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Bridging the Gap:

Using Business and Human Rights Arbitration to Drive Investor Accountability for Business-related Human Rights Harm in Foreign Investment

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This article is the work of the author alone and does not represent the views of the International Bar Association.

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1 This article has benefited from the insightful comments of Senior Legal Advisors Maria Pia Sacco and Kieran Pender at the International Bar Association's Legal Policy and Research Unit.

1. Introduction

The accountability of foreign investors for business-related human rights harm has been the subject of intense debate within the international community.² While foreign investment can contribute to the economic prosperity of capital-importing states by generating cash flow, investors also typically gain significant power over the well-being of individuals.³ As a consequence, investor activities can have a deleterious impact on human rights. Despite the factual linkage between foreign investment and human rights, the regime has historically existed as a secluded field of law, exclusively concerned with the protection and promotion of investments, occasionally at the expense of the preservation of the human rights of affected communities.⁴

This paper's objective is to consider arbitration as a potential mechanism to increase investor accountability for business-related human rights abuses in light of sluggish advances in the foreign investment regime on the human rights front. To this end, this paper will begin by considering the ways in which foreign investment affects human rights in Section 2. Section 3 will analyse whether foreign investors are held accountable in the foreign investment regime. In this section, the paper will look at investor obligations (or lack thereof) under the international law of foreign investment and the disposition of investment tribunals to consider investor accountability for business-related human rights abuses. Section 4 will outline the United Nations Guiding Principles (UNGPs) perspective on investor accountability and the issues associated with exclusive reliance on states' ability and willingness to meet their human rights obligations.⁵

Finally, Section 5 will consider the role of business and human rights (BHR) arbitration under The Hague Rules on Business and Human Rights Arbitration (The Hague Rules) to advance some of the aims and objectives of the UNGPs – to increase corporate respect for human rights. It will also analyse the associated challenges. The Hague Rules, which were launched on 12 December 2019, were devised in February 2017 by a Working Group of international law and human rights specialists within The Hague Institute for Global Justice. They emerged in recognition of a desire to overcome legal and practical barriers facing victims of human rights abuses when bringing claims through the existing mechanisms of redress.⁶ They outline a procedural framework for the proper regulation of BHR arbitration between victims and corporations, between business partners, and between third party beneficiaries and corporations.⁷ In the event of a dispute, the parties to the arbitration could select The Hague Rules as the body of rules governing the BHR arbitration.

2 Stefanie Schacherer, 'Urbaser v. Argentina' (*Investment Treaty News*, 18 October 2018) <<https://www.iisd.org/itn/2018/10/18/urbaser-v-argentina/>> accessed 26 July 2019.

3 Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' [2001] 111 *The Yale Law Journal* 443.

4 Yulia Levashova 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' [2018] 14 *Utrecht Law Review* 40.

5 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (United Nations 2011): The UNGPs are a set of principles seeking to offer a global standard for preventing and remedying the adverse human rights impacts arising from business activities.

6 Martin Doe and Katerina Yiannibas, 'Arbitrating Business and Human Rights Disputes: Public Consultation on the Draft Hague Rules on Business and Human Rights Arbitration' (*Kluwer Arbitration Blog*, 27 June 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/06/27/arbitrating-business-and-human-rights-disputes-public-consultation-on-the-draft-hague-rules-on-business-and-human-rights-arbitration/>> accessed 28 July 2019.

7 Drafting Team of the Hague Rules on Business and Human Rights Arbitration, *Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process* (Center for International Legal Cooperation November 2018); Drafting Team of the Hague Rules on Business and Human Rights Arbitration, *Rules on Business and Human Rights Arbitration* (Center for International Legal Cooperation 2019).

Context and Issue Identification

2. How does foreign investment affect human rights?

Foreign investment occurs when a company invests private capital in a host state and actively manages the investment.⁸ Such capital flows are often regarded as a chief conduit for economic growth for capital-importing states.⁹ Foreign investment is also considered as a profitable endeavour for capital-exporting multinationals who invest, inter alia, to access resources and raw materials, to decrease production costs, and to expand their geographical reach.¹⁰

While companies primarily invest to better their financial returns, sometimes, foreign investment can improve human rights in capital-importing states, at least indirectly.¹¹ However, foreign investment also carries risks to the communities of host states.¹² Investor activities can potentially have a direct and detrimental impact on human rights.¹³ In this context, affected persons may often have limited access to remedies, especially in countries with already poor access to justice.¹⁴ For instance, victims may be unable to claim against a parent company that, due to legal principles or jurisdictional barriers, is shielded from liability for the actions of a subsidiary company abroad in violation of human rights.¹⁵

Investor activities can result in the deprivation of basic human rights.¹⁶ This is often the case where formerly public services are brought within the operative control of investors, and thereby privatised.¹⁷ In these cases, foreign investors are effectively operating in spaces where states would ordinarily comply with their human rights obligations.¹⁸ While this does not imply a subcontracting of human rights obligations to the investor, the effective control over services whose misuse or negligent operation may result in the violation of human rights means that investor activity has a direct impact on foreseeably affected communities.¹⁹ To illustrate, consider the case of *Urbaser v The*

8 James Chen, 'Foreign Investment' (Investopedia, 5 May 2018) <<https://www.investopedia.com/terms/f/foreign-investment.asp>> accessed 1 August 2019.

9 Charles N. Brower and Stephan W. Schill 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' [2009] 9 Chicago Journal of International Law 471, 496.

10 *Ibid.*

11 For example, developing states with the largest influx of foreign investment between 1981 and 1992 generally scored positively on human rights indexes, the United Nations' Human Development Index and Purdue University's Political Terror Scale; Debora Spar, 'Foreign Investment and Human Rights' [1999] 42 Challenge 55.

