Any Chance For Human Rights? Human Rights in International Investment Arbitration

Isabel Humburg

11394870

University of Amsterdam

College of Politics, Psychology, Law & Economics

Law Major

BSc Thesis

Supervised by

Annemarie Middelburg

Marco Fabbri

19th June 2019

"Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper"

Ronald Dworkin, 1980, p. 201

Abstract

The 2016 ICSID Tribunal's decision in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (hereafter: *Urbaser)* was hailed by many human rights lawyers and activists as a landmark decision in the fight for increased human rights protection. Soon after, however, substantial criticism was raised against the reasoning of the Tribunal, specifically against the Tribunal's main argumentation based on soft law conventions allegedly imposing international human rights obligations on corporations. This paper explores the background and relevance of *Urbaser* and discusses the substantive criticism brought against the Tribunal's decision. An analysis of the current international legal framework proves that there are no existing, legally binding human rights obligations for corporations. Furthermore, this paper shows that introducing human rights in the manner outlined by the ICSID Tribunal in *Urbaser* would also not be feasible when considering the adverse economic consequences. Finally, two alternatives for introducing human rights in international investment law (hereafter: IIL) and international investment arbitration (hereafter: IIA) are discussed: domestic laws and so-called 'new-generation' international investment agreements, of which the latter seems most promising in order to achieve the desired increase of human rights protection.

Keywords: international investment law, human rights, arbitration, corporate obligations, investment arbitration, Argentina, Urbaser.

Any Chance For Human Rights? Human Rights in International Investment Arbitration

During the 19th and early 20th century people living, working or investing in foreign countries were often lacking opportunities "for redress if they suffered injustice" (Sabahi, Laird & Gismondi, 2017, p. 7). National courts, in which one could voice their concerns, either did not exist, "provided insufficient protection, or may even have been biased towards local interests" (Sabahi, Laird & Gismondi, 2017, p. 7). States, therefore, started to enact so-called 'gunboat diplomacy': the home nation of the investor could threaten the other State with economic sanctions should it fail to adequately "protect the interests of their nationals" (Sabahi, Laird & Gismondi, 2017, p. 8). However, States were often reluctant to go to such lengths, potentially jeopardising their relationship with the other nation, simply in order to protect the interests of one of their nationals. Therefore, the focus "gradually shifted to developing peaceful means of dispute settlement, including using international arbitration" (Sabahi, Laird & Gismondi, 2017, p. 11) culminating in the creation of the Permanent Court of Arbitration established by the Hague Peace conferences of 1899 and 1907. Over the years many other dispute settlement tribunals were created, for example, the International Centre for Settlement of Investment Disputes (hereafter: ICSID) which plays a central role in this paper. According to Sabahi, Laird and Gismondi (2017) it is "the most frequently used modern international institution" (p. 15) in IIA. Its main legal mechanism, the ICSID Convention, entered into force on September 14, 1966, and has to date 163 signatory and contracting member States (ICSID World Bank Group, n.d.).

Throughout the 1960s and 70s, several United Nations General Assembly (hereafter: UNGA) resolutions were passed to further protect capital and expropriation compensation such as the UNGA Resolution 1803 (1962) focusing on "the promotion and financing of economic development in under-developed countries" (Kilangi, n.d.). Additionally, the

United States started concluding so-called 'Friendship, Commerce and Navigation (FCN) treaties' which are widely considered to be the "forefathers of [modern-day]" (Sabahi, Laird & Gismondi, 2017, p. 19) Bilateral Investment Treaties (hereafter: BITs). These were, however, limited to State-to-State dispute resolution and did not yet allow for investor-State arbitration (Sabahi, Laird & Gismondi, 2017, p. 20). Following the collapse of the Soviet Union, States proceeded to conclude high numbers of BITs with each other to "protect their mutual foreign investments" (Advisory Council On International Affairs, 2015, foreword).

The biggest challenge that IIA currently faces is the regulatory chill effect (Shinde, 2019; Kube & Petersmann, 2018, p. 223). This effect materialises when BITs put pressure on States "to refrain from introducing domestic policy regulations to protect human rights or protection of the environment as a direct result of its obligation under international investment law" (Shinde, 2019, p. 48). If human rights obligations are not already incorporated in the BIT itself, "investors may threaten the State to initiate a costly arbitration dispute on the ground of indirect expropriation to deter States from pursuing certain regulations, such as health and safety ones, in their sovereign capacity" (Shinde, 2019, p. 48). Examples of such corporate practice are the *Philip Morris Brand v. Uruguay* (2016) case in which the tobacco company Philip Morris sued the Government of Uruguay for 25 million dollars in damages "for imposing stricter cigarette packaging regulations than the Uruguay-Switzerland BIT allows" (Shine, 2019, p. 49), or the NAFTA lawsuit against Canada by the fuel additive Ethyl Corporation in which the company successfully pressured the government of Canada to drop their proposed plan to "ban MMT, a gasoline additive of which it was a manufacturer" (Shinde, 2019, p. 48; Government of Canada, 2017). In the latter case, Ethyl Corporation also accomplished that the Government of Canada "publicly acknowledged that MMT was not a health hazard" (Shinde, 2019, p. 48) and received a considerable

compensation in order for them to withdraw the case from arbitration. This pressure constitutes an often times insurmountable obstacle for States seeking to introduce stricter, if any, human rights obligations for corporations. Unless the two State parties to the BIT in question decide to change or amend the BIT itself or to create a new one allowing for the possibility of States to introduce (stricter) regulations, the State seeking to do so faces costly lawsuits brought by powerful corporations.

Additionally, developing countries "suffer a significant resource differential vis-à-vis the first world nations, which account for maximum foreign investments" (Shinde, 2019, p. 49). This forces many countries "to compromise on strategic domestic policy-making" (Shinde, 2019, p. 49) in order to attract and keep foreign investment in their country. Sheetal Narayanrao Shinde (2019) explains, based on Andrew Guzman's (1997) 'prisoner's dilemma' argument, that developing countries "enter into BITs with a clause of investment protection to attract FDIs" (p. 49). If all developing countries decided together to lower these investment protections, they would continue to attract the same amount of investment since no single State would offer more attractive conditions than the others. However, in reality "each country has an incentive to defect" (Shinde, 2019, p. 49) in order to offer better conditions for the investor and to thereby attract more investment than its neighbour. Competing with other countries these developing States "continue relaxing the regulatory regime at the cost of their human rights obligations" (Shinde, 2019, p. 49). This leads to a dangerous "downward regulatory spiral or 'race to the bottom' [which] puts the issues of human rights at the backstage in investment arbitrations" (Shinde, 2019, p. 49). However, this incentive to offer favourable conditions to multinational corporations cannot only be observed in developing countries. For example, EU regulations on corporate tax are currently being violated by Ireland and The Netherlands with their favourable tax rates for

multinational corporations such as Apple and Booking.com (European Commission, n.d.; McConnell, 2019; European Commission, 2019; Tang & Bussink, 2018).

