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Legal Frameworks & Foreign Investment: A Primer on Governments' Obligations

Kaitlin Y. Cordes

Columbia Law School, Columbia Center on Sustainable Development, kaitlin.cordes@law.columbia.edu

Lise Johnson

Columbia Law School, Columbia Center on Sustainable Investment, ljj2107@columbia.edu

Sam Szoke-Burke

Columbia Law School, Columbia Center on Sustainable Investment, sburke1@law.columbia.edu

Rumbidzaii Mawen

Columbia Law School

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An aerial photograph of a mining site, showing a large excavator and a truck in the foreground, with a blue semi-transparent box overlaid on the image. The background shows a vast, textured landscape of earth and rock.

LEGAL FRAMEWORKS & FOREIGN INVESTMENT

**A PRIMER ON GOVERNMENTS'
OBLIGATIONS**

NOVEMBER 2019

KAITLIN Y. CORDES, LISE JOHNSON,
SAM SZOKE-BURKE, RUMBIDZAI MAWENI

Aerial view
of a palm oil mill in
Sabah, Malaysia.

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A PRIMER ON GOVERNMENTS' OBLIGATIONS

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INTRODUCTION

The legal frameworks relevant to foreign investment interact in complex ways. International law, domestic law, and investor-state contracts all create various obligations and/or responsibilities for governments and investors, which can amplify, undermine, or otherwise complicate other existing legal obligations. Understanding these frameworks, and how they interact, is critical for anyone concerned with how foreign investment can be better harnessed to support, rather than weaken, sustainable development and human rights.

This primer first provides a brief overview of host government obligations under international investment law, international human rights law, domestic law, and relevant investor-state contracts. These legal obligations constrain how governments can or should act, and may influence a host government's actions vis-à-vis investors and those who are affected by investors' actions, such as local communities and rights-holders. This primer then highlights some of the ways in which those legal obligations may affect or conflict with each other.¹

SECTION

1. LEGAL FRAMEWORKS & OBLIGATIONS

Governments are bound by an intricate web of legal obligations. These include obligations that arise from international investment law, international human rights law, and other sources of international law, as well as from domestic law and, when applicable, investor-state contracts. These obligations are enforceable through different mechanisms and to varying degrees.²

When it comes to foreign investments, two bodies of international law are especially important for host governments. International investment law, established primarily through bilateral investment treaties and other trade and investment treaties, regulates a host government's treatment of foreign investors. Human rights law, codified in international instruments at the international or regional level, provides for a set of rights that governments must seek to protect, respect, and fulfill. Traditionally, both investment law and human rights law create binding legal obligations for governments, but not for investors. In addition to international law, domestic law also creates legal obligations, generally both for governments and for investors. When used, investor-state contracts are an additional source of legal obligations.

INTERNATIONAL INVESTMENT LAW

International investment law is a powerful force. Of the more than 3,000 existing international investment treaties, most provide foreign investors with a direct private right of action to sue their "host" governments in international arbitration. Investor-state arbitration provides a relatively easy path to bring a legal challenge, with investors generally not required to exhaust domestic remedies (i.e., first seek remedies under national law in a domestic court or proceeding). If the government is found to have violated an investment treaty, the investment arbitration panel established to hear the dispute (typically three arbitrators) usually awards monetary damages, which may cover both past losses and lost future profits. Some awards have been for staggering sums—in 2014, for example, the Russian government was ordered to pay over US\$50 billion in compensation. Even if a government ultimately prevails in an arbitration, it may be forced to expend significant time and resources in defending the claim.³ Consequently, a government that is wary of arbitration claims may decline to address its citizens' concerns in a way that interferes with a (potential) investment, even in circumstances in which the public interest would justify or even require such interference.

International investment treaties may be relevant even when not anticipated by a host government, as corporations can sometimes maneuver to gain protection of an investment treaty that would otherwise not apply.⁴ Some investment arbitration tribunals have even permitted nationals of the host state to obtain treaty protection by “roundtripping”—i.e., establishing a corporate entity in a foreign country and routing investments from the host state through the foreign entity back to the host state.⁵ Complicating matters further, some tribunals have determined that even indirect and minority non-controlling shareholders can initiate arbitrations, potentially exposing the government to multiple suits arising out of the same underlying issue.⁶ Moreover, even if a company’s management or majority shareholders settle or decide to not bring a claim, other arbitrations may still be brought by minority shareholders in the company.

International investment treaties commonly contain a core set of obligations regulating governments’ conduct. Each of these obligations, which are described briefly in Box 1, has ramifications for the governance of investments, as noted below. Despite these implications, however, it is difficult—and arguably inappropriate—for host states to shape their conduct in a way that fully avoids all potential risks. Investment arbitration tribunals are not bound to follow the decisions of previous cases, which means that tribunals in pending and future cases have broad latitude to adopt different interpretations. This lack of precedent, coupled with vague treaty language and differing interpretations by arbitration tribunals, renders it difficult to declare definitively what any one obligation requires. Thus, assessing in advance what types of conduct will and will not give rise to claims of breach is a nearly impossible task, and predicting whether those claims will be successful can be equally challenging.

