THE ROLE OF PUBLIC INTERNATIONAL LAW IN INTEGRATING HUMAN RIGHTS CONSIDERATIONS IN INVESTMENT TREATY ARBITRATION

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ABSTRACT

In investment treaty arbitration, the respondent states have been increasingly raising the defences that the impugned measures were adopted to fulfill and protect that state's human rights obligations or that the conduct of the investors had infringed on the human rights of their local population. Controversies arise as to how to reconcile the tensions between investment protection and public interests, particularly where the language of underlying investment treaties keeps silent on this matter.

This article explores the role of "public international law" in providing "affirmative defences" for the host state in investment treaty arbitration, bridging the normative divide between investment protection and human rights. Specifically, it delves into the application of the doctrines of police powers and contributory fault as judicial tools for tribunals to accommodate public interests or give effect to investor misconduct with respect to human rights. These notable instances reveal the potentials of public international law in integrating human rights considerations in investor-state

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treaty arbitration, thereby reconciling the normative conflicts between competing public and private interests.

KEYWORDS: *investor-state treaty arbitration, human rights, public international law, police powers, contributory fault*

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I. INTRODUCTION

Investor-state arbitration based on international investment agreements (hereinafter "IIAs") has become the most dynamic area of international dispute resolution in recent decades, enabling foreign investors to directly bring a host state to international arbitration for violation of international law. With the proliferation of investor-state treaty arbitrations that have not infrequently rendered massive monetary damages, investment tribunals are increasingly facing complex, intrusive, and challenging questions, especially when adjudicating investor claims against regulatory measures adopted to address public interests. There are deep concerns over the legitimacy of the investment treaty regime that (i) the current regime seems to have been tilting toward "separation of human rights and investor rights like *oil and water*,"[1] (ii) investment arbitration may have expansively interpreted investor rights far beyond what was originally intended under IIAs,[2] (iii) the "free market fundamentalism" has unduly favored foreign investors at the expense of public policy and human rights interests,[3] and (iv) the realization of human rights would be gradually eroded and marginalized in the process.[4] Overall, the normative tensions and potential conflicts between international investment law and human rights reflect the lack of coordination and reconciliation between different branches of international law.

Such normative tensions become all the more problematic during the outbreak of the current global COVID-19 pandemic. In that context, a growing number of countries have enacted a variety of emergency regulatory measures to contain, mitigate, and respond to the spread of COVID-19, with many declaring a state of national emergency under their domestic laws.[5]

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[1] Mehmet Toral & Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Unorthodox Considerations*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 577, 589 (Michael Waibel et al. eds., 2010). *See also* Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60(3) ICLQ 573, 573 (2011) (emphasis added).

[2] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 139 (2007). Gus Van Harten et al., *Public Statement on the International Investment Regime – 31 August 2010*, OSGOODE HALL L. SCH. YORK U., www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (last visited Sept. 18, 2021).

[3] Muthucumaraswamy Sornarajah, *Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 631, 633 (Chester Brown & Kate Miles eds., 2011).

[4] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [hereinafter UNCTAD], SELECTED RECENT DEVELOPMENTS IN IIA ARBITRATION AND HUMAN RIGHTS 3 (2009), https://unctad.org/en/Docs/webdiaeia20097_en.pdf. *See also* Van Harten et al., *supra* note 2.

[5] *See, e.g.*, Angelo Amante & Crispian Balmer, *Italy in Coronavirus Lockdown as Deaths Soar and Economy Fades*, REUTERS (Mar. 10, 2020), https://www.reuters.com/article/us-health-coronavirus-italy/streets-deserted-as-italy-imposes-unprecedented-coronavirus-lockdown-idUSKBN20X11D. (Among soaring deaths and a fading economy, Italy was the first European country to impose a nationwide lockdown to combat the Europe's worst outbreak of COVID-19.)

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Encompassing quarantine orders, closure of borders, travel bans, stay-at-home and social distancing orders, cancellation of mass events, economic shutdowns, and other emergency decrees, these regulatory measures have been generating profound downstream economic effects on foreign investors and investments, the global supply chains, and various commercial relations alike.[6] Given the potential investment treaty claims, the interests at stake, as well as the host states' diminished economic capacity,[7] how to strike a proper balance between investment protection and public interests obtains new significance.

Based on the conceptualization that the investor-state treaty arbitration system is a "public law" regime, a prevailing strand of existing literature focuses on developing "public law" doctrines to recalibrate the balance between investment protection and public interests, aiming to address the legitimacy crisis plaguing international investment law.[8] These "public law" prescriptions include, most notably, a "proportionality balancing" test to safeguard sovereign regulatory autonomy, greater transparency, strengthened reason-giving, better amicus participation, recalibrated standards of review (or the notion of deference), as well as public law analogies and principles drawn from a domestic public law context.[9] While many of these endeavors are worthwhile and point to a promising direction to improve the existing system, it bears noting that in contrast, a *public international law* dimension remains relatively understudied.[10] That is, how

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[6] Lucas Bento & Jingtian Chen, *Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses*, KLUWER ARB. BLOG (Apr. 8, 2020), http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/ (these measures include "emergency declarations empowering governments to take control of private businesses, closure of borders, quarantines, stay-at-home orders, suspension of mortgage and utility payments, closure of non-essential businesses, and in some cases, export controls.")

[7] Martin Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83(6) MODERN L. REV. 1246, 1249 (2020).

[8] *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AJIL 45, 63-68 (2013) (noting that this "public law" paradigm tends to base the public law nature of investment treaty arbitration on theories that (i) the state responsibility turns on a governmental regulatory action to further broader public interests, (ii) the subject matter involves the provision of crucial public services, and/or (iii) the damages rendered may heavily strain the public revenue.)

[9] *Id*. at 66-67 (discussing the use of public law principles (proportionality and legitimate expectations) and standards of review (or deference)). José E. Alvarez, *Is Investor-State Arbitration 'Public'?* 3-6 (N.Y.U. Inst. for Int'l Law & Justice, Working Paper No. 2016/6, 2016), https://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf (summarizing a set of key "public law" prescriptions.)

[10] Roberts, *supra* note 8, at 63-64 (distinguishing the "public law" paradigm from the "public international law" paradigm: the former "focuses on the vertical relationships between unequal parties (a state acting in its public capacity and a private actor subject to that state's regulatory power), while the latter is centered on the "horizontal relations between sovereign states" as equal parties; noting that in so doing the public law paradigm risks obscuring the "system's underlying treaty basis.") For a critical review of the "public law" prescriptions, see generally Alvarez, *supra* note 9.

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could application of international law principles, doctrines, and judicial techniques play a role in bridging the potentially conflictual public and private interests in investor-state treaty arbitration? In what ways and to what extent? And to the extent that this approach is subject to its own limitations, how could IIAs be reformed to sharpen this approach, and thus better alleviate the potential normative conflicts?

Focused on the "hard-case" scenario where the underlying IIAs' language has not explicitly dealt with human rights, this paper explores the role of public international law in providing "affirmative defences" for the host state in investment treaty arbitration, serving as a normative bridge in reconciling the tensions and conflicts between investment protection and public interests. Specifically, investment tribunals may apply doctrines and principles imported from general principles of international law and customary international law to accommodate human rights interests concerned and discipline investors' misconduct with respect to human rights. In this way, general international law could provide important judicial tools to balance competing private and public interests, thus addressing the problem of fragmentation of international law in investment arbitration process.

The remainder of this paper proceeds in five parts. Part II briefly introduces the potential normative conflicts between international investment law and human rights. Part III addresses the role of public international law in integrating human rights considerations in investor-state treaty arbitration. First, it conceptualizes the role of public international law in addressing human rights issues in investment arbitration in general. Then, this Part delves into two notable examples—the doctrines of police powers and contributory fault—to demonstrate the potentials of recalibrating international investment law through application of international law. Part IV reflects on the restraints of this approach, and turns to typical examples of recent IIAs provisions for legal solutions. Part V draws concluding remarks.

II. THE NORMATIVE CONFLICTS BETWEEN INVESTMENT LAW SYSTEM AND HUMAN RIGHTS

Amid a growing backlash among international civil society, critical commentators, and some states, international investment law and the investor-state treaty arbitration system have increasingly been caught in a legitimacy crisis.[11] Among various critiques mounted, a vocal strand stands

[11] Toral & Schultz, *supra* note 1, at 584; Simma, *supra* note 1, at 575.

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out that centers on the normative tensions and conflicts between the investment law system and human rights.[12]

Concerns are expressed that as with the growing invocations of investor-state treaty arbitration, it has increasingly become the case that a host state's human rights-motivated regulatory measures are challenged by a foreign investor before an investor-state tribunal.[13] If this prevailed, critics often claim that the enormous amount of monetary compensations imposed by such an arbitral award may significantly strain the material resources of a host state that could have been used to further public interests and human rights.[14] Such a tension becomes more pressing for a developing country with modest financial revenues or under an economic crisis.[15] Alternatively, this line of argument maintains that multinational corporations may leverage the threats of bringing an investor-state claim to exert pressures on the host state through informal, confidential negotiations, forcing the government to back off from regulatory measures that stand in the way of the former's commercial interests.[16] Either way, investor-state arbitration could result in regulatory chills, potentially impeding a host government's regulatory initiatives deployed to advance public welfare and human rights.

While the language of numerous new-generation IIAs has become more sophisticated and balanced over time, many investor-state arbitration proceedings are premised on older-generation IIAs.[17] However, many of the latter have not accorded significance to states' sensitive public policy space through express treaty language, and generally remain silent on how to

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[12] *See* JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 455-68 (2011).

[13] Van Harten et al., *supra* note 2.

[14] *See* Mark Chinen, *Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility*, 25(3) EUR. J. INT'L L. 703, 707 (2014).

[15] *Id.* at 707. An example is Argentina, which was caught in a series of investor-state treaty arbitrations challenging its regulatory measures adopted amid its economy crisis and a national emergency in the late 1990s. *See* Orhan Bayrak, *Economic Crises and the Fundamental Change of Circumstances in Investment Arbitration*, 35(1-2) ICSID REV. 130, 130-31 (2020).

[16] Adam H. Bradlow, *Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms*, 43(2) YALE J. INT'L L. 355, 356 (2018). *See also* Ethyl Corp. v. The Gov't of Can., 38 I.L.M. 708, Award on Jurisdiction, ¶ 5 (June 24, 1998); Michelle Sforza & Mark Vallianatos, *NAFTA & Environmental Laws: Ethyl Corp. v. Government of Canada*, GPF (Apr., 1997), https://archive.globalpolicy.org/socecon/envronmt/ethyl.htm.

[17] *See, e.g.*, UNCTAD, *Review of ISDS Decisions in 2019: Selected IIA Reform Issues*, IIA ISSUES NOTE 3 (2021), https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf ("Most arbitral decisions rendered in 2019 concerned cases that were based on provisions in old-generation treaties signed in the 1990s or earlier.") For a discussion on new-generation international investment agreements [hereinafter IIAs] that have explicitly dealt with public interests and human rights, see *infra* Sections IV.B(1) & (2).

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balance investment protection and human rights.[18] This may exacerbate the tensions between a host state's obligations to protect foreign investment and to respect, protect, and promote human rights.[19]

Further, the provisions of an IIA typically stipulate investors' various enforceable rights, but rarely create investor obligations that could be enforced in investor-state arbitration, except for limited recent outliners.[20] As such, a normative gap emerges between the lack of effective mechanisms to hold foreign investors accountable for their wrongful conduct in investor-state arbitration and the extensive protection afforded to them under an IIA.[21] This has increasingly fueled critique that the IIAs are "asymmetrical" by design, undermining the rule-of-law elements and the legitimacy of the investment law system.[22]

Fundamentally, the potential normative conflicts between IIAs and human rights reflect a lack of coordination and reconciliation between different branches of international law. Under the current model of international law, it is a sovereign state—not private entities—that bears binding, enforceable international legal obligations to protect foreign investors under IIAs, and to fulfill, respect, and protect human rights.[23] In contrast, as a matter of international law, human rights law generally lacks direct, enforceable legal effects upon individuals and/or corporations.[24] Further, despite the efforts spent in this regard, the initiatives to make an international legally binding instrument on multinational corporations and business enterprises with respect to human rights have yet to bear meaningful fruit, due to a lack of political support from key developed countries—the US, member states of the EU, and Japan—as well as the international business community.[25]

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[18] UNCTAD, *supra* note 4, at 3. *See* Silke Elrifai, *Equity-Based Discretion at the Anatomy of Damages Assessment in Investment Treaty Law*, 34(5) J. INT'L ARB. 835, 836 (2017).