Considering the aforementioned challenges of IIA, this paper will examine to what extent the 2016 ICSID *Urbaser* decision created opportunities for increased human rights protection and changed the landscape for future cases based on human rights counterclaims by host-states against an investor before IIA tribunals. It will be argued that the ICSID Tribunal's reasoning in *Urbaser* cannot be sustained when considering both the current lack of legally binding international corporate human rights obligations as well as the economic consequences that would unfold were one to follow the Tribunal's argumentation. In seeking to analyse the potential for human rights to enter IIL following the *Urbaser* decision, this paper will first given an overview of the content and relevance of the ICSID *Urbaser* case and criticism brought towards the Tribunal's reasoning. Furthermore, Kaplow and Shavell's (2001) theory in their work *Fairness vs. Welfare* outlining the contrast between a welfarist-consequentialist view of public policy assessment and alternative views based on non-specified moral principles will serve as the basis of this paper's economic analysis. Their theory will be evaluated using Michael Dorff's (2002) direct response to Kaplow and Shavell's (2001) work as well as the rights thesis developed by Ronald Dworkin in his book *Taking Rights Seriously* (1978). Finally, it will discuss and evaluate two alternatives that have been put forward in recent years by different stakeholders in order to, nevertheless, increase human rights protection in IIA.

Methodology

In order to answer the research question this paper will conduct a legal analysis of the aforementioned arbitration case and of relevant international human rights and investment instruments such as the Spain-Argentina BIT, the ICSID Convention, the Universal

Declaration of Human Rights (herafter: UDHR), specifically Article 30, the International Covenant on social economic and cultural rights (hereafter: ICESCR), in particular Article 5(1) and Article 11, the European Convention on Human Rights (hereafter: ECHR) and its First Protocol, the SADC Model BIT (2012), the India Model BIT (2015), the draft PAI Code (2016) and the Morocco-Nigeria BIT (2016). Moreover, regarding soft law instruments the following documents are going to be taken into consideration: the United Nations (herafter: UN) Guiding Principles on Business and Human Rights, the UN Human Rights Committee General Comment 31 and the International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy. The aforementioned documents can be accessed on their respective institutions' websites and were selected due to their relevance in outlining the extent of international corporate human rights obligations. Complementing this legal analysis this paper will also conduct a literature review of relevant journal articles, blog entries, textbooks and webpages which were discovered using mainly Google Scholar as well as the online university library of the University of Amsterdam researching the following keywords: *international human rights law, international law, corporate human rights obligations, international investment law, international investment arbitration, human rights, Urbaser, welfare, fairness, rights, value.* The arbitration case was selected due its relevance and importance as being the first IIA case in which a tribunal accepted jurisdiction to hear a counterclaim brought by the host State based on human rights indicating a shift in current IIA practice.

Considering the scope of this work, the paper will focus on the specific human rights aspects, its benefits as well as its potential drawbacks in IIL and IIA. Additionally, the two most relevant and feasible alternatives for increased human rights protection were selected, according to the opinion of the author of this paper. Finally, it is important to state that this

paper presents a legal, deontological perspective towards the currently debated topic. Thus, the economic analysis conducted serves the purpose of engaging with economic considerations and criticism raised against this perspective and to take their concerns into account. However, if one were to choose a contrary, more consequentialist stance towards the issue the conclusion of this paper may differ.

Analysis

International Investment Law and *Urbaser*

Background - *Urbaser.*

Beginning of the 1990s, the Argentina Republic started privatising many previously public sectors, among them also the drinking water and sewerage services, and implemented changes in their laws in order to attract more foreign investments, such as the 'Tax on Assets Law' guaranteeing in particular "equal treatment between national and foreign investors" and "suspending the 'buy-national' system" (*Urbaser*, 2016, para. 42). Complementing these changes in their legal system, Argentina also signed several BITs with other countries, one of them being the Spain-Argentina Investment Treaty of 1992. This particular BIT was agreed upon, similar to other investment treaties, in order to "intensify economic cooperation" (Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments, 1992) between the two countries and to "create favourable conditions for investments made by investors of either State in the territory of the other State" (Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, 1992). In the same year, Argentina also acceded to the ICSID Convention. These major changes "created confidence in foreign investors" (*Urbaser*, 2016, para. 42) and had as its result that corporations

increasingly started investing in Argentina (Crow & Lorenzoni Escobar, 2018, p. 92; *Urbaser,* 2016).

Among these newly won investments were also the Spanish investors, Urbaser and CABB, and their subsidiary, Arguas del Gran Buenos Aires S.A.(AGBA), who were granted a concession to provide water and sewerage services to the citizens of the province of Buenos Aires in 1999 (Crow & Lorenzoni Escobar, 2018, p. 92; Briercliffe, 2017). The dispute at the core of the proceedings between the Spanish corporation, Urbaser, and the Argentine Republic of 2016 arose following the financial crisis in Argentina between 2001 and 2002. Due to this financial crisis Argentina had enacted several emergency measures freezing tariffs which caused the concessionaire substantial financial loss and eventually led to its insolvency (Sabahi, Laird & Gismondi, 2017, p. 22). The claimant, Urbaser and CABB, consequently commenced proceedings at the ICSID under the Spain-Argentina BIT in July 2007 claiming that Argentina had violated its obligations under the Spain-Argentina BIT from 1992 (Schacherer, 2018). On the basis of the BIT the claimants alleged that the city of Buenos Aires had obstructed AGBA's operations and had been unwilling to reasonably "renegotiate the concession in the light of measures taken by Argentina in the face of the state's economic crisis" (Briercliffe, 2017). They subsequently brought claims based on the alleged breaches of "fair and equitable treatment ('FET'), discrimination, and expropriation" (Crow & Lorenzoni Escobar, 2018, pp. 92-93) as well as "non-impairment" (Briercliffe, 2017) against Argentina.

Argentina, however, responded by filing a counterclaim based on Article 46 of the ICSID Convention, allowing for the general possibility for States to bring counterclaims (ICSID Convention, 2003, Art. 46), and international human rights law. It argued that Urbaser had failed to provide the necessary levels of investments in the concessionaire due to mismanagement which as a result led to it being unable to continue to provide water and

sewerage services in the province of Buenos Aires. Argentina alleged that due to their "failure to perform obligations to invest in the expansion of services" (Crow & Lorenzoni Escobar, 2018, p. 93) Urbaser had violated the international human right to water of the citizens of the affected area.

Relevance - *Urbaser.*

As already mentioned above, *Urbaser* was the first case in which an arbitration tribunal accepted jurisdiction over a counterclaim brought by a State party based on human rights. The Tribunal found that both parties had "consented to the use of counterclaims" (Guntrip, 2017) and that Article X of the Spain-Argentina BIT allowed for both parties to commence proceedings, therefore also including "the possibility of a counterclaim" (Guntrip, 2017; *Urbaser,* 2016, paras.1143-1144). Moreover, despite Article 25 of the ICSID Convention only permitting an investment tribunal to hear "any legal dispute arising directly out of an investment" (ICSID Convention, 2003, Art. 25), the Tribunal established that human rights claims could not categorically be excluded on a *prima facie* basis and rejected the claimant's argument that human rights could never be related to investment (*Urbaser*, 2016, para. 1154). The Tribunal concluded, therefore, that it had the necessary jurisdiction to hear the claim due to the broadness of the jurisdictional clause of the BIT. The Tribunal "only required that the respondent present a *prima facie* case (1153) to establish jurisdiction" (Guntrip, 2017).