BOX 1: OBLIGATIONS FLOWING FROM INVESTMENT TREATIES

- Two non-discrimination provisions, the **national treatment obligation and the most-favored nation obligation**, prohibit intentional discrimination against foreign investors on account of an investor’s nationality. According to some tribunals, these obligations also prevent unintentional discrimination. Some treaties apply these obligations on a pre-establishment basis, meaning that governments commit to granting protected investors rights to establish investments on the same terms as domestic individuals and entities (or any other foreign individual or entity).

Government measures that could trigger investment arbitration claims under the non-discrimination obligations include:

- The provision of subsidies to domestic but not foreign-owned firms (intentional discrimination)
- A regulation preventing or restricting foreigners from investing in a specific industry (intentional discrimination)
- The provision of subsidies to companies under a certain size (resulting in unintentional discrimination)

In addition, using the most-favored nation obligation, tribunals have allowed investors covered by a treaty between the investor’s home state and the host state to “import” favorable protections and dispute settlement provisions from other treaties concluded by the host state. This allows the investor to select the most investor-friendly aspects of different treaties, and bring those different aspects together to create a new “super-treaty” to protect the investor’s interests.

BOX 1: OBLIGATIONS FLOWING FROM INVESTMENT TREATIES – CONTINUED

Some international investment treaties include exceptions to these non-discrimination obligations, which can be used for diverse policy aims. Such objectives might include preventing foreign ownership of certain investments and assets, or ensuring that governments can comply with other legal obligations (for example, permitting governments to accord special legal rights to Indigenous peoples within their territories). Some governments have also included language in their international investment treaties clarifying that investors cannot use the most-favored nation obligation to “import” substantive standards from other investment treaties.

- Most investment treaties include an **obligation to provide compensation for expropriations** of an investor’s property.⁷ This has been interpreted to require governments to compensate both for direct expropriations, like outright seizure of property, *and* for indirect expropriations, such as policy measures that destroy the economic value of an investment. While direct expropriations are relatively easy to identify, disputes often arise regarding whether a government regulation or other measure constitutes an “indirect” expropriation. Because it is difficult to distinguish between indirect expropriations and legitimate regulatory measures that negatively affect property rights, some more recent agreements have included additional text to guide tribunals on this point.

Government measures that could trigger claims under the expropriation provision include:

- A regulation requiring that local communities be granted rights of transit across investors’ land
- Measures restricting extraction of natural resources
- Nationalization of public utilities
- A court order invalidating an investor-state concession contract
- The **fair and equitable treatment (FET) obligation** is the standard upon which investors have most frequently prevailed in publicly-known claims to date. Government conduct that lacks the severity necessary to amount to an expropriation may still be deemed a violation of the FET obligation. Infamously vague, the FET obligation has been subject to a wide range of interpretations that can be broken into two general groups. Under one, FET is a minimum standard of treatment that governments must provide to foreign investors; under the other, FET imposes more extensive procedural and substantive obligations, including to not frustrate or interfere with investors’ “legitimate expectations.”

Although this appears innocuous, the ways in which the FET obligation has been applied raise significant concerns for governments, and can affect the nature and scope of investor rights. For instance, some tribunals have interpreted the FET obligation to allow investors to rely on and enforce otherwise non-binding statements by government officials.⁸ Government conduct that interferes with an investor’s expectations generated by those non-binding statements can then result in liability. (Box 2 provides one example of how an investment arbitration tribunal found that the government violated the investors’ “legitimate expectations” relating to their asserted property rights.)

BOX 1: OBLIGATIONS FLOWING FROM INVESTMENT TREATIES – CONTINUED

Government measures that could trigger claims under the FET obligation include:

- Most actions that would also give rise to claims of expropriation or violations of non-discrimination obligations
- A federal government representation that an investment would be allowed, which later turned out to be untrue in light of local community opposition
- The **full protection and security (FPS) obligation** provides foreign investors and investments a measure of protection against harms caused by non-governmental actors (and, according to some investment arbitration tribunals, by government actors as well). Some tribunals have interpreted the FPS standard to protect against any harm, including harm caused by changes in the host government’s legal framework. Other tribunals have interpreted the obligation more narrowly to protect only against physical harm. According to this narrower interpretation, governments are only required to exercise due diligence in providing foreign investors and their investments a normal, non-discriminatory level of police protection. Some more modern model agreements and treaties have specified that FPS only refers to protection against physical harm.⁹

Government measures that could trigger claims under the FPS standard include:

- A failure to evict alleged trespassers or squatters from the investor’s property
- A failure to stop protests interfering with the investor’s operations
- A failure to prevent or redress the forcible seizure of a foreign investment
- The “**umbrella clause**,” which is more common in older investment treaties,¹⁰ varies in both its wording and interpretation. In some cases, and depending on the text and tribunal, umbrella clauses have been interpreted relatively narrowly, requiring a government to comply with written contractual obligations entered into with the foreign investor. In other cases, umbrella clauses have been interpreted more broadly, requiring a government to comply with any obligation it has assumed under domestic or international law that benefits the investor. According to some tribunals, an umbrella clause will only be breached if the government was acting in its “sovereign” capacity when it violated its obligation to the investor (for example, passing a law invalidating an underlying contract). The majority of tribunals, however, have found that a government can also breach the umbrella clause if it was acting as a normal contracting party (for example, failing to comply with its duty to make payments under the contract).