[19] For a critique on the tendency of investor-state tribunals to expansively interpret investor rights far beyond what was originally intended under IIAs, see VAN HARTEN, *supra* note 2, at 137-39.

[20] Jean Ho, *The Creation of Elusive Investor Responsibility*, 113 AJIL UNBOUND 10, 10 (2019). For these "outliners" in IIAs, see *infra* Section IV.B(2).

[21] Ho, *supra* note 20, at 10-11; Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AJIL UNBOUND 33, 33 (2019).

[22] Ishikawa, *supra* note 21, at 33-34. *See generally* Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13(3) J. WORLD INV. & TRADE 349 (2012).

[23] Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, *in* THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 183, 188-91 (Malgosia Fitzmaurice & Panos Merkouris eds., 2013).

[24] *Id.* at 189-90. ("[M]ultinational corporations have no direct human rights obligations under international law. . . . [T]here is to date no international legally binding instrument that impose direct obligations on corporations.") An exception in this regard is the peremptory norms (*jus cogens*).

[25] Ishikawa, *supra* note 21, at 34.

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To be sure, in international law, it has long been the case that "any complete coordination between systems of international law" is absent.[26] Nonetheless, in the subfield of international investment law and investor-state treaty arbitration, this fragmentation issue has been substantially amplified and exacerbated by four notable developments. The first is the emerging social and economic rights that increasingly impose positive obligations on states to respect, protect, and fulfill human rights.[27] The second is the proliferation of investment arbitrations and the substantial increase in monetary damages and arbitration costs.[28] The third is the increasingly expansive investor rights, more regulatory measures challenged, more diverse stakeholders, as well as greater public interests implicated in investment arbitration.[29] The fourth is the rising wave of "privatization" as part of the globalization of the world economy, such that foreign investors have increasingly engaged in the public sectors of a host state—including energies, mining, water, sewage, management of (hazardous) waste sites, and beyond.[30] Consequently, host states may not infrequently find themselves caught between international human rights obligations toward their citizens and international investment law obligations toward foreign investors, resulting in conflicting normative obligations in specific disputes.[31]Given the growing backlash against the investment law system, states and investment tribunals, along with other actors and stakeholders, are required to effectively respond to the legitimacy crisis, lest the normative desirability of the regime risks being undermined.

To be clear, this article does not advance a normative argument that investment tribunals *could* or *should* serve as human rights courts, or engage in some sort of judicial "activism"—at least not so in a consensual arbitration

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[26] Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) EUR. J. INT'L L. 753, 761 (2002).

[27] *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (ICESCR now has more than 170 member states.) *See* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW OF THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678, 679 (Christina Binder et al. eds., 2009). *See also* Chinen, *supra* note 14, at 707-08.

[28] *See* DIANA ROSERT, THE STAKES ARE HIGH: A REVIEW OF THE FINANCIAL COSTS OF INVESTMENT TREATY ARBITRATION 1 (2014).

[29] *See* VAN HARTEN, *supra* note 2, at 89 (arguing that IIAs' open-ended and vague treaty terms have provided investment arbitrators with too much discretion, and that investment arbitral jurisprudence has transformed the "fair and equitable treatment" into "an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process.") *See generally* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78(1) N.Y.U. L. REV. 30 (2003) (criticizing investment arbitral awards that rendered overly-expansive interpretation of "regulatory takings" under the NAFTA investment chapter.)

[30] Brabandere, *supra* note 23, at 183-84.

[31] *Id.*

臺灣大學學術期刊資料庫

process based on disputing parties' consent of arbitration as it currently stands. Rather, it argues for a more modest approach. Namely, where a respondent state raises human rights-grounded or -related arguments in an investment arbitration premised on an IIA that remains silent on these issues, the investment tribunal should effectively respond to these issues and remain sensitive to the human rights interests involved, rather than giving short shrift or paying lip service to them. Further, as will be detailed later, since public international law constitutes the applicable law in principle,[32] tribunals should apply certain international law doctrines to deal with relevant human rights issues falling within their jurisdiction.[33] In so doing, it is hoped that investor-state tribunals could help reconcile the potential normative conflicts between investment law and human rights, and enhance the legitimacy of the international investment law.

III. APPLICATION OF GENERAL INTERNATIONAL LAW AS THE *LEX CAUSAE*

This Part examines the application of the general international law in addressing non-economic issues in investment treaty arbitration, focusing on their interaction with IIAs' substantive protection standards. Section A analyzes the role of public international law as the *lex causae* governing the substance of investor-state treaty disputes. Section B discusses how application of general international law may deal with human rights in investment treaty arbitration in general. Sections C and D proceed to explore customary doctrines of police powers and contributory fault. Through these two notable instances, it aims to show how rules of public international law could enable tribunals to accommodate human rights interests and enforce investor obligations, making for a more balanced approach of treaty interpretation and application.

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[32] *See infra* Part III.

[33] *See* Caroline Foster, *Adjudication, Arbitration, and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible*, 3(3) J. INT'L DISP. SETTLEMENT 525, 533 (2012):

> Investment treaty arbitration is perhaps the most self-contained form of third-party dispute settlement under public international law today. The 'external universe' of public international law is seldom engaged by arbitrators or practitioners, contributing significantly to the potential of the discipline succumb to a crisis of confidence and legitimacy. Arbitrators have been encouraged from within the arbitral community to take it upon themselves, *even in the absence of argument*, *to explore the wider public international law dimensions of the dispute* that come before them (emphasis added).

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A. Public International Law as the Applicable Law Governing the Interpretation and Application of an IIA

Could investment tribunals consider human rights as a matter of applicable law in resolving investor-state treaty disputes? This section answers in the affirmative, since it is public international law that governs the interpretation and application of an IIA in principle.

Broadly speaking, the law applicable to investment treaty disputes contains three elements: (i) the law governing the validity of an arbitration agreement, (ii) the procedural law governing the arbitration proceeding (*lex arbitri*), and (iii) the substantive law governing the merits of an investment dispute (*lex causae*).[34] With respect to the *lex causae*, practitioners and commentators nowadays have come to a consensus that it is international law that shall govern the substance of investor-state disputes arising under an IIA.[35] Yet, it is still worth articulating the legal basis undergirding this conclusion. The discussion below provides two arguments to buttress this conclusion, one premised on the choice-of-law provisions of IIAs and the other on the normative relationship between investment treaty arbitration and public international law.

To begin with, application of public international law to decide investment treaty disputes is required by the choice-of-law provisions of many IIAs. A number of IIAs, whether bilateral, plurilateral or multilateral, contain applicable law provisions, which stipulate that the resolution of investor-state disputes arising under the treaty shall be governed by applicable rules of international law, whether exclusively or in conjunction with other laws.[36] This is the case of 2012 US Model Bilateral Investment Treaty (hereinafter "BIT"), North American Free Trade Agreement (hereinafter "NAFTA"), Energy Charter Treaty, as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of

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[34] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION SUBSTANTIVE PRINCIPLES ¶ 3.51 (2007); Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 191, 191-92 (Katia Yannaca Small ed., 2010).

[35] Banifatemi, *supra* note 34, at 208, 210; HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 235 (2013); Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29(1) BERKLEY J. INT'L L. 1, 4 (2011). *See, e.g.*, MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 204 (May 25, 2004) [hereinafter MTD v. Chile]; Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, ¶ 121 (Aug. 10, 2010) [hereinafter Vivendi v. Argentina] ("The characterization of an act of a State as internationally wrongful is governed by international law.")

[36] Banifatemi, *supra* note 34, at 191, 197 (see nn.16-17).

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Other States (hereinafter "ICSID Convention") (under whose auspice the majority of investment treaty-based arbitrations are conducted).[37]

Absent such an explicit choice-of-law provision, an investment tribunal then must determine the law that would apply to the substance of the disputes between the parties.[38] In investment treaty arbitration, the normative relationship between an IIA and public international law likewise determines the applicability of public international law to govern the interpretation and application of an IIA.

At the core, as a creature of international law, investment treaty arbitration is, by nature, established by international treaties,[39] whose interpretation and application shall be decided by general international law.[40] Unlike a domestic judicial proceeding where a claimant invokes a private contract under municipal law, in investment treaty arbitration an investor typically bases its claims on sources of international law.[41] This makes the underlying procedure an international adjudicatory process primarily aimed at establishing state responsibility for a breach of substantive protection obligations under an IIA (or general international law).[42]

As an international treaty between states, an IIA does not exist or operate in vacuum, but rather is automatically born into general international law—which, as composed of general principles of law and customary international law, is binding on all states.[43] Consisting largely of the law of treaties, state responsibility, the interplay of norms, and the settlement of disputes (often referred to as the "secondary" norms), general international law not only fills the gaps left by treaties, but also ensures the existence of international law

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[37] *See, e.g.*, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment art. 30(1) (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter 2012 U.S. Model BIT]; North American Free Trade Agreement art. 1131(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; Energy Charter Treaty art. 26(6), 1994, 2080 U.N.T.S. 100 [hereinafter ECT]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Oct. 14, 1966, 575 U.N.T.S. 159 [ICSID Convention].

[38] Banifatemi, *supra* note 34, at 191.

[39] Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92(4) AJIL 621, 631 (1998); Moloo & Jacinto, *supra* note 35, at 4; VALENTINA VALI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 188 (2013). *See generally* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51(2) HARV. J. INT'L L. 427 (2010).

[40] Banifatemi, *supra* note 34, at 208, 210 (emphasis added); KJOS, *supra* note 35, at 235. *See also* Vienna Convention on the Law of Treaties [hereinafter VCLT] art. 31, May 23, 1969, 1155 U.N.T.S. 331 (general rules on treaty interpretation).

[41] KJOS, *supra* note 35, at 235.

[42] *Id.*

[43] *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) AJIL 535, 536 (2001) (making a similar point on the relationship between the WTO agreements and public international law). *See also* Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993.

臺灣大學學術期刊資料庫

as an integral legal system.[44] Notably, these secondary rules of international law serve as a "toolbox" to regulate the creation, interpretation, operation, interplay, and enforcement of the "primary" norms that directly impose rights and obligations on states.[45] Moreover, general international law also contains "primary" rules of law.[46] In the context of investment treaty arbitration, relevant primary norms of general international law include, inter alia, customary international law on expropriation of foreign-owned property, international minimum standards for the treatment of aliens, and certain international human rights law (such as the right to water).

Indeed, in the international legal system characterized by a lack of hierarchy between general international law and treaties in principle,[47] a new treaty can contract out of or deviate from certain rules of general international law (except peremptory norms of *jus cogens*).[48] This is often the case with international investment law. With its tailor-made enforcement mechanism (that has generally opted out of traditional rules of general international law on exhaustion of local remedies and restitution),[49] international investment law constitutes a *lex specialis* or a "self-contained" regime in many aspects. However, just as a private contract cannot opt out of every rules of a domestic law system, an IIA cannot contract out of *all* of the rules of general international law, let alone the *entire* system of international law.[50] This means that the interpretation and application of an IIA would always need to fall back on the relevant rules of general international law, to the extent that the latter are not contracted out.[51] In other words, insofar as an IIA is invoked to establish state responsibility, general international law would always govern the "*creation, scope, modification, extinction, interpretation, and operation of the treaty's substantive provisions*," irrespective of the existence of a choice-of-law provision in an IIA.[52]

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[44] Pauwelyn, *supra* note 43.
[45] *Id.* See Axel Marschik, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9(1) EUR. J. INT'L L. 212, 212-13 (1998). *See also* H.L.A. HART, THE CONCEPT OF LAW 92 (1961).
[46] Marschik, *supra* note 45, at 212; Pauwelyn, *supra* note 43.
[47] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (5th ed. 1998); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47(1) BRIT. Y.B. INT'L L. 273, 274 (1975).
[48] *See* Pauwelyn, *supra* note 43, at 537-38.
[49] *See generally* RUDOLF DOLZER & CHRISTOPH SHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012).
[50] *See* Pauwelyn, *supra* note 43, at 537, 539.
[51] *Id.* at 537.
[52] Banifatemi, *supra* note 34, at 208, 210. *See* KJOS, *supra* note 35, at 235. Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16(1) ICSID REV. 20, 21 (2001).