12 International Institute for Sustainable Development, 'Investment for Sustainable Development' <<https://iisd.org/topic/investment-sustainable-development>> accessed 3 August 2019.

13 United Nations Human Rights Office of the High Commissioner, 'International Investment Agreements (IIAs) and Human Rights' <<https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>> accessed 1 August 2019; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' [2011] 60 International and Comparative Law Quarterly 573.

14 Directorate-General for External Policies, *Access to legal remedies for victims of corporate human rights abuses in third countries* (European Parliament 2019).

15 Elements for Consideration in Draft Arbitral Rules (n 7); For a discussion about the difficulties in bringing claims against parent companies arising out of alleged human rights abuses by subsidiaries in foreign countries, see dicta in *Okpabi v Shell* [2018] EWCA Civ 191, *AAA & Ors. v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, and recently *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

16 The human right to water was recognised by the United Nations General Assembly on 28 July 2010 through Resolution 64/292: The human right to water and sanitation/3 August 2010.

17 Ursula Kriebaum, 'Privatising Human Rights: The Interface between International Investment Protection and Human Rights' in August Reinisch and Ursula Kriebaum (eds.), *The Law of International Relations* (Eleven International Publishing 2007), 166.

18 *Ibid.*

19 *Ibid.*

Argentine Republic.²⁰ The company was a shareholder in a concessionaire for the distribution of water and servicing of sewage treatment in Buenos Aires as part of the country's water privatisation plans. Urbaser's failure to sufficiently invest in the supply of water coupled with its increasing prices led to affordability and access issues, particularly within indigent communities who were virtually denied access to water.²¹

Investor activities can also have severe environmental and health impacts.²² This can occur as a result of, for example, a malfunction of sewage systems or waste management facilities.²³ In Ecuador, the operations of an oil-extracting American multinational energy corporation contaminated the country's rainforests and rivers and damaged the health of the surrounding communities.²⁴

3. Can foreign investors be held liable for business-related human rights harm under the foreign investment regime?

a. *International law of foreign investment*

Despite the factual linkage between foreign investment and human rights, traditionally, investors are not subject to legal liability for business-related human rights harm under international investment agreements (IIAs).²⁵ After all, under international human rights instruments, it is the states, and not businesses, that make commitments to uphold international human rights standards.²⁶ The foreign investment regime is no exception.

Foreign investment is regulated through IIAs: bilateral, regional, or international treaties contemplated by states to regulate the legal relationship between an investor and a host state.²⁷ These treaties are legal documents which have a selective function: to offer the greatest degree of protection to investors' property rights, including guarantees that the state will refrain from exercising any measures, such as nationalisation, which could threaten the profit-making nature of the investment.²⁸ Under a typical IIA, the investor bears no enforceable obligations.²⁹ With no obligations to comply with, investors have

20 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016).

21 *Ibid*; Ursula Kriebaum, 'The Right to Water Before Investment Tribunals' [2018] Brill Open Law 16, 28.

22 Horatia Muir Watt, 'The contested legitimacy of investment arbitration and the human rights ordeal' (*HAL*, 3 April 2014) <<https://hal-sciencespo.archives-ouvertes.fr/hal-00972976>> accessed 15 August 2019; A report for the Office of the High Commissioner on Human Rights highlights the connection recognised in United National human rights treaty bodies between 'the environment and the realisation of a range of human rights, such as the right to life, to health, to food and housing'; UNHRC, Report of the OHCHR on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, 15 January 2009 [18].

23 Kriebaum, 'Privatising Human Rights: The Interface between International Investment Protection and Human Rights' (n 17).

24 Diane Desierto, 'From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investors' Dispute on Denial of Justice: The Chevron v Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims' (*Blog of the European Journal of International Law*, 13 September 2018) accessed 20 January 2020; Carlos Andres Sevilla Albornoz, 'Can Foreign Investors Be Held Liable for Human Rights Violations? International Human Rights Law and Beyond' (*Investment Treaty News*, 26 September 2017) <<https://www.iisd.org/itm/2017/09/26/can-foreign-investors-be-held-liable-for-human-rights-violations-international-human-rights-law-and-beyond-carlos-andres-sevilla-albornoz/>> accessed 7 August 2019.

25 Levashova (n 4).

26 Luke Eric Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (International Institute for Sustainable Development, 2003).

27 United Nations Human Rights Office of the High Commissioner (n 13).

28 Henok Gabisa, 'The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?' [2014] 48 *The International Lawyer* 153.

29 Trade Justice Movement, 'Bilateral Investment Treaties (BITs) and ISDS' (*Trade Justice Movement*) <<https://www.tjm.org.uk/trade-deals/bilateral-investment-treaties>> accessed 20 August 2019.

no liability and as a result, investors are not commonly faced with state-initiated claims.³⁰ Combined, the investor is in a particularly comfortable position because, in addition to receiving investment protection, the investor benefits from a unilateral option to initiate arbitration proceedings while also being free from horizontal obligations. This concept of far-reaching protection leaves investors unconcerned with ‘international principles and norms applicable to the protection of human rights.’³¹

Human rights references in traditional IIAs are exceptionally limited in quantity and effect.³² The 2018 OECD Report on Societal Benefits and Costs of International Investment Agreements refers to an earlier 2014 OECD study which found that a mere 0.5 percent of 2,107 investment treaties contained human rights elements.³³ These human rights references have been limited to existing in treaty preambles.³⁴ While such references speak to the spirit of the treaties, they are not valid sources of legal obligations.³⁵ The reality is that the structures of most IIAs provide no scope to account for human rights in their operative parts.³⁶

It is only recently that IIAs are envisaging greater corporate social responsibility, and, on exceptionally limited occasions, corporate accountability for human rights harms.