Government measures that could trigger claims under the umbrella clause include:

- Efforts to seek renegotiation of an investor-state contract
- A court decision that a stabilization clause in an investor-state contract is invalid
- A government entity’s breach of its contractual obligations to the investor

BOX 2: TURNING EXPECTATIONS INTO PROPERTY RIGHTS: *THE AWDI V. ROMANIA CASE*

Under the FET obligation, some investor-state arbitration tribunals have effectively allowed investors to transform their “legitimate expectations” into enforceable property rights, even if such rights do not exist under domestic law. The *Awdi v. Romania* case,¹¹ for example, centered on two decisions by the Constitutional Court of Romania, which had determined that property rights claimed by the investors regarding two discrete investments were invalid. The Court’s first decision had invalidated title to a piece of contested land; the second had found unconstitutional a national law granting the investors a 49-year concession for lands rented from various local governments. In a subsequent action brought by the investors against Romania under an investment treaty, the arbitration tribunal did not find fault with the Constitutional Court’s process or decisions. Nevertheless, the tribunal determined that the investors’ legitimate expectations had been breached and must be compensated. In this way, the Constitutional Court’s authoritative determination over the validity of the property rights under domestic law resulted in a breach of the government’s FET obligation. Romania was thus ordered to compensate the investors €7.7 million for damages, with additional payments to cover the investors’ legal fees and related expenses.

BOX 3: FINDING INDIRECT EXPROPRIATION OF AN INVESTMENT THAT WAS UNLIKELY TO PROCEED: *THE BEAR CREEK MINING V. PERU CASE*

The *Bear Creek Mining v. Peru* case concerned a Canadian mining company’s purported investment in Peru for the development of the Santa Ana mining project close to the border with Bolivia. Development of the mine was strongly opposed by local communities. In an attempt to deal with the unrest, the government adopted measures to prohibit mining in the area generally and to address opposition to the Santa Ana mining project specifically; one such measure revoked a Public Necessity Decree that had authorized the Bear Creek company to own the Santa Ana concessions. At the time the decree was adopted, the investor had no right to undertake exploitation of mining resources, as it still had not obtained all necessary authorizations (including an approved EIA as well as at least 40 other permits required to construct and operate a mine). Nevertheless, the investor brought a claim for more than US\$500 million, claiming, amongst other things, that Peru had unlawfully expropriated its investment.

The Peru-Canada free trade agreement explicitly addresses “indirect expropriation,” by prohibiting the government from taking measures that would effectively expropriate an investment, “except for a public purpose, in accordance with due process of law, in a non discriminatory manner and on prompt, adequate and effective compensation.”¹² The treaty includes an annex intended to guide interpretation and application of this provision, which states that the determination of whether a measure or series of measures constitutes indirect expropriation requires consideration of, among other factors: (i) “the economic impact of the measure or series of measures;” (ii) “the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations;” and (iii) “the character of the measure or series of measures.”¹³ Following limited engagement with the three-prong test laid out in the treaty’s annex, the tribunal concluded that Bear Creek’s investment had been unlawfully expropriated and ordered Peru to pay approximately US\$18 million in damages, estimated to account for Bear Creek’s “sunk costs.”¹⁴ The tribunal reached this conclusion despite its acknowledgment that, even without Peru’s revocation of its initial authorizations, the mining project was unlikely to proceed.¹⁵

INTERNATIONAL HUMAN RIGHTS LAW

In the context of investments, international human rights law will often create countervailing pressures for governments. Whereas international investment law obliges governments to provide certain protections to investors, international human rights law sets out protections for individuals and peoples—including those who risk being negatively affected by investments—and creates corresponding duties for governments.¹⁶ Compared to international investment law, human rights law is far less fragmented: rather than the thousands of investment treaties, there are fewer than a dozen core human rights treaties at the international level,¹⁷ supplemented by other relevant multilateral treaties (such as International Labour Organization Conventions)

and regional human rights treaties in Africa, the Americas, and Europe. Instead of the dispute-specific tribunals created under investment treaties, human rights redress mechanisms are provided through more established forums. These include regional human rights courts, regional human rights commissions, and complaints mechanisms tied to specific treaties.