Merits - *Urbaser.*

Regarding the merits of the case, the Tribunal "countered the claimant's argument that the BIT conferred no obligations on the investors" (Guntrip, 2017; *Urbaser*, 2016, para. 1182) which was initially hailed as "a positive move from a human rights perspective" (Guntrip, 2017). Further, it held that international law proscribed not only rights

but also human rights obligations to corporations (*Urbaser*, 2016, para. 1194). In support of their argument that corporations bear general human rights obligations, the Tribunal referred to Article 30 of the UDHR and Article 5(1) of the ICESCR (*Urbaser,* 2016, para. 1196-1197) as well as the International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (*Urbaser*, 2016, para. 1998). It came to the conclusion that the human right to water had to be "complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights" (Urbaser, 2016, para. 1199; Guntrip, 2017).

Nevertheless, the Tribunal eventually rejected Argentina's counterclaim. It found that Argentina's claim that Urbaser had breached a positive 'obligation to perform' access to water could not be sustained when referring to current international human rights law which imposed positive obligations only on States. It asserted that corporations only had a negative duty to refrain from violating human rights. Therefore, it concluded that Argentina's counterclaim failed on the basis that a breach of such a negative obligation for corporations to abstain from violating human rights could not be regarded as sufficient to uphold Argentina's claim (*Urbaser*, 2016).

Criticism - *Urbaser.*

Ever since the final decision was handed down in 2016, the argumentation of the ICSID Tribunal regarding Argentina's counterclaim has been highly contested. Investment arbitration tribunals have, in the past, accepted claims based on international human rights brought by investors against the host-State under an investment treaty or contract "provided that the jurisdictional clause [was] broad enough" (Abel, 2018, p. 76; Kube & Petersmann, 2018). Thus, reverting to 'external sources', such as international human rights law, which are not directly part of the investment contract or BIT in question, should in theory also be

possible for the host-State. Some international law scholars, including Patrick Abel (2018) and Edward Guntrip (2017), have, however, argued that the ICSID's reasoning concerning Argentina's counterclaim is based on fundamentally flawed premises when looking at the status quo of current international law. Particularly the reference to Article 30 of the UDHR and Article 5(1) of the ICECSR as the "main legal anchor for substantiating the possibility of human rights obligations of private actors" (Kube & Petersmann, 2018, p. 237) has been highly criticised (Abel, 2018; Kube & Petersmann, 2018; Guntrip, 2017). Regarding the former, the UDHR does not establish any legally binding rights or obligations, but merely offers certain guiding principles. Moreover, both Art. 30 UDHR and Article 5(1) ICESCR are merely "aimed at preventing the deliberate misinterpretation of one human rights obligation to justify the violation of other rights" (Guntrip, 2017). Whereas the ICESCR does confer legally binding rights and obligations on the signatory States, it is argued, that the Tribunal misread "Article 5(1) of the ICECSR to bring about a direct binding effect to non-State actors of all ICECSR rights" (Abel, 2018, p. 79). The inclusion of the term "any State, group or person" (ICESCR, 1966, Art. 5(1)) in the article mistakenly led the Tribunal to conclude "that ICESCR rights produce a direct horizontal effect and that therefore the right to water covered by Article 11(1) of the ICESCR, read in conjunction with Article 5(1) of the ICESCR, could be understood as an international obligation of corporations under the human right to water" (Abel, 2018, p. 80). However, the real intention behind this clause is different. It constitutes "a provision on the abuse of rights" (Abel 2018, p. 80) in order to "prevent newly formed fascist groups from relying on human rights as a justification for their activities" (Guntrip, 2017) as evidenced by preparatory work (Abel, 2018, p. 80). Therefore, it is merely meant to prevent "an intentionally abusive invocation of human rights" (Abel, 2018, p. 80) rather than to create human rights obligations for non-State actors.

Thus, scholars argue that the Tribunal was mistaken in interpreting Article 30 of the UDHR and Article 5(1) of the ICESCR as "creating international human rights obligations" (Abel, 2018, p. 82) for private actors. Moreover, the Tribunal in *Urbaser* also "failed to provide a precise argument" (Abel, 2018, p. 77) as to how exactly international human rights law could be integrated into the IIL system. The Tribunal's reasoning of already existing human rights obligations of corporations cannot be sustained when looking at the status quo of international law. As will be demonstrated in the following section, international law, in contrast to certain domestic legal systems, does not yet impose any legally binding human rights obligations on corporations.

The Current Landscape of International Law

Voluntary codes of conduct.

Since the end of the Cold War, questions around the status of corporations in the international legal landscape have increasingly entered the discussions between politicians, legal scholars and civil society (Karavias, 2013, pp. 1-2). Already in the 1950s, however, terms such as 'Corporate Social Responsibility', 'Business Ethics' or 'Due Diligence' started being discussed in academic literature and increasingly also in public debates (De Bakker, Groenewegen & Den Hond, 2005). McWilliams and Siegel (2001) define corporate social responsibility as "actions that appear to further some social good, beyond the interests of the firm and that which is required by law" (p. 117). At its core is the notion of implementing voluntary codes of conduct regarding human rights and environmental protection in the corporate structure (Scherer & Palazzo, 2011).

Moreover, corporations have increasingly been endowed with certain rights under international law such as the right to property (Council of Europe, 1950, First Protocol ECHR Art. 1) and the right to redress for human rights violations (Council of Europe, 1950, Art. 41;

Van Kempen, 2010, p. 26). If and to what extent, however, they also have obligations under international law is highly debated (Abel, 2018; Monshipouri, Welch & Kennedy, 2003; Karavias, 2013).

Positive international human rights obligations.

In his extensive analysis of the existing landscape of human rights obligations of corporations, Marcos Karavias (2013) examines whether *positive* international law exists which creates obligations directly binding upon corporations. Thus, soft law, such as aforementioned voluntary codes of conduct adopted by corporations, or non-binding international law documents are disregarded as long as they do not "contribute to the emergence or recognition of international law obligations" (Karavias, 2013, p. 4). According to Karavias (2013), corporations bear a "baseline obligation to respect the human rights of individual right holders" (p. 196), however, the scope of this obligation is "non-equivalent to those [obligations] of States" (p. 196) and it is highly debated as to what exactly it includes. It can, thus, not be extended to also comprise positive duties of "protection and fulfilment" (p. 196) as these duties are too closely connected to the structure of the State. This reasoning seems in line with the aforementioned argumentation of the ICSID Tribunal in its decision in *Urbaser* affirming negative obligations of corporations to refrain from human rights violations but negating any positive duty to 'provide' human rights, such as a right to water. These positive duties can, under current international law, only be ascribed to States (*Urbaser*, 2016; Karavias, 2013). Whilst international law, in general, does not seem to proscribe any specific legally binding obligations to corporations, positive or negative, Karavias identifies two sources of potential corporate obligations: the law of the sea and international economic law based on contracts with international organisations. Nevertheless, he argues that an analysis of international human rights and criminal law agreements "reveals

that States have shied away from employing treaty law as a means of establishing corporate obligations" (Karavias, 2013, pp. 199-200). According to Karavias (2013), the general landscape of international law is still mostly state-centred and he concludes that international law, treaty law as well as customary law point to a lack of positive as well as concrete negative corporate obligations apart from the "'baseline' obligation to respect human rights" (Karavias, 2013, p. 167) .