There is an important distinction to be made between IIAs that formulate provisions using corporate social responsibility language and those that contemplate corporate accountability for human rights harms. The distinction is drawn from cousin concepts ‘Corporate Social Responsibility’ (CSR) and ‘Business and Human Rights’ (BHR). BHR was anchored in the United Nations Human Rights Council (UNHRC) report commonly known as the ‘Ruggie Report’ in 2008 and hastened by the UNGPs, unanimously adopted by the UNHRC in 2011.³⁷ The conceptual difference, at its broadest, is that while CSR ‘emphasises responsible behavior, BHR focuses on a more delineated commitment in the area of human rights,’³⁸ often by envisaging bases for remedies for human rights victims.³⁹ In other words, CSR relies on *corporate initiative* over the imposition of new legally binding requirements through the employment of *voluntary* measures rather than state oversight.⁴⁰ This is to say that, IIAs which formulate CSR provisions are, in essence, less effective in driving investor’s legal accountability for business-related human rights harms, given their reliance on corporate voluntarism by contrast to the stronger thrust of BHR provisions.

A few contemporary examples of investment treaties, popularly termed ‘new-generation’,⁴¹ are explicitly prescribing CSR obligations. It is true, however, that many IIAs have cautiously couched

30 Naomi Briercliffe and Olga Owczarek, ‘Human-rights-based Claims by States and “New-Generation” International Investment Agreements’ (*Kluwer Arbitration Blog*, 1 August 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/>> accessed 15 August 2019.

31 Gabisa (n 28).

32 Kathryn Gordon, Joachim Pohl, and Marie Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* (OECD 2014), 24.

33 Joachim Pohl, *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence* (OECD 2018) 56; Gordon, Pohl, and Bouchard (n 32).

34 Briercliffe and Owczarek (n 30).

35 *Ibid.*

36 Horatia Muir Watt (n 22).

37 Guiding Principles on Business and Human Rights (n 5).

38 Florian Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’ [2012] 22 *Business Ethics Quarterly* 739.

39 Anita Ramasastry, ‘Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability’ [2015] *Journal of Human Rights* 237.

40 *Ibid.*

41 Briercliffe and Owczarek (n 30).

CSR obligations in aspirational language because, as noted earlier, these obligations would essentially contravene the purpose of investment agreements – to protect investors. For instance, Article 24 of the Pan-African Investment Code (PAIC) conditions obligations, using words like ‘should’. Similarly, Article 12 of the Argentina-Qatar bilateral investment treaty (BIT) provides that investors should ‘*make efforts to voluntarily* incorporate internationally recognised standards of corporate social responsibility into their business policies and practices [emphasis added]’.⁴² Together, these examples demonstrate a trend towards mere encouragement for investors to voluntarily subscribe to CSR obligations, with no legally enforceable obligation to comply with CSR standards. Aspirational rather than obliging provisions for CSR compliance threaten the thrust and effectiveness of the provisions.⁴³ Further, the stated articles do not specify the CSR standards referred to. This is the case despite the existence of a number of recognised CSR standards in international law, each having varying focuses and compliance monitoring systems, including the UNGPs, the OECD Guidelines, and the Global Compact, among other instruments.⁴⁴ Accordingly, even if these aspirational clauses were capable of giving rise to an investment arbitration in the event of a dispute, such broad formulations would present difficulties for tribunals when identifying the intended source of CSR standards.⁴⁵

A bolder approach was taken, however, in the Morocco-Nigeria BIT where business and human rights considerations were contemplated. The Morocco-Nigeria BIT is presently the most far-reaching investment instrument in terms of human rights obligations.⁴⁶ Article 18 requires companies to be *active* in upholding them when making investments.⁴⁷ Specifically, it stipulates that investors ‘shall uphold human rights in the host state’, ‘shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work’, and that investors and investments ‘shall not manage or operate the investment in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are parties.’⁴⁸ Further, Article 20 is unique in that it provides for investor liability, stipulating that in the event of a violation of an investor obligation, the investor is liable before their domestic courts.⁴⁹ Taken together, it is clear that the BIT bypasses traditional approaches toward human rights obligations in IIAs.⁵⁰ These clauses could potentially change the social responsibilities of multinational corporations by transforming human rights into enforceable international obligations, ‘making investment law a useful and unexpected lever to hold corporations accountable’.⁵¹

Despite the promising outlook on human rights protection, the effectiveness of the Morocco-Nigeria BIT is tempered by two related shortcomings. First, under the IIA, the investor is not liable because it does not provide the state with the option to initiate proceedings.⁵² Despite a clear enunciation

42 The Reciprocal Promotion and Protection of Investments between The Argentine Republic and The State of Qatar (signed 6 November 2016) (‘Argentina-Qatar BIT’) art 12.

43 Levashova (n 4).

44 *Ibid.*

45 *Ibid.*

46 Niccolo Zugliani, ‘Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty’ [2019] 68 CUP 761.

47 *Ibid.*

48 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) art 18.

49 *Ibid.*

50 Zugliani (n 46).

51 Laurence Dubin, ‘Corporate Social Responsibility Clauses in Investment Treaties’ (*International Institute for Sustainable Development*, 21 December 2018) <<https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/>> accessed 12 August 2019.