These human rights fora differ from investment arbitration processes in two important ways. First, they generally are only accessible once claimants have exhausted available domestic remedies. Second, the remedies awarded by human rights tribunals are not usually in the form of monetary damages. Even when monetary awards are provided, the high sums seen in investment law disputes are not common in human rights judgments.¹⁸

BOX 4: RIGHTS VIOLATIONS TIED TO EVICTIONS: *THE ENDOROIS CASE*

The decision of the African Commission on Human and Peoples' Rights in the *Endorois* case concerned the Kenyan government's eviction of hundreds of families belonging to the Indigenous Endorois people from their ancestral lands to create game reserves for tourism, and to grant concessions for forestry and mining.¹⁹ The Endorois were not properly consulted or compensated, and were prevented from accessing the land and resources needed for traditional medicines.

The Commission found that the government had violated the community's rights to religion and culture by restricting access to the land and impeding the Endorois' traditional pastoralist way of life. The community's right to property, and its right to freely dispose of its wealth and natural resources, were also found to have been violated by restricting the Endorois' access to the land and resources. Finally, the Commission found that the government violated the community's right to development, given the community's lack of involvement in the process of developing the region for tourism. The Commission recommended that the government recognize the Endorois' ownership of the land, and return the land to them. It also recommended that the government pay compensation for additional losses, and ensure that the community benefit from any royalties and employment opportunities generated from existing economic activities on the land.

BOX 5: BRUTAL RIGHTS VIOLATIONS AIDED BY THE INVESTOR: *THE KILWA CASE*

This decision by the African Commission on Human and Peoples' Rights concerned the 2004 massacre of more than 70 people by the government of the Democratic Republic of Congo, which was aided and abetted by Anvil Mining, an Australian-Canadian mining company that operated a copper and silver mine 50 kilometers from Kilwa, where the massacre took place. Following a low-level rebellion, Anvil Mining, seeking to protect its investment, provided instrumental logistical support to the Congolese military. In a brutal and heavy-handed response, the soldiers proceeded to indiscriminately shell civilians, summarily execute at least 28 people, and disappear many others.²⁰

The Commission found that the government violated articles 1, 4, 5, 6, 7(1)(a), 7(1)(c), 14, 22, and 26 of the African Charter, including through extrajudicial executions, torture, arbitrary arrests, disappearances, forced displacement, and violations of the right to housing, and awarded the eight victims named in the complaint US \$2.5 million, the highest ever award by the African Commission.²¹ It urged the Congolese government to identify and compensate other victims and their families not party to the complaint who were also directly affected by the attack. The Commission further recommended that the government formally apologize to the people of Kilwa, exhume and re-bury with dignity the bodies dumped in a mass grave, construct a memorial, provide trauma counseling for those affected, and rebuild the schools, hospitals, and other structures destroyed during the attack.²² Finally, the Commission urged the Congolese government to launch a new criminal investigation and to take all due measures to prosecute and punish agents of both the state and Anvil Mining Company.

States that have ratified human rights treaties have corresponding obligations to respect, protect, and fulfill the human rights codified therein.²³ Specifically, this means that they must refrain from violating those rights, must prevent third parties from violating those rights, and must take steps to progressively realize those rights (this latter point is often more applicable to economic, social, and cultural rights). In addition to binding treaties, soft law instruments, such as U.N. declarations, general comments by treaty bodies, and widely endorsed guidelines negotiated by governments, help in interpreting human rights law. Box 6 describes some of the human rights that are most frequently affected by foreign investments, particularly investments in natural resource projects.



Creating a water well in Gayo village, Ethiopia.

BOX 6: HUMAN RIGHTS THAT CAN BE AFFECTED BY FOREIGN INVESTMENTS

Several human rights instruments protect the **right to property**, which includes the right to not be arbitrarily deprived of property. This right can generally be limited for actions that are “in the public interest.”

The **prohibition of forced eviction** forbids the coerced or involuntary displacement of individuals or communities from their home or lands without appropriate protection. A government that undertakes or fails to prevent forced evictions related to an investment may violate a range of legally protected human rights, including the **right to adequate housing**.²⁴

The right to **free, prior, and informed consent** (FPIC) requires governments to consult and cooperate in good faith with Indigenous and tribal peoples to obtain their FPIC before: relocating them; approving any project affecting their lands, territories, or resources; or adopting and implementing legislative or administrative measures that may affect them. Regional human rights bodies have clarified that Indigenous rights can apply to peoples that identify as Indigenous but are not recognized as such by the government,²⁵ and that Indigenous rights can also extend to groups that are not Indigenous but that nevertheless share similar connections to and dependencies on land and natural resources.²⁶ Government measures that violate the right to FPIC include allowing an investment to displace Indigenous peoples without their consent, regardless of whether such peoples hold formal title to the land. Such an action might also violate the **right of minorities to enjoy their own culture**, which includes protections of land use or ownership where the culture is closely tied to the land.