Rights and duties of corporations.

In his final submission, Karavias (2013) turns to the general framework of human rights. He states that in principle "a human rights obligation binding on a corporation would mirror the structure of an obligation binding on the State, in the sense that it would operate between the corporation as the obligor and the individual as the right holder in a bilateral, non-reciprocal fashion" (Karavias, 2013, p. 201). However, as mentioned above, sometimes corporations themselves may also enjoy limited human rights protection such as under the ECHR which for example endows corporations with a right to property (Council of Europe, 1950, First Protocol Art. 1), privacy (Council of Europe, 1950, Art. 8) and redress for fundamental right violations (Council of Europe, 1950, Art. 41). A corporation can, thus, operate "both as a right holder and human rights obligor" (Karavias, 2013, p. 201) simultaneously. The invocation of a human rights violation by an individual against the company may then conflict with the corporation's own rights. Karavias (2013) argues that existing international human rights law "does not provide a means of resolving a conflict of rights invoked simultaneously by two respective right holders" (p. 201). It only provides a legality test for assessing possible restrictions of the human right of the individual when in conflict with "the 'rights of others' understood as a collective interest embodied by the State" (Karavias, 2013, pp. 201-202). Conferring not only rights but also obligations on

corporations could, therefore, alter the "traditional non-reciprocal structure of performance of human rights" (Karavias, 2013, p. 202) and warrants a rethinking of the current human rights framework and the persisting dichotomy of positive and negative duties.

In criticising the argumentation of the ICSID Tribunal in *Urbaser,* Patrick Abel (2018) also argues that international human rights obligations, in contrast to directly applicable individual rights, "so far exist only in rare instances such as the notable human rights duties under the 1981 Banjul Charter for Human's and Peoples Rights" (p. 78). The creation, in contrast to the existence, of legally binding international human rights obligations of corporations is currently still merely under discussion in the UN Human Rights Council's Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (Abel, 2018, p. 78). However, so far the council has not come to a "tangible result" (Abel, 2018, p. 78). Abel (2018) further refers to the UN Guiding Principles on Business and Human Rights (2011) which have affirmed that only States have "legally binding international human rights obligations" (p. 78), especially the duty to protect their citizens from human rights violations committed by corporations on their territory (Ng, 2018; UN Human Rights Committee General Comment 31, 2004). He concludes, in line with Karavias' analysis, that positive international law does not bestow any legally binding obligations on corporations and that they have up to date only non-binding social responsibilities serving as the purpose of the aforementioned codes of conducts and as a potential target of civil society's 'naming and shaming' tactics (Abel, 2018, p. 78).

An analysis of the academic literature and international laws, thus, shows that whereas States may create legally binding obligations for corporations in their respective domestic legal systems, under positive international law corporations do not currently have any legally binding human rights obligations, apart from the basic, abstract duty to respect.

States, on the other hand, have both negative and positive duties to refrain from human rights violations as well as to promote human rights, and most importantly to prevent non-State actors from committing any human rights violations on their territories.

Economic Considerations and Human Rights

The previous section discussed the current legal framework regarding corporate obligations to protect human rights. It demonstrated that under the status quo of international law, corporations are bestowed with certain rights, however, that contrary to the Tribunal's reasoning in *Urbaser,* they do not currently face any legally binding obligations that could obligate them to provide concrete human rights. The following section will proceed from the aforementioned findings and engage in an economic analysis of the possible consequences facing the international community if human rights were to be incorporated in IIA in the manner suggested by the ICSID Tribunal in *Urbaser.* It will be argued that where policy changes are concerned, it is important to also consider the potential economic consequences. Nevertheless, these considerations should merely form the first step in policy assessments and one should conclude with a debate on the values and rights at stake in the particular policy change. Applying this theory to *Urbaser,* one can identify serious, possible adverse effects.

Fairness versus welfare.

In their book *Fairness versus Welfare* Kaplow and Shavell (2001) discuss the "principles that should guide society in its evaluation of legal policy" (p. 967). They purport that social policies, in particular legal rules, should be "selected entirely with respect to their effects on the well-being of individuals in society" (p. 967). Notions of morality and fairness "like corrective justice should receive no independent weight in the assessment of legal rules" (Kaplow & Shavell, 2001, p. 967). If a concept is not tangible and not attached to overall

utility in a way that makes it possible for policy makers to define, it should be excluded from policy assessments altogether. Therefore, in order for fairness or morality to enter policy assessments, it needs to be translated into something that affects utility. Only then can the concept and its consequences be analysed in a utilitarian framework of cost and benefit calculations (Kaplow & Shavell, 2001, pp. 976-1028). Utilitarianism purports "the idea of a collective goal of the community as a whole" (Dworkin, 1978, introduction). A utilitarian framework, thus, deals with a calculation of cost and benefits within an aggregation of individual utilities that are combined in a welfare utility function. The way we aggregate individual welfares determines the way we deal with utilitarian action (Kaplow & Shavell, 2001, p. 988). Therefore, regarding policy assessments, if something does not directly affect utility it should not be included. Their argument is based on the "perverse effects on welfare of pursuing notions of fairness" (Kaplow & Shavell, 2003, p. 331). Only concepts that people actually care about should be included. If fairness changes utility then that would show that people care about the notion of fairness. Nevertheless, fairness has to be more than a simple idea: it has to rise to the level of a measurable concept.

Critiquing the welfare-consequentialist's stance.

Deontologists, on the other hand, have argued that notions of fairness are rooted in human morality and can, therefore, not be decoupled from social welfare policy considerations. The American law professor, Michael Dorff (2002), offers a critique to Kaplow and Shavell's (2001) welfare theory. Dorff (2002) acknowledges the important role that welfare economics play in public policy assessments, however, argues that "economics alone is insufficient as a sole basis for determining policy" (p. 898). He starts his critique by outlining the century-old debate between consequentialists on the one hand and deontologists on the other. The former argue that "public policy choices should be made by examining the

likely outcome of such choices" (Dorff, 2002, p. 851) and that one policy "should be preferred over a second if the first will result in a better outcome" (p. 851). Their emphasis lies, thus, on "society's overall welfare, however achieved, measured or defined" (Dorff, 2002, p. 851). Deontologists, on the other hand, "believe that potential policy choices must be run through a gauntlet of moral duties, or principles, which cannot be violated" (Dorff, 2002, p. 851) which means that some actions are considered to be "simply wrong, regardless of their consequences, and are therefore forbidden" (p. 851). Nevertheless, in case a policy would cause "truly disastrous consequences" (Dorff, 2002, p. 853) these disastrous economic consequences may be taken into account "even if they might frame their decision not as a matter of consequence but as one principle (e.g. life) preempting another (e.g. justice) " (p. 853).