52 Levashova (n 4).

of investor obligations to respect human rights, the narrowness of the dispute settlement clause of the Morocco-Nigeria BIT precludes states from acting against investors should they have breached any of the stipulated obligations. Therefore, it appears that the prescribed obligations are to act as a deterrent rather than as a legal basis of enforceability.⁵³ Second, the utility of the provision on investor liability under Article 20 depends on the existence and quality of an enforcement mechanism in the home state capable of litigating against investors for wrongdoing committed in a foreign state.⁵⁴ More broadly, clauses such as these have yet to be tested such that it may be too premature to assess their effectiveness before an arbitral tribunal.⁵⁵

b. Investment arbitration

Investment arbitration tribunals do not commonly consider the investor’s liability for human rights harm, being procedurally restricted to considering, exclusively, claims of breaches of the instruments over which they have jurisdiction.⁵⁶ This is a feature of arbitration which obliges arbitrators to determine on a purely contractual basis.⁵⁷ That is to say that tribunal’s competence to consider human rights arguments goes only as far as the investment agreement allows for.⁵⁸ As we have noted from the previous section, IIAs do not typically envisage human rights obligations on investors, leaving arbitrators ill-equipped to address human rights arguments. For instance, in the *Metalclad* case, the tribunal held in favour of the investor against the Mexican government that blocked its project to build a hazardous waste landfill, despite the series of potentially ensuing environmental and human rights damage.⁵⁹

However, it is no longer accurate to state that companies are invariably ‘immune from becoming subjects of international law’.⁶⁰ In recent years, investment tribunals have increasingly grappled with references to human rights principles. Such references are particularly interesting because ‘they defy the alleged inherent conflict of investment and human rights.’⁶¹ Notably, the tribunal in *Phoenix v Czech Republic* articulated a limit to investor protection where the content of the IIA in question violates ‘the most fundamental rules of protection of human rights,’ like investments made ‘in pursuance of torture or genocide or in support of slavery or trafficking of human organs’.⁶² In practice, this may mean that violations of human rights may serve as the legal basis to dismiss an investor claim at the jurisdictional stage of arbitration proceedings.⁶³ The question remains, however, whether this limit to investor protection is itself restricted to the realm of violations of peremptory norms of international law, or *jus cogens*, or whether it has the potential to transpire across all human rights breaches.

53 Zugliani (n 46).

54 Levashova (n 4).

55 UNCTAD, *World Investment Report 2019* (UNCTAD 2019), 115.

56 Watt (n 22).

57 Simma (n 13).

58 *Ibid.*

59 *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000.

60 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v The Argentine Republic*, (n 20) [1195].

61 Silvia Steininger, ‘What’s Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration’ [2018] 31 *Leiden Journal of International Law* 33, 33.

62 *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) [78].

63 Levashova (n 4).

The answer is that when other human rights are in issue, tribunals have taken a more tempered approach. Specifically, tribunals have considered human rights arguments to justifiably reduce the value of compensatory damages claimed by investors. This was the case in *Bear Creek Mining Corporation v Peru*.⁶⁴ Peru had revoked a decree which awarded Canadian investor Bear Creek a concession to construct a silver mine. Bear Creek initiated arbitration proceedings under the Canada-Peru Free Trade Agreement.⁶⁵ While the tribunal found that Peru indirectly expropriated the land promised to Bear Creek, contrary to the Canada-Peru Free Trade agreement, in delivering an arbitral award, the tribunal reduced recoverable damages claimed by Bear Creek from US\$522m to just US\$18m. The tribunal recognised that the prospect of obtaining a social license from the indigenous communities to operate the mining project was small.⁶⁶ In particular, the partially dissenting opinion of co-arbitrator Philippe Sands on the point of recoverable damages is of note. He suggested that the amount of recoverable damage should be reduced in respect of Bear Creek's contributory fault to the social unrest and the resulting predicament faced by Peru.⁶⁷ The decision is significant in that the threat of a possible reduction of an award may dissuade investors from committing human rights violations lest they are precluded from claiming the entirety of compensatory damages.

Moreover, tribunals have accepted jurisdiction over human-rights based counterclaims, recognising the obligations and responsibilities of investors. In principle, states can only be respondents to arbitral proceedings.⁶⁸ Insulation from legal action by the host state is part of the protection afforded to investors by the treaties. However, states can, treaty-permitting, file counterclaims in response to a primary claim filed by the investor.⁶⁹ Counterclaims allow states to respond to legal action taken against them by challenging the investor's wrongful conduct.⁷⁰ In the landmark case of *Urbaser v Argentina*, the investor claimed against Argentina for the impact on the financial position of Urbaser's investment as a result of measures introduced by the state.⁷¹ In return, Argentina argued that the concessionaire in charge of the supply of water and sewerage services, to which Urbaser was a shareholder, failed to sufficiently invest in the supply of water that led to a breach of the human right to water.⁷² The tribunal accepted jurisdiction over Argentina's counterclaim that Urbaser had breached the human right to water, dismissing the investor's argument that the observation of its human rights responsibilities fell outside the scope of the tribunal's jurisdiction.⁷³ While the counterclaim was ultimately rejected, accepting jurisdiction over human-rights based counterclaims has important implications. The decision demonstrates that human rights-based counterclaims can potentially fall within the jurisdiction of investment tribunals.⁷⁴ In addition, human rights-based counterclaims, whether successful or not, can 'significantly moralise the

64 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017).

65 Canada-Peru Free Trade Agreement (signed 29 May 2008, entered into force 1 August 2019).

66 *Bear Creek Mining Corporation v Republic of Peru* (n 64) [599]-[600].

67 *Ibid*, Dissenting Opinion of Arbitrator Sands [4].

68 Levashova (n 4).

69 *Ibid*.

70 Dubin (n 51).

71 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (n 20) [94].

72 Schacherer (n 2).

73 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (n 20) [1117]-[1134] and [113-1155].