The **right to water** protects individuals’ access to existing water supplies, and includes the right to be free from interference, such as from arbitrary disconnections or contamination of water supplies. An investment that diverts or pollutes water relied on by local individuals or communities thus might give rise to a violation of their right to water.

The **right to food** is realized when an individual has uninterrupted physical and economic access to adequate food, or to the means for procuring adequate food, such as access to land and other productive resources. When a government allows an investor to displace people from land on which they had relied for access to food, it is failing to protect the right to food.

The **right to health** contains both entitlements and freedoms, such as the right to control one’s health and body, and the right to be free from interference. An investment that directly or indirectly contributes to poor health can affect this right for workers or local communities. Such practices might also affect their **right to a healthy environment**, which includes the right to live in an environment adequate for health and wellbeing.

The **right to self-determination** includes the right of peoples to freely dispose of their natural wealth and resources. Investments that deprive peoples of their access to productive resources might infringe on this right.

BOX 6: HUMAN RIGHTS THAT CAN BE AFFECTED BY FOREIGN INVESTMENTS – CONTINUED

The **right to life** must be protected by law, and the **right to liberty and security of person** prohibits arbitrary arrest or detention. In addition, there is a **right to peaceful assembly**, which includes the right to participate in peaceful meetings or protests, as well as the **right to freedom of expression**, which covers the freedom to seek, receive, and impart information (including a **right of access to information** held by public bodies). These rights are sometimes at risk when the government or private security forces respond to efforts by community members or human rights defenders to draw attention to the negative impacts of an investment.

The **right to just and favorable conditions of work** includes requirements for fair wages and safe and healthy working conditions. The **right to form and join trade unions** and the **right to freedom of association** cover workers' rights to form and join unions to protect their interests. Government sometimes fail to ensure that these rights are respected in the operation of foreign investments.

BOX 7: OTHER INTERNATIONAL LEGAL OBLIGATIONS

In addition to obligations under investment law and human rights law, governments have obligations under other types of international law, such as **international environmental law** and **international humanitarian law**. For example:

- States party to the Convention on Biological Diversity are bound to **respect and maintain environmentally beneficial knowledge, innovations, and practices** of Indigenous and other local communities practicing traditional lifestyles, and to do so with their approval and involvement.
- Individuals displaced during armed conflict have a **right to voluntary return** in safety, with the government's assistance, to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. The property of displaced individuals, and of civilians more generally, must not be destroyed or appropriated as part of a reprisal or collective punishment.²⁷
- During armed conflict, governments must **protect cultural property** (defined as “movable or immovable property of great importance to the cultural heritage of every people”), which can include archaeological sites, such as Indigenous burial sites and places of worship.²⁸

DOMESTIC LAW

Within specific jurisdictions, domestic laws and regulations shape how investments are undertaken and regulated, providing processes and rules to be followed.²⁹ For instance, a law might describe the incentives to be offered to investors, prevent foreigners from purchasing certain types of land or property, or set out the authorizations required to receive a permit. Individuals claiming breach of a domestic law generally seek redress through domestic courts. A court might, for example, assess the legality of a concession under domestic law.

Depending on the jurisdiction, there may be specific laws regulating investments or protecting human rights. Some of these laws provide greater protection—of investments, or of human rights—than at the international level. For example, a domestic investment law might expand the opportunities for investment dispute procedures beyond what an investor would receive under an applicable investment treaty. In turn, a domestic human rights law might set forth more specific obligations that a government must follow. One distinction from international law is that domestic law frequently also creates obligations for investors, rather than just for governments.

BOX 8: ROLE OF THE DOMESTIC COURT: *EXAMPLE FROM PAPUA NEW GUINEA*

In 2012, a Malaysian investor acquired, through acquisitions of another company, two Special Agriculture & Business Leases (SABLs) in Papua New Guinea for over 38,000 hectares of land, which it planned to use for oil palm plantations.³⁰ Communities protested these plans, claiming that they were customary owners of the land in question. Plaintiffs representing the affected communities sought judicial review of the leases, arguing that the procedures established by law to obtain SABLs were not followed.³¹ The National Court of Papua New Guinea issued an interim injunction restraining activities on the land, and the leases were subsequently quashed. The investor stated in an announcement that it would comply with the related Order, and also noted that “without the acceptance and co-operation of the customary land owners . . . , there will be no end to challenges over [its] right to operate”³²

INVESTOR-STATE CONTRACTS

In some countries, large-scale investments may be governed by contractual agreements between foreign investors and host governments. Investments in natural resources or in industries that have traditionally been considered “public services,” for example, may be governed by such agreements. These contracts allocate risk between contracting parties and delineate a range of rights and obligations. Investor-state contracts differ in their complexity, as well as in their purported comprehensiveness.