臺灣大學學術期刊資料庫

However, a counterargument can be made: since an investor is neither a state nor a contracting party to an IIA, it is questionable that a host state could invoke rules of international law (applicable between states) against a private entity in investment arbitration. This view seems plausible at first glance, but tends to misconceive the triangular nature of IIAs. To the extent that an IIA grants investment protection to covered investors, the treaty could be understood as "essentially third-party beneficiary contracts," where two states (contracting parties) confer rights on a third entity (not itself a party to the treaty) for the latter's enforcement.[53] In an IIA, both states make reciprocal commitments of substantive investment protection as well as a standing offer to arbitrate the disputes with a covered foreign investor. By accepting the host state's unilateral, standing offer to arbitration in an IIA, an investor "at the same time accepts the treaty terms" concluded between the two states as they are.[54] But the investor's request for arbitration does not "*alter the content or discard any existing (legal) relationships*" between the host state and home state."[55] Instead, the *original treaty* between the two states provides the legal basis for this *third-party beneficiary contractual relationship*—despite that the third party can *enforce* these rights independently—and the terms of this original agreement are *binding* on the third party. Thus, while the two states grant rights to investors for their own enforcement, these rights essentially derive from the treaty (an IIA), and are thus governed by international law as the *lex causae*.[56]

In short, it is untenable for an investor to argue that because IIAs create rights and/or interests for it as a third-party beneficiary, an investment tribunal cannot apply *relevant* public international law rules to *qualify* or *constrain* its rights or interests under an IIA. Rather, a more appropriate way of interpretation would be that the rights/interests created for an investor under IIAs are *qualified* and *conditional* in the first place, rather than absolute and unconditional *a priori*.

The applicability of international law to investor-state treaty disputes has been embraced and endorsed by investor-state adjudicators in their decision-making, even absent the underlying IIAs' express reference to the applicable

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[53] Bayrak, *supra* note 15, at 138-39. *See* James Crawford, *Keynote Address: International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 17, 23 (Rainer Hofmann & Christian J. Tams eds., 2011) (noting that by virtue of IIAs, investors could directly invoke the state responsibility of the host state, but it is unclear that they are holders of substantive rights under IIAs.)

[54] Bayrak, *supra* note 15, at 138 (noting that "[t]hese contracts (IIAs) surmount the principle of privity with respect to enforcement only, and not with respect to the formation of contracts. The contractual relationship remains limited to the two contracting parties.")

[55] *Id.* at 139 (emphasis added).

[56] *Id. See* Crawford, *supra* note 53, at 17, 23.

臺灣大學學術期刊資料庫

law. For instance, the annulment committee in *Vivendi v. Argentina* concluded that "[t]he characterization of an act of a State as internationally wrongful is governed by international law" in accordance with the general principles of international law, and that "whether there has been a breach of the [IIA]" shall be decided by international law as its applicable law, as opposed to domestic law which shall govern a breach of an investment contract.[57] Likewise, the *Phoenix v. Czech* tribunal held that international investment law, the ICSID Convention, and the IIA "cannot be read and interpreted in isolation from public international law, and its general principles."[58] This is also the finding of the *MTD v. Chile* tribunal and its annulment committee.[59] As such, these decisions are representative of an increasingly prevailing consensus among case law and scholarly commentaries that international law shall govern the merits of an investment treaty dispute.[60]

That said, having general international law as a whole as the applicable law governing the substance of investment treaty disputes does not make it the "juridical equivalent of a bag of liquorice allsorts, in which the [t]ribunal may pick and choose at will those doctrines which suit its decision."[61] Rather, the starting point for investment tribunals should always be the treaty text, and the primary role of international law is to progressively illuminate the parties' intentions, as reflected in their treaty text; alternatively, international law may play a supplementary role in filling the gaps left by an IIA, to the extent the treaty has not opted out of it.[62] However, since IIAs' language is typically open-textured, relatively short, and contains many ambiguities and gaps with respect to substantive guarantees,[63] the role of general international law in interpreting and complementing IIAs remains substantial.

It is worth noting that the above discussion by no means suggests the irrelevance of municipal law as the applicable law in investment treaty

[57] Vivendi v. Argentina, *supra* note 35, ¶ 121.
[58] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 77-78 (Apr. 15, 2009).
[59] MTD v. Chile, *supra* note 35, ¶ 204 ("The breach of an international obligation will need, by definition, to be judged in terms of international law"); MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/07, Decision on Annulment, ¶¶ 61, 72 (Mar. 21, 2007) [hereinafter MTD v. Chile, Annulment Decision] ("MTD's claim is one for 'an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor' (BIT, Article 6(1) (ii)), and thus international law as the proper law of the BIT is applicable to that claim and to any defence thereto.").
[60] Banifatemi, *supra* note 34, at 209-10; Fabio Giuseppe Santacroce, *The Applicability of Human Rights Law in International Investment Disputes*, 34(1) ICSID REV. 136, 141 (2019).
[61] Campbell McLachlan, *Investment Treaties and General International Law*, 57(2) ICLQ 361, 390-91 (2008).
[62] *Id.* at 391.
[63] Roberts, *supra* note 8, at 50.

臺灣大學學術期刊資料庫

arbitration. However, since investment treaty arbitration is primarily concerned with establishing a state's responsibility in accordance with relevant rules of public international law, the role of municipal law as the *lex causae* would be rather limited.[64]

In sum, given that investment treaty arbitration is an international dispute settlement mechanism aimed primarily at establishing state responsibility, the applicable law governing the interpretation and application of an IIA should be public international law in principle.[65] This opens the door for investment tribunals to integrate human rights considerations into their decision-making through applying general international law.[66]

B. The Role of General International Law to Address Human Rights

The application of general international law could be of vital value for ensuring robust sovereign autonomy to regulate public interests, especially on sensitive matters of human rights, public health and the environment. Given that certain rules of international law reflect a consensus of states in addressing internationally shared and multi-jurisdictional problems (such as human rights, environmental harm, public health regulation), drawing on these relevant principles and doctrines may help channel a host state's exercise of regulatory powers toward achieving communal public interests.[67] As such, public international law could provide an important vehicle for investment treaty tribunals to balance competing private and public interests, reconciling the tension between investment protection and human rights.

By way of example, the following norms of public international law are most pertinent to addressing investment treaty disputes concerning human rights. Application of the police powers doctrine could provide a host state with greater regulatory autonomy to pursue public welfare and human rights-

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[64] ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS ch. 4.1.3 (2014) (noting that the role of municipal law would be primarily relevant for determining whether an investment exists within the domestic law or whether there is a breach of contractual obligation); Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentary 2001, art. 3, U.N. Doc. A/56/10 (2008), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC's Articles] ("the characterization of an act of a State as internationally wrongful is governed by international law.")

[65] *See generally* BRABANDERE, *supra* note 64, ch. 4.

[66] Theoretically, investment tribunals could draw on human rights law to inform their interpretation of investment obligations in IIAs. Such "cross-regime fertilization" could translate into a beneficial development of investment law. Yet, my article focuses on a narrower scenario, whereby tribunals should apply certain international law doctrines (such as "police powers" and contributory fault) as the applicable law, and thus address some human rights issues implicated.

[67] Foster, *supra* note 33, at 530, 557.

臺灣大學學術期刊資料庫

oriented goals without constituting indirect expropriation under an IIA.[68] Reliance on the precautionary principle by an investor-state tribunal in their decision-making may help secure greater regulatory space of states to address internationally shared problems of public health and environmental protection, enabling states to realize communal international interests.[69] Albeit a minority view, the clean hands doctrine has found acceptance among the investment tribunals in *Al Warraq v. Indonesia* and *Niko v. Bangladesh*, and several separate or dissenting opinions of International Court of Justice (hereinafter "ICJ") judges as a general principle of international law, capable of rendering a claim inadmissible for claimant's wrongdoings with respect to the subject matter of the dispute.[70]

In terms of customary rules on state responsibility, the doctrine of contributory fault could provide a judicial means to address investor misconduct in relation to human rights.[71] As valid legal grounds to preclude the wrongfulness of states' act, customary defences of necessity and distress could be invoked by a respondent state to defend its sovereign autonomy to adopt emergency measures addressing a national emergency (such as the COVID-19 pandemic) against investment treaty claims, insofar as the underlying IIA has not excluded their application.[72] Likewise, the doctrine of a fundamental change of circumstances, as codified in article 62 of the Vienna Convention on the Law of Treaties (VCLT), may be invoked as a defence to abdicate state liabilities or justify treaty non-performance arising from emergency measures deployed to respond to an economic crisis or a

[68] *See infra* Section III.C.

[69] Foster, *supra* note 33, at 525, 531-32 (arguing that when applying the police powers doctrine, investment tribunals could consider the precautionary principle, in order to better channel states' right to regulate in the public interests, even irrespective of whether the precautionary principle is binding per se.)

[70] *See* Niko Res. (Bangl.) Ltd. v. People's Republic of Bangl. et al., ICSID Case No. ARB/10/11 & ARB/10/18, Decision on Jurisdiction, ¶¶ 476-85 (Aug. 19, 2013); Hesham T. M. Al Warraq v. The Republic of Indon., Final Award, ¶¶ 607, 646-48 (ad hoc Trib., 2014). *See also* Patrick Dumberry, *State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award*, 17(2) J. WORLD INV. & TRADE 229, 251 (2016).

[71] *See infra* Section III.D.

[72] Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part I*, EJIL TALK! (Mar. 17, 2000), https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/; Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part II*, EJIL TALK! (Mar. 17, 2000) https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/ (exploring whether a host state could rely on the defences in the law of state responsibility to justify their non-performance of obligations under IIAs as a result of their regulatory efforts to address the COVID-19 pandemic; concluding that while a plea of *force majeure* is difficult to succeed, the doctrine of necessity might find favor from a tribunal (though its invocation will meet some difficulties in proving that the measures are "the only way" to protect an essential interest and that the state itself did not contribute to the situation), and that a defence of distress is most likely to prevail).

臺灣大學學術期刊資料庫

national emergency.[73] In this way, even where an IIA contains no general exceptions provision, application of these public international law defences may safeguard a state's regulatory autonomy to adopt emergency measures to protect public interests at large, providing the sovereignty "safety valve" to exempt the government from incurring state responsibility.

Moreover, general international rules of treaty interpretation could help investment tribunals to construe IIA provisions in light of states' other human rights, public health, and environmental commitments, gravitating arbitrators toward a more balanced interpretive approach to investor protection and state responsibility.[74] For instance, an investment tribunal could resort to the right to water of the host state's population to qualify the investor's legitimate expectations under a fair and equitable treatment claim, thus restraining investment protection from unduly impeding the state's right to regulate the public interests.[75]

Taken together, these instances suggest the important role of public international law in alleviating and reconciling the normative conflicts between investment protection and the public interests implicated.

C. The Police Powers Doctrine

As provided by virtually all IIAs, a host state, in principle, has the sovereign right to expropriate foreign investments covered thereunder within their territory, if expropriation is for public purposes, conducted non-discriminatorily and with due process, and accompanied by compensation

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[73] Bayrak, *supra* note 15, at 133-40, 145-50 (arguing that the defence of a fundamental change of circumstances, as a customary international law norm or a general principle of law, could help a state defend economic emergency measures in investment treaty arbitration, and discussing application of art. 62 VCLT to the investment treaty claims brought against Spain under the ECT).

[74] Simma, *supra* note 1, at 584-92 (discussing "systemic integration of human rights by recourse to article 31(3)(c) VCLT.")

[75] Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 591-92, 594, 622 (Dec. 8, 2016) (relying on the government's obligation to respect its population's the right to water, the tribunal rejected the investor's argument that its "legitimate expectations" under the fair and equitable treatment should prevent the host state from using regulations to alter the legal framework that existed when investments were made: the tribunal found that the government was obliged to:

> [E]nsure the population's health and access to water and to take all measures required to that effect . . . . When measures had been taken that have as their purpose and effect to implement such fundamental rights . . . they cannot hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract. In short, they were expected to be part of the investment's legal framework.)

臺灣大學學術期刊資料庫

paid to the investor affected.[76] Expropriation could be either direct or indirect. Direct expropriation refers to a state measure directly depriving owners of the property through a formal transfer of title and/or outright physical seizure of the property.[77] Indirect expropriation occurs when a state measure renders the foreign investor's business economically useless, such that it must be deemed to have been expropriated even without a formal transfer of title or outright seizure, though the host state may not purport to expropriate.[78] While direct expropriation is relatively rare today, most investment treaty disputes concern claims of indirect expropriation.[79] Yet, other than a few exceptions of recent new-generation IIAs, the text of most IIAs often does not provide meaningful guidance on how to distinguish between indirect expropriation and non-compensable regulatory measures of general application.[80] In this regard, investment treaty tribunals have adopted two general approaches: the "sole effects" doctrine and the "police powers" doctrine.