74 Levashova (n 4).

use of treaty-based arbitration.⁷⁵ This is because the mere threat of a successful human rights-based counterclaim can potentially discourage investors from initiating legal action against the host state. To avoid excluding themselves from the power to act against the state, investors may take particular care not to breach human rights violations from the outset.⁷⁶ However, while the tribunal's acceptance of human-rights based counterclaims can act as an important deterrent for human rights abuses, the low number of counterclaims filed coupled with the minute proportion of successful actions mutes the role it plays in the enforcement of investor obligations in investment arbitration.⁷⁷ In addition, given there is no system of precedent in international investment law, there is no reliable indication that future tribunals will follow suit.⁷⁸

75 Emmanuel Gaillard, *L'avenir des traités de protection des investissements* in Charles Leben (ed), *Droit international des investissements et de l'arbitrage international* (Pedone 2015) 1040.

76 Dubin (n 51)

77 Levashova (n 4).

78 Tarciso Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 292.

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4. The United Nations Guiding Principles perspective on investor accountability

The United Nations Guiding Principles (UNGPs), unanimously endorsed by the Human Rights Council in 2011, are a set of principles seeking to offer a global standard for preventing and remedying the adverse human rights impacts arising from business activities.⁷⁹ They are soft law and therefore do not impose legal obligations on corporations.⁸⁰ Nevertheless, they have been considered the ‘global authoritative standard on business and human rights’ and are frequently contemplated in public policy, law and regulation.⁸¹ The UNGPs comprise three core principles. Pillar I focuses on the state and its duty to protect human rights. Pillar II focuses on corporates’ responsibility to respect human rights and Pillar III focuses on access to remedies for business-related human rights harms. Pillar II provides that:

‘Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impact with which they are involved.’⁸²

This position is grounded in recognition of businesses as ‘specialised organs of society performing specialising functions, required to comply with all applicable laws and to respect human rights’.⁸³ Further, Pillar II considers that the corporate responsibility to respect human rights ‘exists independently of states’ ability and willingness to fulfil their respective human rights obligations’, and asserts that their corporate exercise does not offset states’ duties. In other words, the obligation to respect human rights is not a question of ‘either/or’, but rather grounded on the idea that such respect is to be collective and cumulative.

While states are the primary holders of international legal obligations, on a practical level, invariable reliance on nations for protection from business-related human rights abuses may be inadequate.⁸⁴

The protection of human rights exclusively through government obligations ‘seems rather uncontroversial if host states represented the only threat to human dignity, or if states could be counted on to restrain conduct within their borders effectively’.⁸⁵ States could potentially achieve greater respect for human rights if they conducted ‘inclusive and transparency human rights impact assessment before concluding trade-investment agreements and indirect explicit substantive human rights provisions in those agreements to preserve adequate policy space to discharge their human rights obligations’, according the UN General Assembly report A/72/162.⁸⁶ However, in many

79 Guiding Principles on Business and Human Rights (n 5).

80 Soft law is defined as ‘social rules... which are not legally binding but which are nevertheless of special legal relevance’: Daniel Thurer, *Soft Law – Norms in the Twilight between Law and Politics* (OUP 2009), 8.

81 International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016).

82 Guiding Principles on Business and Human Rights (n 5) 13.

83 *Ibid.*

84 Ratner (n 3).

85 *Ibid.*

86 UN General Assembly report A/72/162.

countries, adequate human rights and environmental concerns and legal protections are absent.⁸⁷ Other states are simply unwilling or unable to enforce their laws because prescribing human rights obligations, or any for that matter, on investors will impinge on the scope of afforded protection.⁸⁸ The more responsibility an investor has, the less freedom and flexibility it has to invest as it sees fit, and the likelier corporations will opt for the state with fewer regulatory burdens.⁸⁹ In their endeavour to attract scarce foreign investment in a competitive market, many developing nations forego pockets of their regulatory power and sacrifice their international human rights obligations,⁹⁰ showing little regard to the regulation of corporate behaviour.⁹¹ Occasionally, states have solicited the cooperation of corporations in violating human rights.⁹² As such, it may be inadequate to invariably depend on states to prevent, protect, promote, and address business-related human rights harms.⁹³ Herein lies the practical importance of Pillar II's prescription of an unconditional respect for human rights – one that is independent of state behavior.

5. The role of business and human rights arbitration

Several initiatives on national and international scales are emerging and being negotiated to drive investor accountability for business-related human rights harm, recognising the need to rebalance the rights and obligations of investors. For instance, on a national level, recognising the extent of damage that can be caused by foreign investment companies, states like Ecuador have endeavoured to hold any private company, including foreign corporations, legally responsible for human rights abuses under domestic law and in national courts.⁹⁴ On an international level, there has been wide debate about the potential role of a binding treaty (the Business and Human Rights Treaty) to regulate the shortfall in the current investment regime to regulate corporate duties.⁹⁵ However, these questions fall outside the scope of this paper.

Rather, the focus of this paper's contribution is the potential role of The Hague Rules on Business and Human Rights Arbitration (The Hague Rules) in advancing the agenda of the United Nations Guiding Principles, inter alia, to increase corporate respect for human rights. The Hague Rules were devised in February 2017 by a Working Group of international law and human rights specialists within The Hague Institute for Global Justice.⁹⁶ They outline a procedural framework for the proper regulation of business and human rights (BHR) arbitration between victims and corporations,

87 Daniel Aguirre, 'Regulating Investor Responsibility, not just Investor's 'Rights'' (*Business and Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/regulating-investor-responsibility-not-just-investor%E2%80%99s-%E2%80%98rights%E2%80%99>> accessed 15 August 2019.

88 *Ibid*; Columbia Center on Sustainable Investment (CCSI), 'Investment Arbitration and Human Rights' (CCSI) <<http://ccsi.columbia.edu/work/projects/investment-arbitration-and-human-rights/>> accessed 10 August 2019.

89 Ratner (n 3).

90 Peterson and Gray (n 26).

91 Ratner (n 3).

92 *Ibid*.

93 *Ibid*.