Investor-state contracts sometimes include a stabilization clause addressing how changes in the law of the host state will affect the contract. Stabilization clauses can be framed broadly, as applying to all domestic laws, or narrowly, applying only to certain topics (for example, tax laws). There are three general categories of stabilization clauses:

- **Freezing clauses** specify that the law in effect on the day that a contract is signed will apply to the investment for the life of the project regardless of any subsequent changes in law.
- **Economic equilibrium clauses** require an investor to comply with new laws, but oblige the host state to compensate the investor for any loss incurred in doing so.
- **Hybrid clauses** are a combination of freezing clauses and economic equilibrium clauses.³³

Although stabilization clauses are discouraged by the OECD Guidelines for Multinational Enterprises³⁴ and by UN human rights guidance,³⁵ some investors continue to seek them in the hopes of insulating the investment from unpredictable and costly changes in domestic laws. As explained below, such clauses interact with international investment law and international human rights law in various ways.

Investor-state contracts generally define the process to be used in addressing disputes arising out of or in connection with the contract. Many provide for commercial arbitration under the same or similar rules that govern arbitration arising out of investment treaties; as with investment arbitration, these commercial arbitrations often occur outside of the host country. Thus, while only an investor can bring a claim for breach of an investment treaty obligation, either the investor or the government can bring a claim under commercial arbitration for breach of a contractual obligation.



Palm Oil Seedlings
on a plantation in
Kalimantan, Indonesia.

SECTION

2. INTERACTION BETWEEN LEGAL OBLIGATIONS

Governments' legal obligations interact in complex ways, and can even conflict with each other. For example, investor-state contracts are generally subordinate to domestic law, but can be essentially elevated above domestic law by an international investment treaty. Investment treaties have also been interpreted in a way that effectively creates new property rights that might not exist under domestic law. At the same time, an investor-state contract can potentially create obligations that conflict with a government's obligations under international human rights law, while a government's obligations under an investment treaty and under relevant human rights treaties may also be in tension.

Governments' obligations under these different legal frameworks and agreements interact in various and complex ways. They may, at times, also conflict.

Investor-state contracts, for example, are generally subordinate to domestic law. However, a stabilization clause in the contract means that the contracting parties have sought to circumvent relevant changes in the domestic law, by excepting the investor from having to comply with or incur the costs of those changes. This may be acceptable in some jurisdictions. Yet it may not be allowed in others, where a court might deem such a clause to be invalid and unenforceable on grounds that it violates the constitutional separation of powers or improperly restricts the government's power to act in the public interest. Additionally, investor-state contracts may seek to create a particular legal regime that differs from what would originally apply under domestic law. Some contracts, for example, provide for particular methods of dispute settlement, and purport to impose specialized rules on available remedies. As with stabilization provisions, the enforceability of such provisions traditionally depends on the domestic law that governs the contract (which is often, but not necessarily, the law of the host state).

The rise of international investment treaties, however, has complicated the role of domestic law. One effect of these treaties is to elevate states' contractual commitments to investors to the international law level, placing those commitments above—rather than subordinate to—domestic law. Thus, even if a domestic court deems a stabilization clause or other contractual provision invalid, an investment arbitration tribunal asked to interpret the investor-state contract may adopt a different view, holding the government to those promises and enforcing them under the umbrella clause and/or fair and equitable treatment obligation. In this way, the presence of an international investment treaty can potentially shield a contractual clause from challenges that, under domestic law, might have been successful.

Moreover, international investment treaties have been interpreted in a way that effectively creates new property rights that might not exist under domestic law. In evaluating whether the fair and equitable treatment standard was breached, some investment arbitration tribunals have determined that investors' rights *and* mere "legitimate expectations" are protected against subsequent government interference. Under this reasoning, even if a tribunal determined that the investor did not possess a valid property right or authorization

under domestic law, it could still conclude that the investor had formed “expectations” that should be protected. This essentially turns these expectations into new and enforceable property rights. Such an interpretation differs from the traditional approach under international law, which recognizes the power of domestic systems to define whether and to what extent a property right exists.

Astoundingly, an international investment treaty can potentially protect an entire investor-state contract (or provisions in that contract) that might otherwise be deemed illegal or unenforceable under domestic law. This is less likely when the illegal nature of the contract is severe: some tribunals, for example, have determined that they do not have the power to hear claims brought by investors that have secured their contracts through corruption or fraud. Yet tribunals have been less likely to dismiss cases in which contracts are illegal on other grounds—for example, if the government authority that signed the contract did not have the authority to do so, or if the process of entering into the contract did not comply with necessary requirements established by domestic law.³⁶

Even in the absence of a stabilization clause in an investor-state contract, some investment arbitration tribunals have determined that promises of legal stability can be inferred from the fact that, when the investor and government entered into their contract, the deal was governed by a particular legal framework. Changes to that framework could then, according to these tribunals, give rise to a violation of the fair and equitable treatment obligation. In such a situation, an international investment treaty may also have the effect of shielding an investor from complying with, or requiring the government to provide compensation for the costs of, changes in the legal framework that negatively affect the investor, even without the parties having explicitly agreed that the government would provide the investor such protections.