1. From the "Sole Effects" Test to the "Police Powers" Doctrine — One vocal school of thought maintains that to assess whether a state measure constitutes indirect expropriation, the only relevant criterion to consider is the economic effects of the measure—there must be a "substantial deprivation" of the economic values or property rights, irrespective of the motivation and intent of the measure at issue (the "sole effects doctrine.")[81] An exemplar of this approach is *Metalclad v. Mexico* decision, where the tribunal's determination of indirect expropriation was solely based on the effects of a challenged regulatory measure, as reflected in the loss of the economic value on the property concerned.[82] In that case, the tribunal found that it "need[ed] not decide or consider the motivation or intent" of the

[76] *See, e.g.*, NAFTA, *supra* note 37, art. 1110(1); ECT, *supra* note 37, art. 13(1); 2012 U.S. Model BIT, *supra* note 37, art. 6(1); Treaty Between the Federal Republic of Germany and _ Concerning the Encouragement and Reciprocal Protection of Investments art. 4(2) (2008), https://www.italaw.com/sites/default/files/archive/ita1025.pdf [2008 German Model BIT]. *See also* DOLZER & SCHREUER, *supra* note 49, at 88, 124; UNCTAD, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 5 (2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

[77] UNCTAD, *supra* note 76, at 5-6.

[78] *Id.* at 7-8.

[79] *Id.* at 7.

[80] UNCTAD, WORLD INVESTMENT REPORT 2017, at 122 (2017), https://perma.cc/3TNU-5RCS (based on a survey conducted by UNCTAD, only 5% of IIAs concluded before 2010 have specified the criteria for indirect expropriation; in contrast, 42% of IIAs concluded from 2011 to 2016 contained such criteria.)

[81] *See* Michael Reisman & Robert Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74(1) BRIT. Y.B. INT'L L. 115, 121 (2003); KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION 296 (2010).

[82] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000).

臺灣大學學術期刊資料庫

disputed measure, given that the measure already had the effects of permanently barring the operation of the investment at issue.[83]

In focusing solely on the effects on the investment concerned, this highly economics-oriented approach of interpretation leaves little or no room for considering the underlying regulatory purposes in the determination of an indirect expropriation claim. In this way, the purposes and characteristics of a state measure become irrelevant, such that *bona fide* general regulations in the public interest that *incidentally interfere* with a property interest may constitute indirect expropriation.[84] Thus, the "sole effects doctrine" has fueled concerns that an expanded notion of regulatory taking would undermine environmental protection, human health, and other public welfare-motivated regulations, resulting in regulatory chills that effectively deter the sovereign prerogatives of the host state to regulate the public interests.[85] This tension between private property rights and public regulatory powers is further exacerbated by the increasingly expanded role of regulations in the modern economy and social life,[86] as well as the positive obligations of a state to pursue and realize human rights (particularly its population's social and economic rights).[87]

However, more recently, case law and commentaries have increasingly converged on the application of a police powers doctrine under customary international law to an indirect expropriation claim, thereby departing from the sole effects doctrine.[88] According to the police powers doctrine, as a matter of general international law, *bona fide* regulations in the exercise of a state's police powers would not constitute indirect expropriation, even when they result in an economic injury to the property or investment.[89]

The view favoring application of the police powers doctrine to an indirect expropriation claim was endorsed by the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to

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[83] *Id.* ¶¶ 103, 111.

[84] *See, e.g.*, Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities, 2007 Grotius Lecture*, 23(3) AM. U. INT'L L. REV. 451, 457 (2008).

[85] *See, e.g.*, Been & Beauvais, *supra* note 29, at 132-35; Deborah Sy, *Warning: Investment Agreements Are Dangerous to Your Health*, 43(4) GEO. WASH. INT'L L. REV. 625, 636-37 (2011).

[86] Rainer Geiger, *Regulatory Expropriations in International Investment Law: Lessons from the Multilateral Agreement on Investment*, 11(1) N.Y.U. ENVTL. L.J. 94, 108 (2002); Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11(1) N.Y.U. ENVTL. L.J. 35, 46 (2002).

[87] Simma, *supra* note 1, at 586-89.

[88] Moloo & Jacinto, *supra* note 35, at 15.

[89] Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 731 (2014); George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532, 536 (7th ed. 2008); John H. Herz, *Expropriation of Foreign Property*, 35(2) AJIL 243, 251 (1941).

臺灣大學學術期刊資料庫

Aliens,[90] the Third Restatement on Foreign Relations Law of the United States,[91] the Organization for Economic Cooperation and Development (OECD) Working Papers on International Investment,[92] and the Interpretive note to article 5 ("Expropriation and Compensation") of the draft Multilateral Agreement on Investment.[93]

In terms of modern treaty practices, the police powers doctrine likewise has become increasingly incorporated into the expropriation provisions of many new-generation IIAs. They often contain clarifications that those provisions are intended to reflect "customary international law concerning the obligation of States with respect to expropriation," which arguably include the police powers doctrine.[94]

Aside from these converging state practices indicative of the *opinion juris* on the customary international law status of the police powers doctrine, investment treaty tribunals also have increasingly recognized its applicability to investor-state disputes as a matter of general international law. In the context of NAFTA and BITs, an increasingly consistent trend of investor-state arbitral decisions has found in favor of differentiating the exercise of

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[90] Louis B. Sohn & R. R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55(3) AJIL 548, 562 (1961).

[91] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (AM. LAW INST. 1987).

[92] Organization for Economic Cooperation and Development [hereinafter OECD], "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 5 (OECD Working Papers on Int'l Inv. No. 2004/4, 2004).

[93] *See generally* OECD, THE MULTILATERAL AGREEMENT ON INVESTMENT: CONSOLIDATED TEXTS AND COMMENTARY (DAFFE/MAI(97)1/REV2) (May 13, 1997), https://www.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf (The Draft Multilateral Agreement on Investment (MAI)). *See Multilateral Agreement on Investment - Report to Ministers, April 1998*, OECD, https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment-reporttoministersapril1998.htm (last visited Sept. 19, 2021) (Ministerial Statement on the Multilateral Agreement on Investment (April 28, 1998)). ("The MAI would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.")

[94] 2012 U.S. Model BIT, *supra* note 37, annex B ("Expropriation"), arts. 1, 4(b); Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment annex B ("Expropriation"), arts. 1, 4(b) (2004), https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf [2004 U.S. Model BIT]; Agreement Between Canada and _ for the Promotion and Protection of Investments annex B.10(c) ("Expropriation") (2014), https://www.italaw.com/sites/default/files/files/italaw8236.pdf [hereinafter 2014 Canada Model BIT]; Agreement Between Canada and _ for the Promotion and Protection of Investments annex B.13(1)(c) (2004), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download [2004 Canada Model BIT]; Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the Reciprocal Promotion and Protection of Investments, Belg./Lux.-Colom., art. IX(3)(c), Feb. 4, 2009; Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, Colom.-U.K., art. 6.2(c), Mar. 17, 2010.

臺灣大學學術期刊資料庫

police powers from indirect expropriation.[95] For instance, in *Feldman v. Mexico*, when interpreting the expropriation provision of NAFTA, an ICSID tribunal noted that:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of governmental subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[96]

As put by the *Philip Morris v. Uruguay* tribunal, these investment awards that emerged after 2000 have contributed to develop the scope, content, and conditions of the police powers doctrine, thereby further anchoring it in general international law.[97] According to this tribunal, "as evidence of the evolution of the principles in the field," this prevailing trend of arbitral awards and treaty practices in distinguishing between indirect expropriation and a non-compensable regulatory measure (in the exercise of police powers) "reflects the position under general international law."[98] Moreover, in many investor-state decisions, the tribunals' recognition and application of the police powers doctrine occur despite the absence of the underlying IIAs' explicit reference on this matter,[99] which further evinces arbitrators' consensus that this doctrine has been enshrined in customary international law.[100]

2. Invocation of the Police Powers Doctrine to Assess an Indirect Expropriation Claim — While the customary nature of the police powers doctrine is a precondition for its invocation in a concrete dispute, an investor-state tribunal still needs to (i) determine whether the treaty parties have opted out of its application in an IIA, and (ii) precisely identify its normative content to be applied to an indirect expropriation claim.

As regards issue (i), the crux is to construe the treaty text. Despite the slightly varying wording, the expropriation provisions of most early IIAs

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[95] Philip Morris Brands Sàrl et al. v. Oriental Republic of Uru. [hereinafter Philip Morris v. Uruguay], ICSID Case No. ARB/10/7, Award, ¶ 295 (July 8, 2016). UNCTAD, *supra* note 76, at 83-85.
[96] Marvin Feldman v. The United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002).
[97] Philip Morris v. Uruguay, *supra* note 95, at ¶ 295.
[98] *Id.* ¶¶ 295-301.
[99] *See id.* ¶¶ 295-99 (discussing investor-state tribunals' caselaw in this regard). *See also supra* note 96 and accompanying text.
[100] UNCTAD, *supra* note 76, at 85-86.

臺灣大學學術期刊資料庫

manifest a relatively high degree of uniformity, often without providing meaningful guidance on distinguishing indirect expropriation from non-compensable governmental measures.[101] The prevailing approach of tribunals is to interpret the slightly "differently-worded provisions as if they refer to a common concept of indirect expropriation" informed by investment arbitration *jurisprudence constance* and general international law.[102] This opens the door for tribunals to import the police powers doctrine from customary international law to assess indirect expropriation under an IIA.

That said, a minority approach exists to treat treaty provisions that require compensation for measures "having an effect equivalent to . . . expropriation" as indicative of the treaty parties' intention to apply a "sole effects" test.[103] This is the approach adopted by the tribunals in *National Grid v. Argentina* and *Siemens v. Argentina*.[104] In addition, certain commentators argued that treaty formulations prohibiting measures that "have the same effects" with direct expropriation or measures "depriving" the covered investment likewise refer to a "sole effects" test (i.e., a "substantial deprivation" standard), thereby carving out of the police powers doctrine under customary international law.[105]

However, the ordinary meaning of this wording remains an open question, for which reasonable interpretations might differ from each other.[106] As the case law now stands, the majority approach has not accorded much weight to these slightly varied treaty formulations, but rather treated them as merely referring to or synonymous with the notion of "indirect expropriation", without suggesting the substantive criteria for its

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[101] ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 559 (2008). *See, e.g.*, NAFTA, *supra* note 37, art. 1110.

[102] Jonathan Bonnitcha, How much Substantive Protection Should Investment Treaties Provide to Foreign Investment? 296-97 (2012) (unpublished D.Phil. thesis, University of Oxford) (on file with author).

[103] *Id.* at 297.

[104] National Grid P.L.C. v. Argentina Republic, Award, ¶ 147 (ad hoc Trib., Nov. 3, 2008). Siemens A.G. v. The Argentina Republic, ICSID Case No. ARB/02/8, Award, ¶ 270 (Jan. 17, 2007).

[105] *See, e.g.*, Prabhash Ranjan, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9(1) ASIAN J. INT'L L. 1, 23-24 (2018) (critiquing the *Philip Morris v. Uruguay* decision's application of the police powers doctrine.) *See* Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, Switz.-Uru., art. 5(1), Oct. 7, 1988; Martin Paparinskis, *Investment Treaty Interpretation and Customary International Law: Preliminary Remarks*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 65, 89 (Chester Brown & Kate Miles eds., 2011) (commenting on the *Saluka v. Czech* decision: "the ordinary meaning of "deprivation" could suggest a rule under which the only criterion of compensation is the loss of the investor"); Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Czech-Neth., art. 5, Apr. 29, 1991.

[106] *See* Paparinskis, *supra* note 105, at 89-90 (discussing two divergent interpretations that reasonably differed on the meaning of the expropriation provision in *Saluka v. Czech*.)

臺灣大學學術期刊資料庫

assessment.[107] On this basis, this approach imported the police powers doctrine from customary international law, either as the substantive law to be directly applied to the merits, or as external legal sources used to construe the open-textured expropriation provisions—thereby rejecting a "sole effects" test.[108]

For instance, in *Philip Morris v. Uruguay*, the tribunal found the police powers doctrine under customary international law applicable to the indirect expropriation claim. Notably, arbitrators dismissed the investors' arguments that the IIA's silence on this doctrine reflected the states' intention not to include it in the treaty, albeit knowing about it.[109] Rather, the tribunal reasoned that the expropriation provision of the IIA shall be interpreted in light of applicable rules of customary international law, which included the police powers doctrine as it had evolved.[110] Indeed, as argued earlier, since an IIA is automatically born into general international law, the treaty shall exclude the rules of general international law that the treaty parties do not want to apply to itself, not the reverse—and the treaty does not need to explicitly list all the rules of general international law applicable to itself.[111]

As for issue (ii), investment tribunals have addressed the normative content of this doctrine in different ways. Indeed, treating the police powers doctrine as "a blanket exception" for all regulatory measures risks creating "a gaping loophole" in IIAs' substantive guarantees against expropriation.[112] Therefore, the key is to develop a judicial approach to effectively distinguish between compensable indirect expropriation and non-compensable legitimate regulation in the exercise of a state's police powers. Though international law "has yet to draw a bright and easily distinguishable line" in general,[113] two notable approaches stand out from arbitral jurisprudence.