94 Article 41 of Ecuador's Organic Law on Jurisdictional Guarantees and Constitutional Control allows any person to initiate a constitutional action against a private entity under circumstances including the causation of a serious injury and a state of subordination or defencelessness of the affected person against an economic, social, cultural or religious or any other power. Retrieved from <http://www.justicia.gob.ec/wp-content/uploads/2015/05/LEY-ORGANICA-DE-GARANTIAS-JURISDICCIONALES-Y-CONTROL-CONSTITUCIONAL.pdf>. For efforts in the international sphere, see an outline of the *Business and Human Rights Treaty* discussions in Carlos Lopez, 'Toward an International Convention on Business and Human Rights' (*Investment Treaty News*, 17 October 2018) <<https://www.iisd.org/itm/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez/>> accessed 1 September 2019.

95 See Pierre Thielbörger and Tobias Ackermann, 'A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?' [2017] 24 *Indiana Journal of Global Legal Studies* 43.

96 The Hague Rules on Business and Human Rights Arbitration (n 7).

between business partners, and between third party beneficiaries and corporations.⁹⁷ In the event of a dispute, the parties to the arbitration could select The Hague Rules as the body of rules governing the arbitration. Note that this article focuses on the role of BHR arbitration in increasing investor accountability for their adverse human rights impact vis-à-vis victims and the challenges therein.

a. *Advancing the United Nations Guiding Principles agenda*

The UNGPs provide that in order to meet their responsibility to respect human rights, businesses should integrate appropriate and legitimate policies and processes to offer remediation of any detrimental human rights impact they caused or contributed toward.⁹⁸ Accordingly, businesses could employ ‘operational-level grievance mechanisms’ and cooperate with judicial mechanisms in particular situations involving alleged crimes. The UNGPs (Pillar III in particular which deals with access to remedy), however, is silent as to the available opportunities for remediation in arbitration. This article identifies business and human rights arbitration as a potential mechanism to increase investor accountability and address the absence of investor accountability in the foreign investment regime.

At the most basic level, arbitration is one such process that enables businesses to address their adverse human rights impact no matter where the abuses might occur.⁹⁹ Arbitration offers a neutral forum for the resolution of disputes with awards which are, in principle, enforceable in over 150 jurisdictions.¹⁰⁰ It is typically characterised as being procedurally swift, flexible, and offering parties the autonomy to choose the laws governing their dispute. Moreover, arbitration allows parties to select ‘seat’ or location of the proceedings, which is of particular value in respect of disputes involving foreign investors.

Arbitrating business and human rights disputes under The Hague Rules goes further in aligning with the UNGPs. The Hague Rules may hold important soft law value in increasing investor accountability for business-related human rights harm in two additional ways. First, **through context sensitive rules, The Hague Rules could ensure that the investor would be held accountable where appropriate.** While The Hague Rules borrow from the 2013 UNCITRAL Arbitration Rules, they depart in several ways to reflect the idiosyncrasies of business and human rights disputes, inter alia: the possible need for special measures to address issues arising from this context, the potential imbalance of power associated with these kinds of disputes, the public interest in the resolution of such disputes, the value of having expert arbitrators, and the possibility of special arrangements being necessary for ascertaining evidence and protecting witnesses.¹⁰¹

To highlight one in particular, in order to address the potential imbalance of power associated with BHR disputes, The Hague Rules incorporate tailored provisions on evidence gathering, different from the UNCITRAL Arbitration Rules. Specifically, the provisions will assist the process of sourcing of information for victims of human rights abuses who are typically disadvantaged in this respect. Article 32(2) states that the tribunal has the discretion to organise the taking of evidence according to what

97 *Ibid*; *Elements for Consideration in Draft Arbitral Rules* (n 7).

98 Guiding Principles on Business and Human Rights (n 5) 15.

99 Claes Cronstedt, Jan Eijbouts, Adriennes Margolis, Martijn Scheltema, Robert C. Thompson, and Steven Ratner, ‘International Arbitration of Business and Human Rights: A Step Forward’ (*Kluwer Arbitration Blog*, 15 November 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/>> accessed 1 September 2019.

100 Catherine Dunmore, ‘International Arbitration of Business and Human Rights Disputes: Part 2 – Advantages and challenges’ (*Asser Institute Centre for International & European Law*, 13 December 2017) <<https://www.asser.nl/DoingBusinessRight/Blog/post/international-arbitration-of-business-and-human-rights-disputes-part-2-advantages-and-challenges-by-catherine-dunmore>> accessed on 22 August 2019.

101 *The Hague Rules on Business and Human Rights Arbitration* (n 7), Preamble.

it deems appropriate to ‘enable each party to effectively present its case...including considerations of fairness, efficiency, cultural appropriateness and rights-compatibility’.¹⁰² One way the tribunal can exercise this discretion is by limiting the scope of evidence and sanctioning non-compliance with orders to produce evidence by the tribunal itself or by approved party-requests. Upon non-compliance, arbitral tribunals are entitled to make adverse inferences and reverse the burden of proof, whereas according to Article 32(1), ‘each party shall have the burden of proving the facts relied on to supporting its claims or defence’.¹⁰³ This provision addresses the potential inequality of arms by allowing parties, especially the victim of human rights abuse, to access information via requests launched to the arbitral tribunal. Beyond that, the provision asks of the arbitral tribunal to ‘order the production of documents to the extent necessary to enable each party to have a reasonable opportunity of presenting its case’.¹⁰⁴ The significance of these departures from the UNCITRAL Arbitration Rules is that it enables a level playing field between disputing parties, taking account of the associated vulnerabilities of many victims of human rights abuses, most notably including a lack of financial resources.