International investment treaties are typically asymmetrical (creating protections for investors and corresponding obligations for governments), and therefore do not have a similar impact on investors' contractual commitments to governments. One example is found in the context of renegotiation of investor-state

contracts. Due to investment arbitration tribunal decisions interpreting the fair and equitable treatment obligation as requiring governments to protect investors' “legitimate expectations,” and the umbrella clause's mandate that host states abide by commitments made to foreign investors, host governments may be constrained in their ability to seek renegotiation. In contrast, investors retain more freedom to request renegotiations—or to resist renegotiation attempts by states—without incurring liability under international law.

Given that international and regional human rights treaties are not principally concerned with the protection of investment, they generally do not affect commitments in investor-state contracts as investment treaties do.³⁷ Yet international human rights law and investor-state contracts can potentially create conflicting obligations for governments. For example, a contract granting a concession that results in air pollution violating a community's right to a healthy environment, or that displaces Indigenous peoples without their free, prior and informed consent, would place the government's human rights obligations in conflict with its contractual obligations. Similarly, a broadly framed stabilization clause in an investor-state contract may be in tension with a government's human rights obligations to the extent that the clause limits the applicability to the underlying investment of new laws or policies necessary to respect, protect, or fulfill human rights.³⁸ When a government is party to an investment treaty relevant for the investment, the treaty can create an additional potential conflict between the government's obligations under the investment treaty and under relevant human rights treaties.

This web of international, domestic, and contractual legal obligations can pose difficulties for governments seeking to assess their full set of obligations, as well as to take actions to protect rights-holders in the context of investment. To date, international tribunals have not provided much assistance in resolving potential conflicts, tending either to avoid finding that a conflict exists or to resolve a dispute based only on one set of legal obligations, as noted in Box 9.

BOX 9: HOW INTERNATIONAL BODIES HAVE TREATED CONFLICTS BETWEEN INVESTOR PROTECTION OBLIGATIONS AND HUMAN RIGHTS OBLIGATIONS

Few human rights courts, tribunals, or expert bodies have addressed how a conflict between a state's human rights obligations and its obligations under an international investment treaty should be determined. One notable exception, however, is found in the Inter-American Court of Human Rights' decision in the case of *Sawhoyamaxa Indigenous Community v. Paraguay* (March 2006). That case focused on Paraguay's failure to resolve a legal claim by the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people over the community's ancestral lands, which had been sold by the government to foreign investors. Paraguay argued that the land had been bought by a German national, whose interest in the land was protected by a "bilateral treaty"³⁹ between Paraguay and Germany. While the Court rejected that argument on procedural grounds, it also offered two alternative justifications for upholding the community's rights to the land even when a bilateral investment treaty might be operative. The Court's first alternative rationale was that the bilateral investment treaty allowed for expropriation of capital investments where necessary for a public purpose, and such a purpose could include the restitution of ancestral land to an Indigenous community. Its second alternative rationale involved holding that the bilateral and reciprocal nature of the investment treaty rendered it inferior to the American Convention on Human Rights, asserting that the enforcement of "bilateral commercial treaties . . . should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."⁴⁰

Investment arbitration tribunals have also generally avoided addressing conflicts between a state's obligations under human rights treaties and an investment treaty.⁴¹ While host governments or amicus curiae have made submissions to investment arbitration tribunals asking that a government's human rights obligations be taken into account when assessing the scope of its obligations and potential liabilities to foreign investors, tribunals have tended to dismiss such arguments rather summarily. This includes by not engaging with the arguments at all, by determining that human rights were not in fact at risk, and/or by concluding that the government's obligations to protect and fulfill human rights did not excuse its obligations to comply with investment treaty commitments.

As the field of international investment law continues to evolve, however, future investor-state arbitration decisions may give more weight to and become more thorough in their treatment of human rights arguments. Some international arbitration tribunals have been somewhat more receptive to grappling with human rights concerns or arguments in relation to investment disputes. The *Urbaser v. Argentina* award, for example, marked the first time an investment tribunal has accepted jurisdiction over a state's counterclaim asserting breaches of international human rights law.⁴² In relation to a dispute regarding a concession contract for water and sewage services, Argentina alleged that the investor's failure to make the agreed investments led to, amongst other things, violations of the human right to water,⁴³ with implications for the health and environment of the local community, along with implications on related rights such as the right to adequate housing and living conditions. Although ultimately dismissing the claims on the merits, a number of the tribunal's determinations with respect to the counterclaim are noteworthy. For example, the tribunal recognized a sufficient connection between the original claim and the counterclaim and explicitly rejected the investor's argument that human rights counterclaims and investment disputes are