One earlier approach seeks to define expropriation by its impacts on the investment at issue, subject to the exception of regulatory measures satisfying certain conditions.[114] Under this approach, provided that the specified criteria are met, a disputed measure shall fall within the police powers of a state, serving as a categorical exception to indirect expropriation. An exemplar of this approach is *Methanex v. US* decision, where Methanex

[107] Bonnitcha, *supra* note 102, at 297. *See* Philip Morris v. Uruguay, *supra* note 95, ¶¶ 289-91; Saluka Investment BV v. The Czech Republic [hereinafter Saluka v. Czech], UNCITRAL, Partial Award, ¶ 254 (Mar. 17, 2006).
[108] *See, e.g.*, Philip Morris v. Uruguay, *supra* note 95, ¶¶ 289-91; Saluka v. Czech, *supra* note 107, ¶¶ 254-62.
[109] Philip Morris v. Uruguay, *supra* note 95, ¶ 289 (referring to the claimants' memorandum, ¶ 210).
[110] *Id.* ¶¶ 290-301.
[111] *See* Pauwelyn, *supra* note 43, at 537. *See also supra* notes 99-100 and accompanying text.
[112] Pope & Talbot Inc. v. The Gov't of Can., UNCITRAL, Interim Awards, ¶ 99 (June 26, 2000).
[113] Saluka v. Czech, *supra* note 107, ¶¶ 263-64.
[114] Bonnitcha, *supra* note 102, at 306, 308, 325-26.

臺灣大學學術期刊資料庫

claimed that California's regulation that banned the sale and use of the fuel additive MTBE amounted to expropriation since it significantly deprived itself of its business (which produced methanol, a chemical ingredient used to manufacture MTBE).[115] As contended by the US, California's ban was adopted for environmental and health purposes in response to the threat of MTBE contamination of groundwater and drinking water.[116] Instead of assessing the effects of the said measure, the tribunal addressed the police powers exception first, holding that:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects, inter alios a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government . . . to refrain from such regulation.[117]

In other words, the tribunal identified the criteria of a legitimate public purpose, non-discrimination, due process, and non-violation of specific commitments made to an investor, as the conditions for invoking the police powers doctrine. Applying this test to the facts on the regulation, the tribunal, without analyzing its actual effects, found that the measure met these criteria, and hence constituted a lawful regulation, rather than an expropriation.[118]

Another approach to invoke the police powers doctrine is to balance the effects and characteristics of a measure.[119] Unlike the former formulation, under this approach even if a regulatory measure had the indicia of a legitimate regulatory action, it still may constitute indirect expropriation, provided that it fails a proportionality test.[120] There are two major versions of this balancing approach.

The first one is a holistic approach that takes into account all relevant factors and balances the effects of a measure against its characteristics.[121] A leading case is *Firemen's Fund v. Mexico*, where the tribunal sought to distinguish a compensable expropriation from a non-compensable regulation by taking into account all the circumstances, including the effects on the investment (under a "substantial deprivation" test), whether the measure was discriminatory, of general application, and applied in good faith, as well as

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[115] Methanex Corp. v. United States of America, NAFTA/UNCITRAL, Award, pt. IV, ch. D, ¶ 5 (Aug. 3, 2005).
[116] *Id.* pt. III, ch. A, ¶¶ 1-12.
[117] *Id.* pt. IV, ch. D, ¶ 7.
[118] *Id.* pt. IV ch. D, ¶¶ 8-15.
[119] Bonnitcha, *supra* note 102, at 331.
[120] *Id.*
[121] *Id.* at 331-33.

臺灣大學學術期刊資料庫

the proportionality between the means and the policy goal.[122] The tribunal held that it should consider all these relevant elements, and then conclude whether the disputed measure was expropriatory.[123]

The second one is a more narrowly tailored "proportionality-balancing" approach that was developed more recently. An exemplar of this approach, *Tecmed v. Mexico* adopted a two-step analysis. First, as a threshold requirement, the tribunal examined whether the disputed measure had the effects of total or near-total deprivation of the investment.[124] While noting that severe adverse effects on the economic value of the investment alone were insufficient to establish indirect expropriation, the tribunal rejected a general exception exempting regulatory actions "beneficial to society as a whole" *per se*.[125] Second, citing the jurisprudence of the European Court of Human Rights (ECHR), the tribunal sought to assess the existence of a "reasonable relationship (i.e., proportionality) between the means employed and the aim sought to be realized."[126] As observed by commentators, such a proportionality test reflects the tribunals' intention to calibrate a somehow "mitigated" form of the police powers doctrine, instead of an absolute exception model as applied in *Methanex v. US*.[127]

This Section does not intend to evaluate the relative merits of different approaches articulating the prescriptive requirements of the police powers doctrine. Instead, for the purpose of this article, the doctrinal move enabled by the police powers doctrine is more significant than its nuances identified above. Despite these varied formulations on how this doctrine should interact with an IIA's expropriation provision *in concreto*, these investment decisions suggest an increasingly convergent trend of arbitral consensus on its application to assess the expropriatory nature of a regulatory measure, such that the purposes and characteristics of the impugned measure become part of tribunals' overall assessment, in addition to the effects on the investment.[128] This means that if a governmental action is found to be a *bona fide* regulation that is aimed at legitimate public purposes, of general application, and conducted non-discriminatorily and in due process, it is less

[122] Firemen's Fund Ins. Co. v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, Award, ¶ 176 (July 17, 2006).
[123] Bonnitcha, *supra* note 102, at 335.
[124] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003).
[125] *Id.* ¶¶ 119-22.
[126] *Id.* ¶¶ 116, 121-22.
[127] *See* Catharine Titi, *Police Powers Doctrine and International Investment Law*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 323, 325 (Andrea Gattini et al. eds., 2018). *See also* Yannick Radi, *Philip Morris v. Uruguay—Regulatory Measures in International Investment Law: To Be or Not to Be Compensated?*, 33(1) ICSID REV. 74, 78-79 (2018).
[128] Moloo & Jacinto, *supra* note 35, at 24.

臺灣大學學術期刊資料庫

likely to constitute indirect expropriation.[129] Though tribunals have yet to flesh out the exact scope of "public purposes" in a comprehensive way, public health, environmental protection, and other widely shared human rights goals that require positive and progressive regulatory actions to fulfill obviously qualify as such.[130] And international human rights law could provide an external international legal basis to inform what may constitute legitimate public purposes under this doctrine.

At the core, the police powers doctrine concerns striking a proper balance between the investment protection obligations under IIAs and the regulatory autonomy of the host state to act in the public interest, which is not uncommon for investment treaty arbitration in general. Yet, the relevance and significance of this doctrine become all the more prominent in the current context of a global pandemic, as countries across the world have enacted a variety of extraordinary regulatory measures to combat the spread of COVID-19, resulting in heavy tolls on businesses and enterprises alike.[131] Whilst a detailed analysis of a hypothetical case is beyond the scope of this article, it suffices to say that the police powers doctrine provides an important judicial means to safeguard the host state's right to regulate in pursuit of legitimate public policy goals, particularly those *bona fide* regulations designed to prevent the spread of the COVID-19 virus, restore public order, and safeguard public health.[132]

In sum, even short of being explicitly incorporated under an IIA, the police powers doctrine may become the applicable law governing investor-state disputes, to the extent that it has not been excluded by the treaty. As part of general international law, the police powers doctrine could shift the tribunals' assessment away from a "sole effects" test to a more holistic approach that accords greater weight to regulatory purposes and characteristics of the measure. As such, application of this doctrine can help to ensure greater regulatory autonomy for the host state to fulfill, respect, and protect its international and domestic human rights obligations, provided that the police powers are not abused or claimed just as a pretext. This could counter an overly expansive interpretation of investors' rights under IIAs, thereby restoring the balance between investment protection and human rights interests.

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[129] *Id.* at 16, 24.
[130] *Id.* at 24. *See* Noam Zamir, *Police Powers Doctrine in International Investment Law*, 14(3) MANCHESTER J. INT'L L. 318, 327, 332 (2017).
[131] Bento & Chen, *supra* note 6.
[132] *See* Satyajit Bose, *Police Powers as a Defence to COVID-19 Liability Does It Protect Host States*, AM. REV. INT'L ARB. (Aug. 6, 2020), http://blogs2.law.columbia.edu/aria/police-powers-as-a-defence-to-covid-19-liability-does-it-protect-host-states/.

臺灣大學學術期刊資料庫

D. The Doctrine of Contributory Fault

At the quantum phase, investment arbitrators generally enjoy the widest discretion, capable of exercising their discretion based on notion of "equity" to correct "inequitable" outcomes arising from a narrow application of IIA obligations.[133] An important extrinsic factor is investors' "contributory fault" that results in their own injury, which may be considered by arbitrators to accordingly reduce the compensation awarded. Application of the contributory fault doctrine in investment treaty arbitration could provide a judicial means to establish the liability of foreign investors for their wrongful conduct regarding human rights.

1. Contributory Fault Under International Law — As "an axiomatic legal concept of torts and civil liability", contributory fault (also known as "contributory negligence," "comparative fault," "*faute de la victime*") has been incorporated into a number of national laws, generally allowing the reduction of damages owed to victims by taking into account their own faulty conduct that gives rise to or exacerbates the damage suffered.[134] Under international law, contributory fault initially emerged as "a corollary of the full reparation principle", as established by the Permanent Court of International Justice in the seminal decision of *Chorzów Factory*.[135] In that case, the Court held that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[136] This full reparation principle has been subsequently incorporated in article 31 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on States' Responsibility,")[137] which requires the responsible state to "make full reparation for the injury caused by the internationally wrongful act."[138]

By implication, full reparation requires an international adjudicatory tribunal to consider the extent to which the injured party has contributed to

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[133] Elrifai, *supra* note 18, at 837.

[134] Farouk El-Hosseny & Patrick Devine, *Contributory Fault under International Law: A Gateway for Human Rights in ISDS?*, 35(1-2) ICSID REV. 105, 107 (2020). *See* ILC's Articles, *supra* note 64, art. 39, cmt. 1. *See also* Ulrich Magnus & M. Martin-Casals, *Comparative Conclusions*, *in* UNIFICATION OF TORT LAW: CONTRIBUTORY NEGLIGENCE 259 (Ulrich Magnus & M. Martin-Casals eds., 2004) (finding that contributory negligence is an essential element of national tort law at the domestic level).

[135] Jean-Michel Marcoux & Andrea K. Bjorklund, *Foreign Investor' Responsibilities and Contributory Fault in Investment Arbitration*, 69(4) ICLQ 877, 881 (2020).

[136] Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).

[137] ILC's Articles are generally deemed an expression of customary international law by international adjudicatory tribunals and scholarly commentaries. *See also* El-Hosseny & Devine, *supra* note 134, at 107.

[138] ILC's Articles, *supra* note 64, art. 31, cmt. 2.