Second, **The Hague Rules offer greater transparency in arbitration proceedings which may result in the investor’s public scrutiny.** Article 38 stipulates that, when exercising the discretion to adapt the requirement of any provisions of the Rules, the arbitral tribunal must contemplate the public interest in transparency, the parties’ interest in a fair and efficient resolution of their dispute, and the ‘safety, privacy and confidentiality concerns of the parties, witnesses, representatives and others involved.’¹⁰⁵ Requiring tribunals to consider the relevance of adopting increased transparency measures means that tribunals must actively ensure the appropriate degree of transparency is upheld in any event. The spotlight phenomenon may oblige companies to adhere to better standards of respect for human rights ‘not because of the sanction of the law but because of the sanction of the market’.¹⁰⁶

b. The limits of arbitrating business and human rights disputes under The Hague Rules

While The Hague Rules hold promise in the quest for greater corporate respect for human rights, they face several challenges. The Hague Rules are not revolutionary in the sense that they do not impose human rights obligations on corporations. In other words, if a dispute arose and parties decided to arbitrate under The Hague Rules, they would still have the flexibility to choose governing rules devoid of human rights obligations. Parties are also not obliged to engage with the Hague Rules in the event of a dispute: the Hague Rules can only operate on an opt-in basis. As such, **one limitation of The Hague Rules in advancing UNGP Pillar II and III is that it is reliant, in large part, on the corporate initiative to use arbitration** to address human rights claims arising from their business activities.¹⁰⁷ In other words, in order for The Hague Rules to have the effect of increasing investor accountability, investing companies must voluntarily submit themselves to the arbitration.

Would businesses and human rights victims even consent to arbitration? Experience tells us that it is possible – although admittedly uncommon – for businesses and victims to submit a dispute to

102 *Ibid.*, Article 32(2).

103 *Ibid.*, Article 32(1).

104 *Ibid.*, Article 32(4).

105 *Ibid.*, Article 38(2).

106 Spar (n 11).

107 Diane Desierto, ‘Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration’ (*Blog of the European Journal of International Law*, 12 July 2019) < <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/> > accessed 14 August 2019.

arbitration despite a lack of contractual agreement. In 2013, the Dhaka garment factory collapsed because of an infrastructural deficiency in Rana Plaza, killing scores of workers.¹⁰⁸ Following the disaster, two global trade unions initiated arbitration proceedings against two signatory companies to The Bangladesh Accord on Fire and Building Safety in Bangladesh (The Bangladesh Accord), signed on 15 May 2013.¹⁰⁹ The proceedings were launched for alleged breaches of ‘obligations to compel their suppliers to remediate working conditions and negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation’.¹¹⁰ Although both cases settled, The Bangladesh Accord could serve as a useful model for other industries looking for ways to give victims of human rights issues access to legal remedy without contractual consent to arbitrate.

In any case, **it can be said that businesses are generally incentivised to arbitrate business and human rights disputes.** First, incorporating a contractual clause providing for the arbitration of BHR disputes is not only a way to control and attempt to avoid human rights abuses across supply chains. It also serves as a legal mechanism to address claims, should they arise.¹¹¹ Second, submitting disputes to arbitration allows businesses to circumvent reputational damage that may otherwise result from media attention.¹¹² While there is no legal obligation for a company under international law to comply with human rights standards, ‘those companies who have violated them have found, to their cost, that society at large will condemn them.’¹¹³ Where human rights abuses occur, businesses may lose customers, lose their social license to operate in places beyond where the abuse took place, and lose the opportunity to tender their goods or services in government programs.¹¹⁴ In addition, businesses may be incentivised by the greater degree of control over their legal risk by submitting to arbitration.¹¹⁵ This is because submitting to arbitration typically entails a *final and binding* award, subject to limited grounds for challenge in national courts.¹¹⁶ In other words, by submitting to arbitration, businesses could avoid claims being attempted in domestic courts.¹¹⁷

Another challenge for business and human rights arbitration is the risk of the non-enforceability of an award.¹¹⁸ If a BHR award is delivered in favour of the victim but it is not capable of being recognised and enforced in a national court, then it cannot be said that the investor was held legally accountable for the human rights harm caused. A BHR award may face the threat of non-enforceability if the matter is considered to be non-arbitral, in the same way that criminal matters are in most jurisdictions.¹¹⁹ The non-arbitrability of a subject-matter is determined through the lens of public policy.¹²⁰ In regards to business and human rights disputes, arbitration has been criticised

108 Michael Safi, ‘Rana Plaza, five years on: safety of workers hangs in balance in Bangladesh’ (*The Guardian*, 24 April 2018) <<https://www.theguardian.com/global-development/2018/apr/24/bangladeshi-police-target-garment-workers-union-rana-plaza-five-years-on>> accessed 20 August 2019.

109 The Bangladesh Accord on Fire and Building Safety in Bangladesh (signed 15 May 2013).

110 Julianne Hughes-Jennet and Alison Berthet, ‘Arbitrating business and human rights disputes: uncharted territory’ (*Practical Law Arbitration Blog*, 30 August 2018).

111 Cronstedt, Eijssbouts, Margolis, Scheltema, Thompson, and Ratner (n 99); *The Hague Rules on Business and Human Rights Arbitration* (n 7) Preamble.

112 Claes Cronstedt, Jan Eijssbouts and Robert C. Thompson, *International Business and Human Rights Arbitration* (Lawyers for Better Business 2017).

113 Ratner (n 3).

114 Cronstedt, Eijssbouts and Thompson (n 112).

115 Ashwita Ambast, Jan Eijssbouts, Abiola Makinwa, Giorgia Sangiulo, Martijn Scheltema, ‘The Hague Rules: Improving International Dispute Resolution in the Field of Business and Human Rights’ (World Justice Project Working Sessions, 1 May 2019) <https://worldjusticeproject.org/sites/default/files/documents/2019-07-15%20Working%20Sessions%20Summaries%20FINAL_noalgorithms.pdf#page=86> 86> accessed 15 July 2019.

