. The law includes fundamental rights".
[1083] Bradlow, *supra* note 33 at 358.
[1084] *Methanex Corporation v. United States of America*, *supra* note 386; *Pac Rim Cayman LLC v. The Republic of El Salvador*, *supra* note 541; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, *supra* note 509; *Burlington Resources Inc. v. Republic of Ecuador (Decision on Ecuador's Counterclaims)*, *supra* note 630; *David R. Aven and Others v. Republic of Costa Rica*, *supra* note 423; See Thesis note 122 Part 2, Chapter 3, Section 1.
[1085] Bray, *supra* note 524 at 475.
[1086] Secretary General, *supra* note 43 at 12.
[1087] Smeureanu, *supra* note 1080: "debate on climate change, in a broader human rights context, presents an opportunity for young arbitrators who can explain the role of, and 'clear the name' of, ISDS where it has been damaged".
[1088] Nolan, *supra* note 248 at 222; Ishakawa, *supra* note 248.
[1089] Attanasio & Sainati, *supra* note 639 at 749.
[1090] McCorquodale, *supra* note 2 at 27.

In addition, developing legal certainty towards environmental and human rights through investment arbitration jurisprudence is easier than establishing a multilateral court or treaty that would tackle these issues[1091].

Compliance of BITS, host states, investors, and arbitrators with the rule of law will help to legitimize the ISDS system. Developing a consistent behaviour in admitting *amicus curiae* would tackle the question of the "mounting appeal for more transparency, participation, and the rule of law" – linked to the "legitimacy crisis' of investment arbitration"[1092]. The World Investment Report proposed a reform regarding third parties' access to ISDS as a way to bolster the rule of law[1093].

"After all, only if investment treaties and investor-state arbitration themselves meet the commonly accepted standards embodied in the rule of law will the outcome of arbitral jurisprudence be considered as legitimate"[1094]. Here, arbitrators' role is key as they are "the main actors responsible for granting the functioning of investment arbitration"[1095].

In this chapter, an analysis of investment arbitration jurisprudence in human rights cases has been proposed, showing that the decisions rendered are lacking consistency and coherence. The impact of insufficient legal certainty has also been discussed and it demonstrated that it is a serious threat to commercial activities, arbitrators' role, human rights' protection and more broadly, the rule of law. Consequently, "[l]ack of coherence is, indeed, one of the main reasons which are at the basis of the quest for a structural reform of investment arbitration"[1096].. Nevertheless, "international arbitration is an example of the "machinery" needed to implement the rule of law"[1097].

[1091] Castellarin, *supra* note 298 at 216: "these pioneering treaties are far from replacing all BITs, so that it will take a long time before the structure of ISDS can ensure legal certainty".
[1092] Steininger, "Leiden Journal of International Law", *supra* note 345 at 34.
[1093] Reforming international investment governance 2015, note 263 at 148.
[1094] Schill, *supra* note 51 at 98.
[1095] Zarra, *supra* note 281 at 146.
[1096] *Ibid* at 184.
[1097] Smeureanu, *supra* note 1080.

Conclusion

The ancient concept of the rule of law has traveled through ages to get through the doors of international investment arbitration, where it faces challenges[1098]. The principle emerged thousand years ago[1099] until being enshrined in the most important documents of our times[1100]. The constituent parts[1101] of the concept must be upheld in order to guarantee the rule of law.

International investment arbitration, like any other mechanism to solve disputes, aims at ensuring the good implementation of the rule of law[1102]. This is not an easy task. This thesis sought to demonstrate that two core features of the concept, namely legal certainty and human rights, are still undermined by ISDS[1103] . Even if human rights as a rule of law element face controversy[1104], it is hard to imagine that the concept would be preserved without an effective protection of those rights. However, ensuring legal certainty in investment arbitration so as to guarantee the protection of human rights and the rule of law, are difficult tasks. It is true that "[j]ustice, human rights, democracy and rule of law […] are 'interpretive legal concepts' which people share, even though they often disagree about the criteria for interpreting and applying these legal terms"[1105]. Indeed, there is still no international definition of the notion which renders its application difficult[1106].

[1098] Hachez & Wouters, *supra* note 8 at 66; Castellarin, *supra* note 298 at 214; Steininger, "Leiden Journal of International Law", *supra* note 345 at 34.
[1099] See Thesis note 122 Part 1, Chapter 1, Section 1.
[1100] See Thesis *ibid* Part 1, Chapter 1, Section 3 ; *UN Charter*, *supra* note 42; *ECHR*, *supra* note 42; *ICCPR*, *supra* note 169; *ICESCR*, *supra* note 170.
[1101] Bingham of Cornhill, *supra* note 47; Bingham of Cornhill, *supra* note 3.
[1102] See Thesis note 122 Part 1, Chapter 3; McCorquodale, *supra* note 2 at 35.
[1103] See Thesis note 122 Part 1, Chapter 2, Chapter 3.
[1104] Bingham of Cornhill, *supra* note 3 at 66; Jowell, *supra* note 30.
[1105] Petersmann, *supra* note 227 at 284.
[1106] See Thesis note 122 Part 1, Chapter 1, Section 2; Vanspranghe, *supra* note 52 at 142; McCorquodale, *supra* note 2 at 31.