臺灣大學學術期刊資料庫

the injury that it suffered, in order to fully re-establish the "situation affected by the breach".[139] Put differently, the compensation awarded is "payable only for the consequences of injuries caused by the breaching party's conduct",[140] and must not exceed the loss actually suffered by the victim by virtue of that.[141] In this regard, article 39 of the ILC Articles on States' Responsibility provides that: "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[142]

According to the ILC's commentary, in order to be considered "wilful or negligent" for this purpose, the actions or omissions should "manifest a lack of due diligence on the part of the victim of the breach for his or her property or rights."[143] While article 39 has yet to elaborate on its definition, the notion of "negligence" needs not to reach the threshold of "serious" or "gross"; rather, the ILC emphasizes that its relevance for reparation depends on "the degree to which it has contributed to the damage as well as the other circumstances of the case."[144] This suggests a context-specific inquiry based on the facts of a given case. On that note, Sergey Ripinsky and Kevin Williams argued that the determination of "negligence" could be based on a test of reasonableness,[145] taking into account various factors "that are capable of affecting the form or reducing the amount of reparation in an appropriate case."[146]

It bears making three distinctions here regarding the doctrine of contributory fault. First, under article 39, this doctrine only constitutes a circumstance that could attenuate or offset the obligation of paying compensation, rather than a justification precluding the wrongfulness of a state's conduct.[147] This means that article 39 could solely influence the

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[139] *Id.* Marcoux & Bjorklund, *supra* note 135, at 882.
[140] MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 104 (2008).
[141] Marcoux & Bjorklund, *supra* note 135, at 882.
[142] ILC's Articles, *supra* note 64, art. 39.
[143] *Id.* cmt. 5. *See* El-Hosseny & Devine, *supra* note 134, at 107-08; Anaïs Moutier-Lopet, *Contribution to Injury*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 639, 644 (James Crawford et al. eds., 2010).
[144] *Id. See* Marcoux & Bjorklund, *supra* note 135, at 882.
[145] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 315 (2008).
[146] ILC's Articles, *supra* note 64, art. 39, cmt. 5.
[147] Marcoux & Bjorklund, *supra* note 135, at 882-83, 888-89 (arguing that this is because "contribution to the injury" was addressed by the ILC in Part Two of its Articles on State Responsibility ("Content of the International Responsibility of a State"), which focuses on legal consequences arising from the responsibility of a state, while circumstances precluding the wrongfulness of a state's conduct, such as necessity, self-defense, force majeure, distress, consent, among others, are encompassed in Part One as a separate chapter; also noting that article 39 only

臺灣大學學術期刊資料庫

"form" and "extent" of reparation, but cannot completely negate or exonerate a finding of state responsibility.[148] Second, contributory fault should not be conflated with issues of illegal investment or corruption that would deprive a tribunal's jurisdiction or render an investment treaty claim inadmissible; rather, its application is relevant in the merits or quantum phase of investment treaty arbitration.[149] Third, contributory fault should not be confused with the investor's duty to mitigate its losses. While the latter means that a tribunal may reduce its damages accordingly when an investor failed to take some reasonable measures to minimize its losses caused by an infringing party, contributory fault applies to the scenario where the investor had contributed to its own losses in the first place.[150]

2. Contributory Fault as Applied in Investment Treaty Arbitration — In recent cases, investment tribunals have increasingly applied contributory fault (as codified in article 39) when determining the level of compensation awarded to an investor in light of its conduct.[151] While a minority approach suggested that contributory fault may preclude state responsibility, most investment tribunals interpreted this doctrine to be only capable of reducing the damages due to the claimant in proportion to its own fault.[152]

Broadly speaking, there are two categories of factual scenarios where the contributory fault of investors may provide the basis for a tribunal to proportionately set off the damages awarded. These include where (i) the misconduct of the investor had increased the losses it suffered, but this was unrelated to the wrongdoing of host state, and distinct from the failure of the investor to take mitigation measures to minimize its losses; and (ii) the investor misbehavior had directly triggered the disputed measures of the host state.[153]

As for the first scenario, a typical case in point is the *MTD v. Chile*, where the tribunal addressed the claimants' imprudent business decisions (i.e., substantially investing in a project that was already subject to an

provides that "wilful or negligent action or omission" of the injured victim is relevant "in the determination of reparation.") *See* ILC's Articles, *supra* note 64, art. 39.

[148] RIPINSKY & WILLIAMS, *supra* note 145, at 315. *See also* Mark Kantor, *The Impact of Contributory Investor Conduct: Only with Difficulty Commensurable*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 533, 534 (Meg Kinnear et al. eds., 2015).

[149] El-Hosseny & Devine, *supra* note 134, at 111; Marcoux & Bjorklund, *supra* note 135, at 890-92.

[150] *See* Eric Runesson & Rasmus Josefsson, *Contributory Fault, Mitigation and Other Defences to Damages Claims*, *in* THE INVESTMENT TREATY ARBITRATION REVIEW 265, 268-69 (Barton Legum ed., 2018).

[151] Elrifai, *supra* note 18, at 867-68; Marcoux & Bjorklund, *supra* note 135, at 879-80. *See* El-Hosseny & Devine, *supra* note 134, at 108 n.21.

[152] Marcoux & Bjorklund, *supra* note 135, at 879 n.7; El-Hosseny & Devine, *supra* note 134, at 110. For the minority approach mentioned, see Ioan Micula et al. v. Romania, ICSID Case No ARB/05/20, Final Award, ¶¶ 926-27 (Dec. 11, 2013).

[153] Yukos Universal Ltd. v. The Russian Fed'n, PCA Case No. AA 227, Final Award, ¶¶ 1604-05 (July 18, 2014) [hereinafter Yukos v. Russia].

臺灣大學學術期刊資料庫

existing zoning regulation without reasonable due diligence) under the rubric of contributory fault. In that case, the tribunal found that the claimants (two real estate development firms) showed a lack of diligence in the making of their investment—due to their failure to seek adequate professional advice on urban development, and their acceptance of an improper land valuation on the future assumption that development permits would be granted, without seeking contractual protections.[154] Emphasizing that "BITs [were] not an insurance against business risk," the tribunal held that the claimants had contributed to their own injury through their bad business judgment and that they "should bear the consequences of their own actions as experienced businessmen."[155] Notwithstanding a finding of a breach of the fair and equitable (FET) standards, the tribunal ruled that the claimants "had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by the [respondent state]."[156] On this ground, the tribunal reduced damages by 50 percent, which reflected its estimation of the claimants' contributory fault to the injury suffered.[157]

In the subsequent proceeding to annul this decision, the annulment committee upheld the tribunal's decision on contributory fault.[158] Particularly, the committee confirmed the relevance of article 39 in investment treaty arbitration,[159] and that contributory fault may arise from "a failure [by the claimants] to safeguard its own interests rather than a breach of any duty owed to the host [s]tate."[160]

Regarding the second scenario, the following cases are the most relevant ones. In *Occidental v. Ecuador*, the tribunal found that the negligent and unlawful act of the claimants (i.e., transfer of its contractual rights) in breach of the domestic laws had triggered the Ecuadorian regulatory measures.[161] The tribunal accordingly used its discretion to reduce the damages owed to the investors by 25%, as a consequence of their material and significant wrongdoings that contributed to the prejudices suffered.[162] In *Yukos v. Russia*, the tribunal found a sufficient causal link between the investors' abuse of the Russia tax regime and their injuries resulting from Russia's destruction of their investment, and thus reduced the damages by 25%, in

[154] MTD v. Chile, *supra* note 35, ¶¶ 168, 178.
[155] *Id.* ¶ 178.
[156] *Id.* ¶ 242.
[157] *Id.* ¶ 243.
[158] MTD v. Chile, Annulment Decision, *supra* note 59, ¶ 101.
[159] *Id.* ¶ 99.
[160] *Id.* ¶ 101.
[161] Occidental Petroleum Corp. et al. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 681 (Oct. 5, 2012) [hereinafter Occidental v. Ecuador].
[162] *Id.* ¶ 687.

臺灣大學學術期刊資料庫

order to reflect the investors' fault that led to their own injury.[163] The *Goetz v. Burundi II* tribunal likewise reduced the compensation due to one of the expropriated assets by 30% for the investors' misconduct that triggered the disputed act of expropriation.[164] In these cases where the host states had successfully claimed a set-off, tribunals tend to require that the investor wrongdoings should have contributed in "material and significant" ways to the disputed regulatory measure, with a "sufficient" causal link between the contributory fault and the prejudices suffered.[165]

In sum, the case law above suggests that the doctrine of contributory fault, as a secondary norm rooted in the law of state responsibility, has increasingly "percolated into investment treaty arbitration through judicial practice."[166] Despite the relevant IIAs' silence in this regard, investment tribunals are apt to apply article 39 of the ILC Articles on States' Responsibility (as an expression of customary international law) to address a range of different investor misconduct, thereby proportionately apportioning liability between the disputing parties.[167] For this purpose, the injured investor's contribution should be "material and significant" and causally linked to the injury suffered.[168] As a separate step in assessing the damages awarded to an investor after a finding of the breach by a respondent state, application of contributory fault does not seem to vary between different substantive investment protection obligations invoked.[169]

3. Contributory Fault Addressing Investor Misconduct Regarding Human Rights — Aside from unlawful transfers of contractual rights and abuses of taxation schemes, contributory fault may apply to human rights violations by a foreign investor.

In *Copper Mesa v. Ecuador*, Ecuador had terminated the investor's mining concessions for its failure to conduct prior consultations with the local communities in breach of Ecuadorian municipal law.[170] After finding that Ecuador had committed unlawful expropriation under the Canada-Ecuador BIT, the tribunal proceeded to examine the claimant's alleged

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[163] Yukos v. Russia, *supra* note 153, ¶¶ 1592, 1596-98, 1633, 1637.
[164] Antoine Goetz et al. v. Republic of Burundi, ICSID Case No. ARB/01/2, Award, ¶ 299 (June 21, 2012); Elrifai, *supra* note 18, at 867.
[165] *See* Yukos v. Russia, *supra* note 153, ¶¶ 1599-1600, 1615; Occidental v. Ecuador, *supra* note 161, ¶ 687.
[166] Marcoux & Bjorklund, *supra* note 135, at 881, 887.
[167] *Id.* El-Hosseny & Devine, *supra* note 134, at 110-11.
[168] El-Hosseny & Devine, *supra* note 134, at 110-11. *See* ILC's Articles, *supra* note 64, art. 31, cmt. 13.
[169] Marcoux & Bjorklund, *supra* note 135, at 887.
[170] Copper Mesa Mining Corp. v. Republic of Ecuador, PCA Case No. 2012-2, Award, ¶ 1.93 (Mar. 15, 2016) [hereinafter Copper Mesa v. Ecuador]. The right to local consultation prior to extractive operation under Ecuadorian law is a human right required by the ILO Convention that Ecuador ratified on May 15, 1998.

臺灣大學學術期刊資料庫

misconduct under the doctrine of contributory fault.[171] In this regard, the tribunal considered that the claimant had "substantially reduced its chances of turning its [investment] into a commercial success" through its local agents' "recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands."[172] On this basis, the tribunal decided that the claimant's injury was caused by both the host state's expropriation and by its own "contributory negligent acts and omission" that "ma[de] the situation far worse."[173] Relying on article 39 to invoke contributory negligence, the tribunal determined that the claimant had contributed to 30% of its own injury, and accordingly reduced the amount of compensation.[174]

However, in that case, when addressing the misconduct of Copper Mesa's Canadian senior management, the tribunal did not identify a clear set of legal standards to evaluate its conduct.[175] To be clear, the tribunal noted that several of the claimant's senior personnel in Quito (Ecuador's capital) had violated Ecuadorian criminal law in "directing violent acts committed on its behalf", and that the claimant's Canadian senior management was *negligent* with respect to "the planning and execution of these acts" in Ecuador (albeit without being "fully privy" to that).[176] But regarding Copper Mesa's Canadian senior management, aside from criticizing the investor's misconduct "as a sustained act of folly,"[177] the tribunal had neither specified clear legal source imposing a duty of care (or any human rights obligations), nor compared its conduct to such a benchmark to determine whether it had acted negligently.[178]

This does not come as a surprise. As stated earlier, there is a general dearth of formal legal instruments that impose direct, binding legal obligations on business enterprises as a matter of international law.[179] While investors' contractual breaches or abuses of tax schemes may be easily addressed (by comparing the investor conduct to a set of relatively clear yardsticks), human rights violations by a foreign investor remain much more difficult to substantiate in investment treaty arbitration.[180] Even though

[171] *Id.* ¶ 5.65. The tribunal adopted the "police powers" doctrine to determine the expropriation claim, but found the conditions for its invocation unsatisfied. *See id*. ¶¶ 6.58, 6.60, 6.66-.67.
[172] *Id.* ¶ 6.99.
[173] *Id.* ¶¶ 6.97, 6.99.
[174] *Id.* ¶ 6.102.
[175] *Id.* ¶ 6.99. *See* Marcoux & Bjorklund, *supra* note 135, at 895.
[176] Copper Mesa v. Ecuador, *supra* note 170, ¶ 6.100.
[177] *Id.* ¶ 6.99.
[178] Marcoux & Bjorklund, *supra* note 135, at 895.
[179] *Id. See supra* notes 20, 24, 25 and accompanying text.
[180] Marcoux & Bjorklund, *supra* note 135, at 895.

臺灣大學學術期刊資料庫

investment tribunals may be keen to reduce damages to the extent that an investor is at fault, the limited domain of human rights norms (mostly inapplicable to private firms and corporations) at present may considerably restrain arbitrators from successfully doing so in practice.