Kaplow and Shavell's (2001) definition of fairness includes "any theory that does not rely exclusively on welfare as a normative criterion for selecting legal policies" (pp. 856-857). This, Dorff argues, does indeed "encompass much of readers' likely intuitive sense of 'fairness' including the existence of rules that trump all consequentialist concerns out of a desire for justice or the pursuit of some other principle of morality" (p. 857). Further, Kaplow and Shavell (2001) contend that "not only will fairness criteria decrease social welfare as a whole but in some cases the use of such criteria will actually make *everyone* worse-off" (Dorff, 2002, p. 857) which would violate the Pareto principle stating that one "should always favour a policy under which everyone is better off" (Kaplow & Shavell, 2001, p. 1015). The mere fact that the possibility exists that "applying fairness criteria will sometimes make everyone worse-off should then be sufficient to persuade legal policy makers not to employ fairness criteria" (Dorff, 2002, p. 858). Kaplow and Shavell (2001) find irrelevant the notion that when it comes to policy consideration, such a situation, in which everyone would

be worse-off, is highly unlikely, if not impossible. They argue that it is it is enough to show that it is theoretically possible "in a contradiction of the Pareto principle" (Dorff, 2002, p. 859). Dorff (2002) further highlights that it is "difficult to imagine a situation in which the Pareto principle could *ever* apply" (p. 859) because the material benefits created for fairness adherents by the efficient policy "cannot compensate them for the moral deficit created" (p. 859). Therefore, it is "impossible to state meaningfully that welfare economics recommends a different policy from fairness because economics' policy recommendation *depends* on fairness criteria" (Dorff, 2002, pp. 859-860). The main problem Dorff (2002) sees with Kaplow and Shavell's (2001) argumentation is that "policy analysis must *inevitably* be grounded on some conception of fairness as Kaplow and Shavell define the term" (p. 862).

Dorff (2002) concludes by admitting that economics can be useful in providing important information about which legal policy generates the "greatest aggregate social wealth" (p. 898). It is not convincing to reject any arguments about maximising wealth "as gross materialism" (Dorff, 2002, p. 898) because these concerns need to be taken into consideration as we need wealth in order to provide all the values deontologists hold most important, including human rights such as the right to water. However, contrary to Kaplow and Shavell (2001), Dorff (2002) argues that wealth maximisation should not "replace all other forms of policy analysis" (p. 898). Instead, it "should be the *first* step in determining social policy" (Dorff, 2002, p. 898) as it can "supply critical information about the likely consequences on aggregate wealth of a proposed legal regime" (p. 898) and how it will affect the distribution of wealth" (p. 898). After this initial step one should proceed to considerations of "fairness, justice, mercy, theology, religion and any and all other values or systems of belief" (Dorff, 2002, p. 898). It is important to consider the consequences of a

policy change as they are "vital to determining their morality, but the consequences by themselves have no meaning independent of some moral framework" (Dorff, 2002, p. 899).

A broader deontological critique based on Ronald Dworkin.

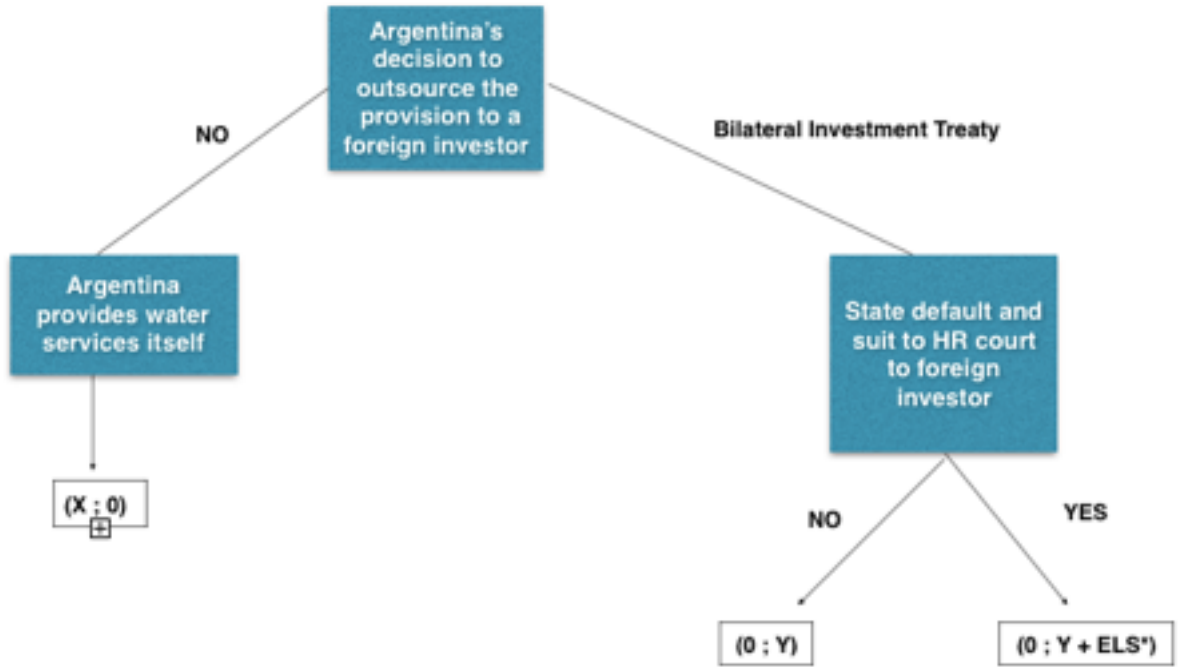
With this argument Dorff (2002) builds on the work of the American legal philosopher, Ronald Dworkin. In his article *Is Wealth a Value?* (1980) Dworkin engages with legal economist arguments in favour of wealth maximisation as a social goal and argues that "maximising social wealth (…) makes no sense as a social goal, even as one among others" (p. 220). He agrees that individuals do sometimes "'trade off' justice against personal welfare in their own lives" (Dworkin, 1980, p. 202), however, holds that it would be senseless to think that an individual would ever "trade off justice against, not welfare in their own lives, but wealth over the society" (p. 202). Individuals "would be ill-advised to take gains in social wealth as some index to gains in their own antecedent welfare" (Dworkin, 1980, p. 202) and would, therefore, not care about social wealth but only their own (p. 203). Therefore, he stresses "judicial decisions on grounds of principle should always be preferred to one on grounds of policy" (Dworkin, 1980, p. 223). In *Taking Rights Seriously* (1978), he demonstrates that an argument might be "thoroughly consequentialist in its detail" (p. 297), however, if it intends to "answer the question whether or not some party has a right to a political act or decision" (Dworkin, 1980, p. 297) it is still an argument of principle. According to Dworkin (1978), legal economists have misconstrued legal arguments taking into consideration the consequences of a decision for being inherently consequentialist in nature, i.e. arguments of policy (pp. 294-300). When balancing the two competing interests at stake, it is, indeed, highly necessary to also take into account the consequences. Nevertheless, this does not mean that the argument is necessarily one of policy.