It has been explained that investment arbitration is confronted with problems of legal certainty when it comes to consider socio-economic rights breaches due to an investment[1107].
The inconsistency is noticeable at a procedural stage, where arbitrators are opposed to BIT containing no human rights indications or poor ones[1108]. They have to answer calls from local populations' representatives (*amicus curiae*) but have not established a consistent jurisprudence that accept them in human rights cases[1109]. Finally, their decisions on host states' justifying their fundamental rights policies through defenses or counterclaims, are quite uncertain[1110].
In addition, arbitral tribunals' use of interpretation tools to incorporate international human rights law instruments in their decisions has been poor and particularly unpredictable[1111]. The relevance of human rights law is uncertain, even if cases are analogous[1112]. Those adjudicators face a body of law known to be vague and it is challenging to develop coherence, consistency, predictability, and legal certainty in their decisions[1113].
Nevertheless, the promotion and implementation of the rule of law remains essential in today's world[1114].

Along with the issue of legal certainty, environmental and human rights protection is unsatisfactory. However, "human rights compliance is a priority in any decent host State's public policy agenda and thus it cannot but affect the regulatory spaces of a host State vis-à-vis foreign investors and other States"[1115].
Not only do governments have the duty to respect human rights, corporations as well[1116] and arbitrators must take the opportunity to ensure that. There are arbitration proceedings where host states or third parties try to emphasize on obligations to protect human rights. They are challenged by investors' protection obligations and interests are conflicting; there is no official prevalence of

[1107] See Thesis note 122 Part 1, Chapter 3 and Part 2, Chapter 3.
[1108] See Thesis *ibid* Part 2, Chapter 1, Section 1.
[1109] See thesis *ibid* Part 2, Chapter 1, Section 2.
[1110] See Thesis *ibid* Part 2, Chapter 1, Section 3.
[1111] See Thesis *ibid* Part 2, Chapter 2, Section 1.
[1112] See Thesis *ibid* Part 2, Chapter 2, Section 2, Sub-section 2.
[1113] See Thesis *ibid* Part 2, Chapter 2, Section 2, Sub-section 1.
[1114] McCorquodale, *supra* note 2 at 32; Secretary General, *supra* note 43; note 43; Bingham of Cornhill, *supra* note 3; Neuberger, *supra* note 1.
[1115] Simma, *supra* note 10 at 578.
[1116] Nolan, *supra* note 248 at 230.

investment law or international human rights law in these disputes[1117]. Regarding the human rights problem, a balance must be found by arbitrators between economic interests, human rights protection and international rule of law strengthening. However, "given the fact that there is no principle of binding precedent in public international law, it is submitted that the way ahead is through the gradual development of arbitral case law"[1118]. International human rights law should be applied in a consistent manner so as to offer predictable outcomes and bolster legal certainty.

Arbitrators, in recent cases such as *Urbaser*[1119] have understood this. It is clear that *Urbaser* has an impact on human rights considerations and the role that arbitrators can have in this battle. It put some light one their capacities to intervene and have an impact of local populations' rights[1120]. It is now time to harmonize the jurisprudence in terms of human rights as well as investors' obligations.

Of course, the protection of fundamental rights would be better guaranteed in ISDS if BITs were adapted to the reality of such issues; or "if both parties to arbitration proceedings agree for the application of international human rights law to their dispute"[1121].

The evolution of arbitral jurisprudence shows an increasing development of socio-economic rights considerations and it is the reason why they will "hold a central position in the debate on the future of investment arbitration"[1122].

The ignorance of host state's populations and human rights has led certain countries to withdraw from the ICSID Convention. Indeed, if governments "do not believe that investor-state arbitration respects their rights, as well as those of investors, they will not consent to the system and that system itself will run the risk of collapse"[1123].

[1117] Cazala, *supra* note 340 at 320.
[1118] Hobér, *supra* note 197 at 64.
[1119] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, *supra* note 626.
[1120] See Thesis note 122 Chapter 3, Section 1, Sub-section 1.
[1121] Dumberry & Dumas-Aubin, *supra* note 394 at 370; Reiner & Schreuer, *supra* note 389 at 84.
[1122] Steininger, "Leiden Journal of International Law", *supra* note 345 at 34.
[1123] Burke-White, *supra* note 347 at 432.