This tension is further exposed in *Bear Creek v. Peru*, where the majority of the tribunal and a dissenting co-arbitrator, Philippe Sands, fundamentally diverged on whether the investor had contributed to the social unrest (such that the level of damages should be reduced), notwithstanding their unanimous finding of indirect expropriation of the claimant's investment.[181]

In that case, the majority found that the investor had no contributory fault regarding the outbreak of social unrest that led the respondent state to adopt a decree ending the investor's right to operate its mining concessions.[182] In the view of the majority, while the claimant "could have gone further in its outreach activities", to decide Peru's contributory fault claim the relevant question was whether "such further outreach was legally required and its absence caused or contributed to the social unrest, so as to justify [the disputed measure]."[183] First, the majority considered that the invoked "ILO Convention 169 impose[d] direct obligations only on [s]tates" rather than private companies, such that the latter cannot "fail to comply" with the local consultation requirements.[184] Second, the majority found that Peru had failed to prove a causal link between the claimant's alleged omission or fault and the harm suffered, to the effect that had the claimant timely implemented the social communication program (to fulfill the local consultation requirements), the social unrest that led to its losses would not have occurred.[185] Rather, the majority found that the evidence presented showed that the claimant had "complied with all legal requirements with regard to its outreach to the local communities."[186]

In stark contrast, Sands found that the claimant's inability to obtain a "social license" to operate had materially and significantly contributed to the events of social unrest that prevailed in Peru and which required the government to respond reasonably.[187] In other words, the claimant failed to

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[181] Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, ¶¶ 1, 39 (Nov. 30, 2017) [hereinafter Sands' Dissenting Opinion].
[182] Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 569, 668 (Nov. 30, 2017) [hereinafter Bear Creek v. Peru].
[183] *Id.* ¶ 408.
[184] *Id.* ¶ 664.
[185] *Id.* ¶¶ 410-11, 568, 667.
[186] *Id.* ¶ 567.
[187] Sands' Dissenting Opinion, *supra* note 181, ¶¶ 3-4 ("[T]he Respondent has clearly established the Claimant's contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being.")

臺灣大學學術期刊資料庫

gain ample support from the affected local communities and stakeholders for the successful implementation of its extractive project. In Sands' view, through such negligent actions and omissions, the claimant had contributed to its own injury for the purpose of applying article 39: given the "significant and material" contributory fault of the investor, Sands concluded the damages awarded should be reduced correspondingly.[188]

At the core, the disagreements between the majority and Sands largely derive from the specific standards applied to determine whether the claimant's conduct is negligent. According to the majority, even assuming the ILO Convention is applicable to a private firm, the "relevant examination" should be whether the claimant had conducted prior consultation in *good faith* "with the objective of reaching agreement."[189] Under this view, though the ILO Convention establishes "principles on how community consultations should be undertaken," it neither imposes "an obligation of result" nor grants the affected "community [a] veto power over a project."[190] Importantly, under this good faith test that focuses on the *procedural* aspects of the consultation process, it is more difficult to prove the claimant's negligence with respect to the imposed requirements, let alone establish a causal link between the claimant's fault and the injury suffered. By comparison, Sands applied a "soft law" obligation of obtaining a social license to operate from the affected local communities. Akin to a *result*-oriented test, this test imposes a more stringent requirement than the procedural obligation to consult in good faith.[191]

Though recognizing that the ILO Convention imposed obligations on states (rather than private firms), Sands argued that it was not "without significance or legal effects" for foreign investors.[192] Sands further found that under the ILO Convention, a state was required to "deliver a domestic law framework that ensure[d] a consultation process and outcomes [were] consistent with art. 15 of ILO Convention," while it was for an investor to obtain a "social license" out of the processes.[193] In Sands' view, albeit being aware of it, the claimant did not comply with this ancillary soft law obligation (deriving from the ILO Convention) to ensure the rights of "local communities of indigenous and tribal peoples" under international law (which were "not lesser rights.")[194] According to Sands, largely due to its failure to obtain this social license, the claimant had contributory fault for

[188] *Id.* ¶ 39.
[189] Bear Creek v. Peru, *supra* note 182, ¶ 664.
[190] *Id.*
[191] Sands' Dissenting Opinion, *supra* note 181, ¶ 37
[192] *Id.* ¶ 10.
[193] *Id.* ¶ 37.
[194] *Id.* ¶¶ 11, 39.

臺灣大學學術期刊資料庫

the injury it suffered.[195] On this basis, Sands concluded that such a "significant and material" contribution rendered the claimant equally liable as the host state,[196] which should reduce the damages awarded by half.[197]

Together with the strand of cases canvassed in the precious Section, *Copper Mesa v. Ecuador* and *Bear Creek v. Peru* demonstrate that application of contributory fault could provide an important means to incorporate considerations of investor misconduct into investment treaty arbitration, particularly with respect to relevant human rights obligations. In particular, Sands' consideration of an investor's failure to comply with soft law human rights obligations as its contributory fault is "jurisprudentially innovative," suggesting new entry points through which human rights norms (whether soft law or not) may be implemented in investor-state arbitral proceedings.[198]

That said, critiques might take issue with the *Copper Mesa v. Ecuador* tribunal's failure to provide clear yardsticks to assess whether the investor's Canadian senior management was negligent, and question whether Bear Creek's damages awarded could be reduced for a failure to comply with recommendations and guidelines of soft law (as opposed to municipal law or international hard law.)[199] Indeed, to invoke contributory fault to address investor misconduct with respect to human rights, the difficulty largely arises from the absence of clear standards by which the investor conduct should be assessed as "wilful" or "negligent." As noted earlier, such lacunae at the international level are due to the general lack of formal, binding obligations on foreign investors in international human rights law, IIAs, as well as international "soft law" instruments on corporate responsibilities.[200]

In response, investment tribunals could adopt a more flexible approach to applying contributory fault. Perhaps contributory fault needs not be "systematically conflated with [a notion] of *illegality* (*per se*), whether in the making or operation of an investment."[201] As shown in *MTD v. Chile*, though the investor's misconduct (a lack of due diligence when making an

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[195] *Id.* ¶ 6.
[196] *Id.* ¶¶ 4, 39 (arguing that the investor's contributory fault to the social unrest had "left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being.")
[197] *Id.* ¶ 39.
[198] El-Hosseny & Devine, *supra* note 134, at 126.
[199] Marcoux & Bjorklund, *supra* note 135, at 895; El-Hosseny & Devine, *supra* note 134, at 116, 124-25, 128; Sands' Dissenting Opinion, *supra* note 181, ¶ 9. (It bears noting that while Sands pointed out that the right to consultation as provided by the ILO Convention had been incorporated into Peru's domestic law (Resolution 26253) not to the investor's objection, both the ILO Convention and Resolution 26253 only impose obligations on the state, but are not directly addressed to business enterprises.)
[200] *See supra* notes 20, 24, 25 and accompanying text.
[201] El-Hosseny & Devine, *supra* note 134, at 128.

臺灣大學學術期刊資料庫

investment) did not amount to a violation of municipal law or a breach of duty owed to the host state, the tribunal deemed it "a failure [by the investor] to safeguard its own interests," reflecting its imprudent conduct from a business perspective.[202] In this light, Bear Creek's failure to comply with a "soft law" norm—namely, the inability to obtain a "social license"—similarly evinces its negligence in not taking care of its own business. On this basis, Sands' dissenting opinion may be better doctrinally justified. Likewise, the conduct of Copper Mesa's senior Canadian management could be deemed negligent in failing to maintain a level of due diligence over its major business abroad. As such, the proper standards to determine an investor's contributory fault become a "due diligence" test of what a reasonable business enterprise/businessman would do to safeguard its own interests in the specific circumstances.[203] On top of that *imprudent* conduct (not *illegality* per se), an additional factor of *illegality* (such as a breach of municipal or international hard law) would further heighten the degree of fault for which the investor should be liable.[204] Of course, such a determination is eventually up to a tribunal's wide discretion.

Alternatively, this dilemma may be resolved by incorporating investor responsibilities into IIAs (or the host state's domestic laws, where applicable). As will be detailed later, for new-generation IIAs that explicitly incorporated provisions on investor obligations or referred to international soft law instruments,[205] Sands' approach would provide a promising means of enforcing investor responsibilities, thus holding them accountable for their wrongdoings in relation to human rights.

IV. LIMITATIONS AND POTENTIAL SOLUTIONS IN NEW IIAS

Thus far, as a matter of applicable law, this article has laid out legal bases for an investor-state tribunal to integrate human rights considerations in investment arbitration. This Part proceeds to critically reflect on the limitations of this approach (in Section A) and looks to new IIA examples that may provide potential solutions (in Section B).

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[202] MTD v. Chile, Annulment Decision, *supra* note 59, ¶ 101.

[203] *See* RIPINSKY & WILLIAMS, *supra* note 145, at 315 (arguing that the assessment of "fault" or "negligence" should adopt a test of *reasonableness*.) *See also* ILC's Articles, *supra* note 64, art. 39, cmt. 5 (arguing that the "wilful or negligent" conduct under article 39 should "manifest *a lack of due diligence* on the part of the victim of the breach for his or her property or rights.")

[204] Occidental Petroleum Corp. et al. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion, ¶¶ 7-8 (Sept. 20, 2012) (disagreeing with the majority's decision to reduce 25% of the damages awarded as a result of the claimants' contributory fault, Stern endorsed a 50/50 split in compensations. Citing the *MTD v. Chile* tribunal's decision to cut the damages in half as a result of the investor's imprudent conduct (assessed from a business perspective), Stern argued that "[a] split 50/50 would have been even more justified, as the Claimants have acted both very *imprudently* and *illegally*.") (emphasis added).

[205] *See infra* Section IV.B.

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A. Critical Reflections of This Approach

While application of public international law could help rebalance investor protection with non-economic interests, this juridical approach is subject to its own constraints.

First, despite their potentials in accommodating public interests, the concrete content of certain rules of general international law might be relatively unclear and ambiguous, which could create controversies and accordingly constrain their effectiveness. In the case of the police powers doctrine, notwithstanding many tribunals' acknowledgement of its status as part of customary international law, they have yet to forge a coherent approach with respect to its application to expropriation claims.[206] As such, the varied formulations of this doctrine applied by different tribunals can not only lead to jurisprudential inconsistencies, but also cause analytic confusion as to what exactly is its normative core crystalized into general international law.[207]

Further, sometimes the relationship between customary international law and a treaty can feed contestation in investment treaty arbitration. This problem is evinced in *Bear Creek v. Peru*, where the tribunal rejected Peru's arguments invoking the customary doctrine of police powers, holding that the IIA had implicitly excluded its application.[208] In reaching this conclusion, the tribunal largely relied on its reading of the IIA's general exceptions provision, reasoning that its wording had already provided an *exclusive* (rather than *exemplary*) list of enumerated exceptions without any reference to the police powers doctrine.[209] This led the tribunal to apply a relatively more stringent exception provided thereunder.[210] Albeit controversial, this instance suggests that different interpretation of the relationship between a customary international doctrine and a treaty provision could result in a state's curtailed policy space to regulate the public interest.

Second, human rights law itself may impose a constraint on how far this approach can go. While IIAs generally contain no provisions imposing

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[206] *See supra* notes 114-127 and accompanying text in Section III.C.
[207] *See* Titi, *supra* note 127, at 340-41.
[208] Bear Creek v. Peru, *supra* note 182, ¶¶ 473-74.
[209] *Id.* ¶ 473 (reasoning that given that the list of the general exceptions provision contained no wording suggesting it is of an exemplary nature (e.g., "such as"), it "must therefore be understood to be an exclusive list.") Free Trade Agreement Between Canada and Peru art. 2201(3)(a), Can.-Peru, May 29, 2008.
[210] Bear Creek v. Peru, *supra* note 182, ¶ 477 (the tribunal held that since the general exception provision, by its terms, did not waive the compensation obligation against expropriation, Peru must show why revocation of claimant's mining rights without compensation was "necessary" for the protection of human life.) In contrast, if upheld, the police powers doctrine could preclude a finding of expropriation, thus exempting Peru from the compensatory obligations.

臺灣大學學術期刊資料庫

binding obligations or enforceable responsibilities on foreign investors,[211] international human rights law can barely fill this gap. With a predominantly vertical nature, human rights generally impose legal obligations on states, rather than on investors. Moreover, on the international level, absent substantial political consensus from key capital exporting countries, binding international instruments on corporate responsibilities or investor duties are still far from being a reality.[212] As a result, it remains difficult to invoke contributory fault to directly enforce human rights obligations in investment arbitration.

Third, judicial endeavors of investment tribunals are generally incapable of eradicating the conflicts created by implementation of IIAs and human rights obligations in extreme situations. Where a state is limited by its financial means at disposal or undergoing a grievous financial crisis, specific implementation of an IIA may render it difficult to fully realize the economic and social rights of its population. For instance, when experiencing a national economic emergency or a severe public health crisis, a host state might still find itself caught between two competing sets of particularly challenging international obligations simultaneously, such that the fulfillment of one would prevent the government from achieving another, given its limited material resources.

To be sure, compliance with an IIA does not justify or exempt a breach of human rights law. Rather, states remain responsible for their cumulative international obligations. Given that international adjudicators are under a limited mandate to interpret and apply an IIA as it is, international dispute resolution may be unlikely to eliminate such a conflict. This means that though the normative tensions between investment arbitration and human rights could be alleviated by application of some public international law doctrines, they may persist in those exceptional circumstances.