Application to *Urbaser.*

When applying Kaplow and Shavell's (2001) theory to *Urbaser* we see that obliging the Spanish company to invest on the basis of human rights claims will have serious consequences on the behaviour of foreign investors in the future. The probability of being sued on the basis of human rights violations will be reflected in a higher price for the proposed investment, which will in turn affect other aspects of the investment, such as the service being delivered. The central question is, thus, whether it is fair or moral for a company to stop providing a service after bankruptcy. Kaplow and Shavell (2001) would answer this in the affirmative arguing on the basis of utilitarianism: if one obliges private companies to provide a service even in the case of bankruptcy, companies will in the future, in turn, ask for a higher price under normal conditions to provide the service in question in order to outbalance the risk of human rights claims. Private corporations are profit-seeking actors and the decisions they take in the present are driven by what they think will happen tomorrow. This backward induction would encourage corporations to try to outbalance the risk of human rights counterclaims. The decision tree of future investments is, thus, joined by a new branch opened by international human rights law allowing human rights claims against the private corporation and this branch will then be included in the asking price of today resulting in an increasing price. This situation is visualised in Figure 1 below.

In the present case this means that the accessibility of water will become more difficult for parts of the population of Argentina that will then not be able to afford the elevated price anymore. Thus, the idea of morality and fairness is translated from an abstract idea into a utilitarian concept. While legal scholars have continued to look at the role of human rights in IIL from a static perspective merely considering the current legal framework, it is important to also consider the future effects and consequences of allowing human rights to enter IIL in the way suggested by the ICSID Tribunal's decision in *Urbaser*.

Figure 1: The Argentine Republic and the Decision to Outsource the Provision of Water Services



Key:
(Payoff Argentina State; Payoff Foreign Investor)
ELS = Expected Legal Suit
X = cost for the Argentinian State as paid by the citizens
Y = cost for the foreign investors as paid by the citizens
X > Y as central states are less efficient than private companies
* ELS always ≤ X
==> Argentina will not outsource the provision of water services if X > Y + ELS; the marginal consumer who can afford to pay Y but not X or Y+ELS will have his/her human rights to water violated because of the HR court decision

Alternatives for Human Rights

As shown above, economic considerations are vital for the assessment of legal policy. However, contrary to Kaplow and Shavell's (2001) argument that welfare economics should be the sole consideration when assessing policies, this paper agrees with Dorff (2002) and Dworkin (1978, 1980) that it should be included as a first step after which one then proceeds with discussing the important values and rights at stake. The previous sections have outlined the currently existing legal framework of corporate obligations to protect human rights and the economic considerations when assessing policy changes. It has been argued that

introducing human rights in IIL in the manner outlined by the ICSID Tribunal in *Urbaser* is not feasible given both legal as well as economic considerations. The Tribunal's argumentation is lacking a proper legal basis in current international law. Moreover, if one were to nonetheless pursue this line of reasoning it would lead to adverse economic consequences as outlined in the previous section.

The following section will discuss two alternatives which have since been proposed which seek to find a better way of introducing human rights in IIL and IIA. It will discuss and analyse two proposals for adapting the current arbitration and investment law system. It will, furthermore, give a critical evaluation of each of the proposals put forward by analysing both their potential benefits as well as pitfalls.

Domestic Laws.

In criticising the argumentation of the ICSID Tribunal, Patrick Abel (2018) identifies two alternative sources for introducing human rights in IIL: reference to domestic law or directly including them as a clause in the BIT itself. The latter will be discussed further on. Turning to the first suggestion, Abel (2018) describes the possibility of including human rights concerns in IIA through the reference to the domestic law of the host State. This would require "an applicable law clause in the BIT which encompasses domestic law" (Abel, 2018, p. 82). However, if such a clause does not exist in the relevant BIT, Article 42(1) of the ICSID Convention "provides for the applicability of the host State's domestic law as a residual rule" (Abel, 2018, p. 82). By referring to domestic law conferring human rights obligations upon corporations, international human rights law could, thus, indirectly enter the realm of IIL. Nevertheless, this alternative also faces serious challenges. It requires States who do not yet have transformed international human rights law into domestic law to do so without violating the terms and conditions of already existing international investment

agreements. Otherwise, as the examples in the introduction have highlighted, States could potentially face serious backlash from corporations in terms of costly lawsuits or, in case of developing countries, loss of investment as the investor would move to a different country with more favourable conditions, in turn triggering the race to the bottom (Shinde, 2019; Kube & Petersmann, 2018). Thus, States who have not yet established domestic human rights protection laws often face little incentive to do so.

"New-generation" international investment agreements.

In recent years, we have seen the emergence of so-called "new-generation" (Briercliffe & Owczarek, 2018) international investment agreements which are imposing human rights obligations on investors, such as the SADC Model BIT (2012), the 2015 India Model BIT, the 2016 draft PAI Code, or the 2016 Morocco-Nigeria BIT (Briercliffe & Owczarek, 2018; Abel, 2018). These agreements include human rights obligations directly as a clause in the agreement itself rather than in form of a reference to an external source, such as the host State's domestic law. Nevertheless, in the clause itself the parties are free to also refer to "international human rights law (and even soft law instruments) to define the content of the BIT investor obligation" (Abel, 2018, p. 83). This provision could be "interpreted as imposing a *binding, directly applicable* obligation in contrast to a moral responsibility as understood by the Second Pillar of the 2011 UN Guiding Principles on Business and Human Rights" (Abel, 2018, p. 83).

However, the jurisdiction clauses of these new agreements "remain relatively restrictive" (Briercliffe & Owczarek, 2018) as none of them allow for the possibility for the State to initiate claims against the investor. The Morocco-Nigeria BIT and the SADC Model BIT, for example, explicitly only allow one-directional claims initiated only by the investor (Briercliffe & Owczarek, 2018). Nevertheless, both the SADC Model BIT and the draft PAI

Code permit a host State to bring counterclaims against an investor "for damage for other relief resulting from an alleged breach" (SADC Model BIT, Article 19(1) and draft PAI Code, Article 43(2).) The Morocco-Nigeria BIT does not expressly allow counterclaims but its jurisdiction clause "permits tribunals to determine 'any dispute between the Parties' which seems wide enough to allow a counterclaim by a State" (Briercliffe & Owczarek, 2018) against an investor for breach of an obligation under the agreement. Moreover, under the Morocco-Nigeria BIT an investor "may choose to submit a claim under ICSID or UNCITRAL Rules, both of which contemplate host-State counterclaims" (Briercliffe & Owczarek, 2018). However, the 'subject-matter of the dispute' requirement in Article 46 of the ICSID Convention "may (…) operate as a restriction" (Briercliffe & Owczarek, 2018).

This new trend constitutes "an important innovation in that it establishes a clear expectation as to investors' behaviour" (Briercliffe & Owczarek, 2018). In line with the legal and economic analysis above, these agreements would impose legally binding contractual obligations and would simultaneously satisfy the company's legitimate expectation in knowing what could await them once they sign up as an investor under these agreements. This would disable some of the dangerous economic consequences that could unfold if arbitration tribunals were to follow the ICSID reasoning in *Urbaser* as outlined in the previous section. Nevertheless, there are still some issues that remain. These new agreements still do not allow for the possibility for States to initiate claims against an investor allegedly breaching their obligations. This could only be addressed through a counterclaim once proceedings have been initiated by the investor. This represents a "significant restriction" (Briercliffe & Owczarek, 2018) and "assumes a State must commit, or be alleged to have committed, a wrong" (Briercliffe & Owczarek, 2018). Additionally, should the investor choose to commence proceedings at the ICSID, the aforementioned restriction of

Article 46 still applies, obliging the State to show that the counterclaim "arises out of the 'subject-matter of the dispute' in order to establish the jurisdiction of the arbitral tribunal over the counterclaim" (Briercliffe & Owczarek, 2018). So far, *Urbaser* has been the only case in which a State has succeeded in proving a sufficient connection between its counterclaim and the investment dispute in question. Furthermore, if human rights obligations are "drafted very broadly" (Briercliffe & Owczarek, 2018) it might be difficult to define their exact content. Finally, the examples of the new generation international investment agreements are also unclear as to "what remedies a State should be able to claim for violations" (Briercliffe & Owczarek, 2018). Since it is usually individuals who typically end up having to carry the burden of human rights violations, a State "would have to somehow establish a right to claim damages from an investor on behalf of its citizens or otherwise demonstrate how the violation by an investor of its obligations has caused the State itself to suffer losses" (Briercliffe & Owczarek, 2018).