For instance, Ecuador, Bolivia, Venezuela have withdrawn from the ICSID system[1124]. Brazil is refusing to sign treaties involving ISDS mechanisms; South Africa and Indonesia are withdrawing from key BITs containing ISDS provisions[1125]. Other countries such as Argentina or Uruguay, involved in important arbitration cases, "may be rethinking its commitment to investor-state arbitration and the ICSID system"[1126] as they are not afforded protection when they try to protect economic, social and cultural rights of their populations.

This has considerable impact on the legitimacy of the ISDS regime as "both the credibility and viability of the good governance mission of international investment law hinges on how investor misconduct is addressed by investment treaties and investment arbitration practice"[1127]. The calls for reforms aim at legitimizing a system that is confronted with public issues, through public accountability[1128]. Improvements must be made as there are more and more cross-cutting issues which demonstrate the need to coordinate various fields of international law "such as the application of international human rights, or also international social and environmental law"[1129].

In addition, BITs would better operate in host state where the "rule of law and respect for human rights in tandem with investor protection can thus form a sort of virtuous circle in improving welfare"[1130]. For instance, it is now acknowledged that "human rights considerations, including the right to water, and a sustainable development framework is crucial to foreign investment's success as a key driver of economic growth and job creation"[1131]. Therefore, it cannot be said that international investment law and international human rights law are like oil and water anymore[1132].

[1124] Mavluda Sattorova, "Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance" in Andreas Kulick, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016) 53 at 54; Bradlow, *supra* note 33 at 385.
[1125] Bradlow, *supra* note 33 at 385.
[1126] Burke-White, *supra* note 347 at 431.
[1127] Sattorova, *supra* note 262 at 148.
[1128] Mariel Dimsey, "Article 4. Submission by a third person" in Dimitrij Euler, Markus W Gehring & Maxi Scherer, eds, *Transparency in international investment arbitration: a guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge: Cambridge University Press, 2015) at 130.
[1129] UNCTAD Report 2009, note 367 at 3; *Report of the Multi-year Expert Meeting on Investment for Development*, UNCTAD, 1st Sess, UNCTAD/TD/B/C.II/MEM.3/3 (2009).
[1130] Simma, *supra* note 10 at 576.
[1131] Farrugia, *supra* note 329 at 282.
[1132] Simma, *supra* note 10 at 573; Toral & Schultz, *supra* note 376 at 577–602; Feria-Tinta, *supra* note 328 at 630.

Obviously, improvements in the system need to be made regarding legal certainty and human rights protection. But "the current ISDS regime is almost certain to remain in place for at least a few more decades to come"[1133]. This is due to the fact that many BITs and IIAs contain clauses that guarantee the existence of investment arbitration for few more years. These improvements must occur from parties and users of the investments arbitration system[1134]. Governments must also take charge of the matter and "need to consider more proactively human rights impacts when they sign trade and investment agreements […] Such steps would address many of the governance challenges at the heart of questions relating to business and human rights"[1135].

This discussion, enlightened with a variety of authors, has "shown that investment arbitration needs to be reformed to get closer to the model of the rule of law"[1136].
As the Lord Neuberger once stated, "the success of arbitration rests entirely on the rule of law", as it is the case in any legal system[1137]. It must be added that it is also "in the interests of business to uphold human rights and to work within the law. It is also in their interests … for there to be an international rule of law to enable them to operate effectively around the world"[1138]. Everyone is concerned in the good implementation of the rule of law. Generally speaking, "the functional effect of investment arbitration is that it serves to strengthen the rule of law on a global scale"[1139].

At the end of the day:

> International law must balance claims for respect for the special requirements of national communities, which is their very *raison d'être,* and concern for which is one of international law's central postulates, against the need for sustaining the international Rule of Law so that economic activity can continue to flow freely about the globe.[1140]

[1133] Bradlow, *supra* note 33 at 357.
[1134] Lawrence & Smith, *supra* note 397.
[1135] Robinson, *supra* note 200 at 25.
[1136] Castellarin, *supra* note 298 at 214.
[1137] Neuberger, *supra* note 1 at 184.
[1138] McCorquodale, *supra* note 2 at 27.
[1139] Schultz & Dupont, *supra* note 187 at 1163.
[1140] Reisman, W Michael, *Economic Development, National Sovereignty and International Arbitration* (Santa Fe de Bogotá, 2005) at 13.

The reconciliation of these interests with the paramount rule of law principles through international investment arbitration "remains a challenging task" and an "unfinished business"[1141].

[1141] Kube & Petersmann, *supra* note 17 at 104.

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