Indeed, the hands of investment tribunals are inevitably constrained by their limited jurisdiction and mandate. To transcend that limitation would require states to re-contract IIAs with provisions that strike a better balance *ex ante*. Compared with adjudicators' balancing of competing interests on an *ex post* and *ad hoc* basis, states, as masters of their treaties, are in a better position to address this issue in the political arena by re-contracting an IIA.

B. Potential Solutions in New IIAs

This Section looks to new IIA provisions to deal with the limitations identified above. Though not exhaustive, these typical examples can provide

[211] Marcoux & Bjorklund, *supra* note 135, at 894.
[212] Ishikawa, *supra* note 21, at 34.

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templates for treaty parties to consider, suggesting legal solutions to sharpen this public international law approach examined by this article.

1. Safeguarding States' Policy Space to Regulate Public Interests — Given the ambiguities in the prescriptive content of the police powers doctrine under general international law as well as its relationship with the general exceptions provision of an IIA,[213] treaty parties may use explicit language to clarify the potential confusion. This helps to avoid inconsistent arbitral approaches and enhance the predictability and certainty of arbitral jurisprudence on this matter. Recently, this possibility has materialized in Canada's 2021 Model BIT.[214]

In that treaty, Canada has clarified the constitutive elements of the police powers doctrine to be invoked to assess indirect expropriation. Importantly, Canada deleted the prior language "so severe in light of its purpose,"[215] which required tribunals to examine the relationship between the impacts of the disputed measure on investment and its purposes—for instance, through *a proportionality test*.[216] Instead, the new model spelt out *a good faith test* to limit a host state' potential misuse or abuse of police powers, clarifying that "(a) non-discriminatory measure of a Party that *is adopted and maintained in good faith* to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, *even if it has an effect equivalent to direct expropriation*."[217] Such a shift from a "proportionality" test to a "good faith" test not only provides greater clarity

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[213] *See supra* Section IV.A.

[214] *Agreement Between Canada and for the Promotion and Protection of Investments*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng (last visited Sept. 12, 2021) [hereinafter 2021 Canada Model BIT].

[215] *E.g.*, 2014 Canada Model BIT, *supra* note 94, annex B.10(c):

> [E]xcept in rare circumstances, such as *when a measure or a series of measures is so severe in the light of its purpose* that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation (emphasis added).

See also Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments, Can.-Mold., annex B.10, June 12, 2018; Agreement Between the Government of Canada and the Government of the Republic of Mongolia for the Promotion and Protection of Investments, Can.-Mong., annex B.10, Sept. 8, 2016; Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Burk. Faso-Can., annex 1, Apr. 20, 2015.

[216] Compare those IIAs provisions listed in the previous footnote with 2021 Canada Model BIT, *supra* note 214, art. 9(3).

[217] *Id.*

臺灣大學學術期刊資料庫

as to the police powers doctrine's normative content, but also appears to grant a host state greater leeway for regulating public interests.

Further, in this new model, Canada has deleted from its general exceptions provision subparagraphs equivalent of GATT-style general exception clauses—particularly, article XX(b) and (g)—thus departing from around twenty-five years of investment treaty practice.[218] This change might be intended to avoid creating confusion regarding the relationship between the police powers doctrine and the general exceptions provision, which may unintendedly curtail regulatory autonomy to further public interests—as shown in *Bear Creek v. Peru*.[219]

Furthermore, some states have concluded IIAs with explicit carve-outs designed to shield good faith regulatory actions in the public interests from investment arbitration. For instance, the Trans-Pacific Partnership agreement contains a novel tobacco "carve-out" that blocks firms from making investment arbitration claims over a host state's tobacco control measures, epitomizing a historic shift.[220] Likewise, the EU–Canada Economic and Trade Agreement contains a "prudential carve-out", exempting reasonable regulatory measures in financial services adopted for prudential reasons.[221]

In addition, at the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Investor-State Dispute Settlement (hereinafter "ISDS") reform forum, South Africa's submission proposes the inclusion of "public interest" exceptions to exempt "public interest laws, regulations and legislation" from investment arbitration claims, thereby ensuring that "investors are not able to challenge legitimate public interest regulations."[222] It also advances the incorporation of a "supremacy clause" in investment treaties to the effect that investment protection shall not prevail over "international social, environmental and human rights commitments" of a host state in case of a conflict between these rules.[223] In a similar vein, the 2021 Canada Model BIT incorporates a new provision in the applicable law clause, mandating that the treaty parties' joint interpretation of the IIA

[218] *Id.* art. 22. Compare this to 2014 Canada Model BIT, *supra* note 94, art. 18(1)(a)(i)(iii).
[219] Joshua Paine (@painejoshua1), TWITTER (May 14, 2021, 6:37 PM), https://twitter.com/painejosh1/status/1393153578391511043. *See also* Bear Creek v. Peru, *supra* note 182.
[220] *TPP Full Text*, USTR, https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf (last visited Sept. 12, 2021) (art. 39.5); Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-out*, 16(2) YALE J. HEALTH POL'Y. L. & ETHICS 327, 328-29 (2016).
[221] *CETA Chapter by Chapter*, EUR. COMMISSION, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (last visited Sept. 12, 2021) (art. 13.16).
[222] U.N. Comm'n on Int'l Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa*, ¶ 56, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019) [hereinafter South Africa's Submission to UNCITRAL].
[223] *Id.* ¶ 58.

臺灣大學學術期刊資料庫

must be binding on an investment tribunal formed thereunder.[224] This amendment augments states' decision-making authority compared with that of an arbitral tribunal, granting treaty parties greater control over treaty interpretation in the arbitration process.

2. Imposing Enforceable Investor Obligations — As of this date, due to a substantial lack of political will to amend and change treaties, most IIAs continue to evolve without enforceable rules on investors' responsibility, and most investor-state arbitral proceedings have arisen from old-generation BITs.[225] A viable option to alter such a status quo would be to stipulate human rights and investors' responsibility in the substantive rules of IIAs, thus ushering in a new normal of enforceable investor obligations.

To this end, some scholars and transnational advocacy groups have advocated reform proposals to insert rules on investors' responsibility into new-generation IIAs, in order to better re-calibrate the balance between investor rights and human rights (among other public policy objectives).[226] In this regard, the Morocco–Nigeria BIT 2016 breaks new ground in explicitly stipulating "*post-establishment* obligations" of investors, requiring that investors and investments *shall* "uphold human rights in the host state," comply with the "core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998," and *shall* not "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties."[227]

Such efforts are not alone. Both the Indian Model BIT and the Southern African Development Community (SADC) Model BIT have set out investor obligations under domestic laws or international rules, including those relating to anti-corruption, disclosure, minimum standards on labor, environmental protection, human rights, corporate governance and accounting practices.[228] This approach is also reflected in South Africa's

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[224] 2021 Canada Model BIT, *supra* note 214, art. 32(2).

[225] Ho, *supra* note 20, at 10; Ishikawa, *supra* note 21, at 34; Elrifai, *supra* note 18, at 836.

[226] Ho, *supra* note 20, at 10; Ishikawa, *supra* note 21, at 34. For civil society's proposals to reform IIAs on this matter, see HOWARD MANN ET AL., IISD MODEL INVESTMENT AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS' HANDBOOK 9-11 (2d ed. 2006), https://www.iisd.org/system/files/publications/investment_model_int_agreement.pdf. Part 3 is devoted to establishing investors' obligations and duties, including general obligations, pre-establishment impact assessment, anti-corruption, post-establishment obligations, corporate governance and practices, corporate social responsibility, investor liability, and enforceability in investor-state arbitration. These provisions have also included specific obligations with respect to human rights in the host state.

[227] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, arts. 18(2)-(4), Dec. 3, 2016 [hereinafter Morocco–Nigeria BIT].

[228] Bilateral Investment Treaty Between the Government of the Republic of India and_, arts. 10-12 (2015), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf; S. AFRICAN DEV. CMTY.,

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UNCITRAL submission on the ISDS reform, which favors establishing "an international minimum standards" of investor obligations on environment and labor issues.[229]

In a similar vein, the Investment Agreement for the COMESA Common Investment Area provides that investors and their investments must "comply with all applicable domestic measures" (i.e., "any legal, administrative, judicial or policy decision" that is "directly relating to and affecting an investment.") [230] Likewise, article 9 of the Organization of Islamic Cooperation Investment Agreement imposes an obligation on the investor to comply with domestic laws and "refrain from acts that may disturb public order or morals or that may be prejudicial to the public interests."[231]

As noted earlier, by applying the doctrine of contributory fault, these IIA provisions on investor obligations and responsibilities may entitle a respondent state to deduct the compensation awarded to an investor, had an investor-state tribunal found that the investor's imprudent or illegal conduct in breach of these rules had materially contributed to its own injury.[232] In addition, had a tribunal adopted the *Al Warraq v. Indonesia* decision's stance on the clean hands doctrine, an investor's breach of these IIA rules closely in relation to the subject matter of the dispute may render its claims inadmissible.[233] In this way, investment arbitration could enforce these rules to discipline investors' misconduct concerning human rights in the host state, assisting to build a more balanced investment arbitration process.

These instances indicate that some states, having realized the powerfulness of investor-state claims, are recalibrating their IIAs to rebalance investment protection and public policy objectives.[234] Compared with an arbitral tribunal's *ex post* reconciliation on an *ad hoc* basis within their limited mandate, treaty parties are generally in a better position to address such conflicts by re-contracting IIAs. By rebalancing competing

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SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 32-37 (arts. 10-16) (2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

[229] South Africa's Submission to UNCITRAL, *supra* note 222, ¶ 70.

[230] Investment Agreement for the COMESA Common Investment Area art. 13.1, May 23, 2007.

[231] Agreement on Promotion, Protection and Guarantee of Investments Amongst the Member States of the Organization of the Islamic Conference art. 9, June 5, 1981.

[232] *See supra* Section III.D.

[233] *See supra* Section III.B.

[234] For instance, the provisions on enforceable investor obligations could provide specific benchmark to evaluate the legality or appropriateness of the investor's conduct, making it easier to invoke "contributory fault" to reduce compensation. Successful invocation of the police powers doctrine could provide a basis to preclude state responsibility. And the "public interests" exception provisions in new-generation IIAs' provisions (such as the public interests- and tobacco-regulation carve-outs) could prevent certain regulations from being challenged by investment claims in the first place. These instances would strengthen the "*affirmative defences*" raised by a host state, evincing a recalibrated balance struck between investment protection and public interests.

臺灣大學學術期刊資料庫

interests and values underlying distinct sub-systems of international law on an *ex ante* and systemic basis, the conflicts between IIAs and human rights in the implementation and enforcement phase may have a greater likelihood of being well addressed.

V. CONCLUSION

International investment law and human rights law are by no means "separate worlds" foreign to and in clinical isolation from each other, with the former operating as a completely autonomous "self-contained" regime immune from "the dynamics and tensions of the rest of the legal universe, including human rights."[235] To effectively respond to the backlash against the investment treaty regime's legitimacy and achieve good governance, investment tribunals need to strike a better balance between investment protection and human rights. Otherwise, the "public-private" divide may persist "between those who will assert public interests through human rights, and those who will defend the settled autonomy or normative specialization of international investment law," causing normative disruptions and undermining the legitimacy of the investment treaty regime as a whole.[236]

As stated by the *Clayton/Bilcon v. Canada* tribunal chaired by a former ICJ judge Bruno Simma, NAFTA has explicitly recognized that "economic development and environmental integrity can not only be reconciled but can be mutually reinforcing."[237] The same could also be said of IIAs and human rights. Focused on the role of public international law as the substantive law governing the merits of investor-state treaty arbitration, this article explores the legal grounds for tribunals to integrate human rights factors in their decision-making processes. Through direct application of relevant public international law rules, investment tribunals could not only provide the respondent states with greater sovereign autonomy to regulate public interests, but also hold investor accountable for their misconduct regarding human rights in the host state. The doctrines of police powers and contributory fault are notable examples in this regard, yet other relevant rules of general international law may likewise function to rebalance international investment law (as shown in Section III.B.). These judicial doctrines and principles could enable investment tribunals to reconcile competing private and public interests, achieving a better balance between the commitments and flexibility of IIAs. Though confined by its own limitations, this public international law-based approach could be sharpened by carefully drafted

[235] Simma, *supra* note 1, at 576.
[236] *Id*. at 592.
[237] William Ralph Clayton et al. v. Gov't of Can., PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 597 (Mar. 17, 2015).

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treaty provisions, thereby enhancing the legitimacy and the rule of law elements of the entire regime.

臺灣大學學術期刊資料庫

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