Nevertheless, given the current efforts seeking to include human rights in IIA, these 'new generation' international investment agreements seem like the best possibility at this point in time. Despite some countries already imposing national obligations on corporations operating on their territory such as the EU Timber Regulation (Council Regulation 995/2010, 2010), it is unlikely that the majority of States that have not done so yet will change their laws any time soon, which makes the first alternative about the possibility of referring to national laws in IIA almost meaningless.

Conclusion

Since its very beginning, IIL has been motivated by economic concerns of States over their territory and their nationals. These economic concerns are the red thread winding its way through every international investment dispute, for example, in the requirement that

tribunals only have jurisdiction to judge an issue directly arising out of an investment dispute. This economic rationale and the current challenges of IIA such as the regulatory chill effect make incorporating human rights considerations in IIL and IIA difficult. Whereas corporations have sometimes used human rights arguments in order to support their own claim of a breach of a contractual obligation from a BIT against the host State, human rights based counterclaims put forward by States remain rare. *Urbaser* is the first IIA case in which an investment tribunal declared jurisdiction to hear a counterclaim based on human rights violations brought by a State against a corporation. Whereas this was initially hailed by international human rights lawyers as a revolutionary step supporting the effort of increased human rights protection in IIL, the reasoning by the ICSID Tribunal in *Urbaser* has since been heavily criticised. The Tribunal ultimately rejected Argentina's counterclaim but declared that considering international law of human rights obligations, and especially at Article 30 UDHR and Article 5(1) ICESCR, corporations already faced certain negative duties to respect human rights, whereas States also had positive duties to provide human rights. Looking at the status of quo of international law, however, this claim cannot be upheld. Article 30 UDHR does not endeavour to create legally binding obligations, but merely general principles. Article 5(1) ICESCR is indeed legally binding on its signatories, but does not intend to create legally binding obligations for corporations. Thus, critics of the *Urbaser* decision have pointed out that the Tribunal was mistaken in interpreting Article 30 UDHR and Article 5(1) ICECSR as creating legally binding international human rights obligations for corporations.

Furthermore, a thorough legal analysis of current international law evaluated the critics' arguments and showed that under current international law corporations do, indeed, not have any legally binding human rights obligations. Whereas states have positive, legally

binding human rights duties, current international law, contrary to some domestic law, does not yet proscribe any legally binding human rights obligations to corporations, apart from a basic, very abstract duty to respect. The scope and extent of this basic duty is highly debated. Scholars like Karavias (2013) have instead identified two alternative sources of potential corporate obligations: the law of the sea and international economic law based on contracts with international organisations. He argues that these sources bear features that could potentially be utilised to introduce human rights obligations for corporations, however, that at this moment in time they lack any indication of seeking to introduce or increase human rights protection. It is also argued that corporations also hold certain human rights under international law and can, therefore, operate "both as a right holder and human rights obligor" (Karavias, 2013, p. 201). The human rights of the individual would, then, stand in conflict with the human right of the corporation and existing international law does not yet provide a solution for such a situation. While there have been efforts to codify corporate human rights obligations, these have not been able to come up with a tangible result, so that current international law still only provides soft law recommendations, such as the UN Guiding Principles on Business and Human Rights.

Despite this apparent lack of positive international corporate human rights obligations, this paper also sought to conduct a thought experiment based on economic theory: what would happen were the world community to follow the Tribunal's reasoning in *Urbaser*. The importance of taking into consideration the economic consequences of a policy change was highlighted following Kaplow and Shavell's (2001) welfare-consequentialist theory. Departing from their argument, however, this paper then followed the reasoning of Michael Dorff (2002) and Ronald Dworkin (1978, 1980) in stressing that such economic considerations should not represent the only step in policy assessments but merely the first

after which an assessment of the important values at stake should follow. It is vital to not disregard economic considerations outright since they can be highly important in providing useful information concerning the potential consequences of a policy change. Nevertheless, any policy assessment should eventually depart from economic considerations and conclude with a discussion on the values and rights at stake. When applying these theories to *Urbaser*, it was demonstrated that following the Tribunal's reasoning would have serious adverse effects since corporations would include the probability of being sued based on human rights violations into their up-front calculations and charge an increased price. This, in turn, would affect the human rights of those people who would consequently not be able to afford the services anymore. The Tribunal's reasoning is, thus, unfounded considering current international law and not feasible to be followed when taking into account economic considerations.

The final section, therefore, assessed two alternatives that have been brought forward by scholars in order to find another way to include human rights in IIA. The first alternative describes the possibility of referring to human rights obligations incorporated in the domestic law of the host State. This, however, presupposes that the host State has already enacted laws obliging corporations to respect human rights, and if not, for the host State to do so. This can prove difficult when the host State, by doing so, might run the risk of violating the terms and conditions of already existing international investment agreements. Secondly, in recent years, so-called 'new generation' international investment agreements have been emerging which impose human rights obligations on investors, such as the SADC Model BIT, the 2015 India Model BIT or the 2016 Morocco-Nigeria BIT. Instead of allowing for reference to external sources of human rights obligations, these new BITs directly include them as a clause in the treaty itself and establish clear expectations for the investor. Nevertheless, serious restrictions

remain, for example, the limitation that only the investor may initiate proceedings which presupposes that the host State committed an (alleged) wrong. Additionally, these new BITS also face certain procedural challenges, for example how much and what kind of remedies a State should be allowed to claim. Despite these obstacles, however, and awaiting a concrete change in international law regarding corporate human rights obligations, these new generation international investment agreements seem like the best possibility for increased human rights protection at this point in time.

References

Abel, P. (2018). Counterclaims based on international human rights obligations of investors in international investment arbitration: Fallacies and potentials of the 2016 ICSID Urbaner v. Argentina award. *Brill Open Law 1,* 69-90. doi: 10.1163/23527072-00101003.

Advisory Council on International Affairs. (2015, April). *International investment dispute settlement: From ad hoc arbitration to a permanent court* (no. 95). The Hague, NL: Author.

Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Arg.-Sp., Sept. 28, 1992, 1699 I 29403.

Briercliffe, N. (2017, January 30). Holding investors to account for human rights violations through counterclaims in investment treaty arbitration. *Practical Law Arbitration Blog.* Retrieved May 19, 2018, from http://arbitrationblog.practicallaw.com/holding-investors-to-account-for-human-rights-violations-through-counterclaims-in-investment-treaty-arbitration/.