116 *Elements for Consideration in Draft Arbitral Rules* (n 7) 6.

117 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017), 20.

118 Maria Laura Izzo, ‘A Further Step Toward Business and Human Rights Arbitration – The Hague Rules’ (*Kluwer Arbitration Blog*, 13 September 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules/>> accessed 1 October 2019.

119 Moses (n 117) 35.

120 *Ibid.*

for being an inappropriate forum for their resolution for a number of reasons. First, the resolution of business and human rights in a privatised setting ‘does not come without significant potential costs to both the dispute resolution and societal regulation purposes of public dispute resolution processes’.¹²¹ Proponents of private justice emphasise the enormous benefit of relieving judicial case backlogs; however, a singularly instrumentalist take on arbitration risks ignoring deeper discussions on whether arbitration can match the public value offered by the courts in cases of particularly high public interest.¹²² In jurisdictions which operate partly on the basis of precedent, the adjudication of disputes through private justice stifles the development of the law.¹²³ This is particularly problematic in key areas like human rights.¹²⁴

In the same vein, in instances where states consider human rights strictly as a matter of the state, disputing parties may be restricted when attempting to enforce the award.¹²⁵ This may be the case for jurisdictions which have made a ‘commercial reservation’ to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²⁶ This reservation allows a contracting state to recognise and enforce awards exclusively arising out of disputes of a commercial nature.¹²⁷ In order to prevent the non-enforceability of a BHR award, Article 1(2) of The Hague Rules provides that when arbitrating under the rules, disputes are considered to have ‘arisen out of a commercial relationship ... for the purposes of Article 1(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.’¹²⁸ While this could potentially preclude a party from objecting to the enforceability of an award, the potential for a party to challenge under this basis is one which could, at the very least, significantly delay the conclusion of business and human rights disputes.

6. Conclusion

This paper’s main contribution was to consider BHR arbitration as one way to complement the international endeavour to increase corporate respect for human rights given the limitations found in the foreign investment regime. To this end, it began by demonstrating the number of ways that foreign investment can affect human rights, including by depriving communities of basic human rights and by causing severe environmental and health impacts.¹²⁹ This paper has discussed, at length, whether foreign investors are held accountable in the foreign investment regime, concluding the following: traditionally, investors are not subject to legal liability for human rights harm resulting from business activities under IIAs.¹³⁰ In the same vein, investment arbitration tribunals do not

121 Trevor C. W. Farrow, *Civil Justice, Privatisation, and Democracy* (University of Toronto Press 2014) 136.

122 Lorna McGregor, ‘Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR’ [2015] 26 *The European Journal of International Law*, 607.

123 Sonia Anwar-Ahmed Martinez, ‘The Rise of Mediation and its Erosive Effect on the Rule of Law in Dispute Resolution’ [2019] 6 *SOAS Law Journal* 265.

124 Jacques Werner, ‘Limits of Commercial Investor-State Arbitration: The Need for Appellate Review’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.) *Human Rights in International Investment Law and Arbitration* (OUP 2009) 115.

125 *The Hague Rules on Business and Human Rights Arbitration* (n 7) 4.

126 United Nations Commission on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (UNCITRAL 2016), 33-34.

127 *Ibid.*

128 *The Hague Rules on Business and Human Rights Arbitration* (n 7) Article 1(2).

129 Watt (n 22); A report for the Office of the High Commissioner on Human Rights highlights the connection recognised in United National human rights treaty bodies between ‘the environment and the realisation of a range of human rights, such as the right to life, to health, to food and housing’ (n 22); United Nations Human Rights Council, Report of the OHCHR on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, 15 January 2009, [18].

130 Levashova (n 4).

commonly consider the investor's liability for human rights harm, being procedurally restricted to consider, exclusively, claims of breaches of the instruments over which they have jurisdiction.¹³¹ It is only recently, and on limited occasions, that the foreign investment regime has gained greater sensitivity to human rights concerns. This paper has followed to highlight the UNGPs perspective of the corporate responsibility to respect human rights as one which is independent of the state's behaviour and effort to meet their own obligations. In addition, it has contemplated the inadequacy of invariable reliance on states for protection from business-related human rights abuses.¹³²

Finally, this paper has identified business and human rights arbitration under The Hague Rules as a potential mechanism to increase investor accountability and address its absence in the foreign investment regime. BHR arbitration could enable businesses to address their adverse human rights impact no matter where the abuses might occur.¹³³ The Hague Rules, as procedural rules that could govern a BHR dispute, can ensure that the investor would be held accountable where appropriate through context sensitive rules. Equally, they can offer greater transparency in arbitration proceedings which may result in the investor's public scrutiny. With that said, The Hague Rules are not free from challenges. One limit of The Hague Rules in advancing UNGP Pillar II is that it is reliant, in large part, on the corporate initiative to use arbitration to address human rights claims arising from their business activities. A second challenge for business and human rights arbitration is the risk of the non-enforceability of an award given its non-commercial nature.¹³⁴ While the effectiveness of business and human rights arbitration is limited in these respects, 'against the realities of a continuing limited universe of legally binding human rights recourse against the impacts of private transnational activities, we cannot afford to close off the arbitral option either.'¹³⁵

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131 Watt (n 22); Kriebaum, 'Privatising Human Rights: The Interface between International Investment Protection and Human Rights' (n 17).

132 Ratner (n 3).

133 Cronstedt, Eijssbouts, Margolis, Scheltema, Thompson, and Ratner (n 99).

134 Izzo (n 118).

135 Desierto (n 107).

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