Briercliffe, N., & Owczarek, O. (2018, August 1). Human-rights-based claims by States and "new generation" international investment agreements. *Kluwer Arbitration Blog.* Retrieved May 16, 2019, from http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/.

Council of Europe. (1950). *European convention on human rights.* Retrieved May 3, 2019, from https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9.

Council Regulation 995/2010 of Oct. 12, 2010, Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23.

Crow, K. & Lorenzoni Escobar, L. (2018). International Corporate Obligations, Human Rights, and the Urbaser standard: breaking new ground. *Boston University International Law Journal, 36*(1). Retrieved May 5, 2019, from https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/builj36&id=94&men_tab=srchresults.

De Bakker, F. G. A., Groenewegen, P., & Den Hond, F. (2005). A bibliometric analysis of 30 years of research and theory on corporate social responsibility and corporate social performance. *Business & Society, 44*(3), 283-317. doi:10.1177/0007650305278086.

Dorff, M. B. (2002). Why welfare depends on fairness: A reply to Kaplow and Shavell. *Southern California Law Review, 75*(4), 847-900. Retrieved May 15, 2019, from https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/scal75&id=866&men_tab=srchresults.

Dworkin, R. M. (1978). *Taking rights seriously*. Cambridge, Massachusetts: Harvard University Press.

Dworkin, R. M. (1980). Is wealth a value?. *The Journal of Legal Studies, 9*(2), 191-226. Retrieved from https://heinonline.org/HOL/Page?handle=hein.journals/legstud9&div=20&g_sent=1&casa_token=&collection=journals&t=1557928125.

European Commission. (n.d.). *Taxation: Representation in Ireland.* Retrieved May 24, 2019, from https://ec.europa.eu/ireland/news/key-eu-policy-areas/taxation_en.

European Commission. (2019, January 10). *State aid: Commission opens in-depth investigation into tax treatment of Nike in the Netherlands.* Retrieved May 24, 2019, from http://europa.eu/rapid/press-release_IP-19-322_en.htm.

Government of Canada. (2017, December 21). *Cases filed against the government of*

Canada: Ethyl corporation v. government of Canada. Retrieved May 24, 2019, from https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng.

Guntrip, E. (2017, February 10). Urbaser v Argentina: The origins of a host state human rights counterclaim in ICSID arbitration?. *European Journal of International Law*. Retrieved May 9, 2018, from https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.

ICSID World Bank Group. (n.d.). *Database of ICSID Member States*. Retrieved May 24, 2019, from https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

International Centre for Settlement of Investment Disputes. (2003). *ICSID convention, regulations and rules*. Washington, D.C.: International Centre for Settlement of Investment Disputes.

Kaplow, L., & Shavell, S. (2001). Fairness versus welfare. *Harvard Law Review, 114*(4), 961-1389. Retrieved May 15, 2019, from https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hlr114&id=990&men_tab=srchresults.

Kaplow, L., & Shavell, S. (2003). Fairness versus welfare: Notes on the Pareto principle, preferences, and distributive justice. *The Journal of Legal Studies, 32*(1), 331-362. doi:10.1086/345679.

Kilangi, A. (n.d.). Permanent sovereignty over natural resources general assembly resolution 1803 (XVII): Introductory note. *United Nations Codification Division Office of Legal Affairs - Audiovisual Library of International Law*. Retrieved May 24, 2019, from http://legal.un.org/avl/ha/ga_1803/ga_1803.html.

Kube, V., & Petersmann, E. U. (2018). Human rights law in international investment

arbitration. In *General Principles of Law and International Investment Arbitration* (pp. 221-268). Brill Nijhoff.

Karavias, M. (2013). *Corporate obligations under international law*. Oxford University Press.

McConnell, D. (2019, January 15). Ireland under fresh attack from EU on corporation tax. *Irish Examiner.* Retrieved May 24, 2019, from https://www.irishexaminer.com/breakingnews/business/ireland-under-fresh-attack-from-eu-on-corporation-tax-897813.html.

McWilliams, A., & Siegel, D. (2001). Corporate social responsibility: A theory of the firm perspective. *Academy of Management Review, 26*(1), 117-127. Retrieved May 13, 2019, from https://www.jstor.org/stable/259398?seq=1#metadata_info_tab_contents.

Monshipouri, M., Welch, C. E., & Kennedy, E. T. (2003). Multinational corporations and the ethics of global responsibility: Problems and possibilities. *Human Rights and Corporations, 25*, 965-989. doi:10.1353/hrq.2003.0048.

Ng, M. (2018). Can human rights counterclaims succeed in investment treaty. *Transnational Dispute Management (TDM)*. Retrieved May 10, 2019, from https://www.transnational-dispute-management.com/article.asp?key=2600.

Sabahi, B., Laird, I. A., & Gismondi, G. E. (2017). International investment law and arbitration: History, modern practice, and future prospects. *International Investment Law and Arbitration, 1*(1), 1-64. doi: 10.1163/24055778-12340001.

Schacherer, S. (2018, October 18). *International investment law and sustainable development: Key cases from the 2010s*. Canada: The International Institute for Sustainable Development.

Scherer, A. G., & Palazzo, G. (2011). The new political role of business in a globalised

world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy. *Journal of Management Studies, 48*(4), 899-931. doi: 10.1111/j.1467-6486.2010.00950.x.

Shinde, S. N. (2019). Investment and human rights: Sensitising the arbitration mechanism to protect human rights in the host state. *Indian Journal of Arbitration Law, 7*(2), 45-60. Retrieved May 10, 2019, from https://heinonline.org/HOL/Page?handle=hein.journals/ijal7&div=15&g_sent=1&casa_token=&collection=journals&t=1559136570.

Tang, P., & Bussink, H. (2018, March). *Booking.com avoided 715 million euro of tax in the EU*. Retrieved June 10, 2019, from https://paultang.nl/wp-content/uploads/2018/03/Booking.com-avoided-715-million-of-tax-in-the-EU.pdf.

United Nations General Assembly. (1948). *Universal Declaration of human rights (217 [III] A).* Retrieved May 5, 2019, from https://www.refworld.org/docid/3ae6b3712c.html.

United Nations General Assembly. (1966). *International Covenant on economic, social and cultural rights.* Treaty Series, vol. 993. Retrieved May 3, 2019, from https://www.refworld.org/docid/3ae6b36c0.html.

United Nations Human Rights Committee. (2004). *General comment 31: Nature of the general legal obligation imposed on state parties to the covenant.* UN Doc CCPR/C/21/Rev.1/Add/13. Retrieved May 3, 2019, from http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

United Nations Human Rights Office Of The High Commissioner. (2011). *UN guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework.* Retrieved May 3, 2019, from https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentina Republic., ICSID Case No. ARB/07/26, Award, (Dec. 8, 2016). Retrieved May 3, 2019, from https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20[english%20translation]%20UNTS.pdf.

Van Kempen, P. (2010, December). Human rights and criminal justice applied to legal persons: Protection and liability of private and public entities under the ICCPR, ECHR, ACHR and AfChHPR. *Electronic Journal of Comparative Law, 14*(3). Retrieved May 25, 2019, from https://www.ejcl.org/143/art143-20.doc.