BOX 9: HOW INTERNATIONAL BODIES HAVE TREATED CONFLICTS BETWEEN INVESTOR PROTECTION OBLIGATIONS AND HUMAN RIGHTS OBLIGATIONS – CONTINUED

mutually exclusive.⁴⁴ Moreover, the tribunal considered that the investor as a private party could bear obligations under international law, including an obligation “not to engage in activity aimed at destroying” certain rights.⁴⁵ In *Bear Creek v. Peru*, mentioned above, a partial dissenting opinion also engaged with human rights arguments advanced in an amicus curiae submission. In a departure from the majority’s approach to the calculation of damages, the partial dissent asserted that the investor claimant’s failure to obtain a social license to operate should result in a 50% reduction of the damages award. In general, however, these examples represent the exception. To date, engagement by investment tribunals with human rights-based argumentation advanced by host states and amici curiae remains rare (although tribunals appear more open to considering human rights concerns advanced by investor claimants).⁴⁶

CONCLUSION

Governments’ multiple legal obligations relevant to investment—and the ways in which those obligations interact—can complicate efforts to govern investment appropriately and to ensure that rights-holders are not harmed by investment projects. While the legal frameworks discussed in this primer do not inherently conflict, governments’ legal obligations can collide in specific situations; when this happens, a government may discover that its obligations under human rights law, international investment law, domestic law, and/or a contract are not easy to reconcile.

There are many reasons why governments might find themselves in situations in which their various legal obligations collide. To name a few: a change to a more democratic or post-conflict regime, a lack of clarity at the time an investment was approved of the human rights impacts that would arise, or the evolution of relevant human rights norms by which the government seeks to abide. Regardless, the particulars of how a government found itself in such a situation does not absolve the government of its obligations to protect human rights. Nor does its track record of compliance with human rights to date.

Understanding the ways in which various legal obligations interact is important for governments seeking to address the needs and concerns of their citizens in the context of

investment. Yet awareness of these legal frameworks is not a reason to avoid good faith actions designed to protect rights-holders or to address their concerns. When governments take action in the public interest—for example, to strengthen environmental and labor laws or to regulate the use of property rights—those actions are frequently challenged in domestic courts. The fact that a challenge has been brought does not mean that the government’s action was illegitimate, nor that the government should not have taken that action.

One distinction between domestic challenges and those brought under investment treaties is that governments can regulate the flow and implications of domestic challenges through rules on who may sue, on what grounds, and for what remedies, whereas governments are less able to control the expansive way in which tribunals have interpreted investment treaties to date. As long as investment treaties exist in their present form, it will be difficult if not impossible for governments to avoid claims challenging even good faith actions taken to address public interest issues.

Legal frameworks, and how they interact, are often invisible in the day to day. Yet they are powerful forces that influence government actions and that help to shape who benefits and who loses from foreign investment.

ENDNOTES

- This primer focuses on governments' obligations under relevant legal frameworks. It does not explicitly address the interactions of investors' various obligations and responsibilities under those same frameworks—an important topic that is outside the scope of this document.
- International law codified in treaties or covenants is legally binding on States Parties that have ratified the instrument. In addition, states are bound by customary international law, which is established by state practice. *Customary International Law*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/customary_international_law. Commitments found in soft law, on the other hand, are generally considered to be quasi-legal rules that provide important norms and guidance but do not hold the same legal authority. See, e.g., Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172-4 (2010).
- Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 GLOBAL ARB. REV. (2014), <http://globalarbitrationreview.com/news/article/32513/>.
- Investment arbitration tribunals have generally taken a relatively permissive approach toward allowing companies to structure or restructure their holdings so as to gain treaty protection, and to use parent or intermediate companies to secure treaty coverage, for their investments. See, e.g., *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, paras. 248-272 (Sep. 22, 2014); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, paras. 239-242 (Mar. 17, 2006). However, note that in recent years some tribunals have refused to hear cases where the dispute was foreseeable and the primary or sole purpose of restructuring was to enable a claim to be brought under a specific investment treaty, on the basis that such action constitutes an "abuse of rights." See, e.g., *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, paras. 248-272 (Jan. 9, 2015); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2021-12, Award on Jurisdiction and Admissibility, paras. 585-588 (Dec. 17, 2015).
- See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004); but see *id.*, Dissenting Opinion of Chairman Prosper Weil.
- See, e.g., *TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), and *Iberdrola Energía S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award (Aug. 17, 2012). The two claimants in these cases were separate investors in a single electricity distribution project in Guatemala. After a dispute arose regarding tariffs, the two investors filed separate investment treaty claims against the government of Guatemala.
- The expropriation provisions also often set out criteria for a lawful expropriation, including that the expropriation be done for a public purpose, on a non-discriminatory basis, and in accordance with due process of law.
- See, e.g., *Micula v. Romania*, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013); *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004); *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, paras. 74-101 (Aug. 30, 2000); *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, para. 547 (Apr. 8, 2013).
- See, e.g., Agreement between the Government of the Republic of Colombia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Colom.-Fr., art. 4(2), July 10, 2014. Some treaties similarly state that FPS requires the level of "police protection" mandated under international law. See, e.g., Canada–South Korea Free Trade Agreement, S. Kor.-Can., art. 8.5(3)(b), Mar. 11, 2014.
- U.N. Conference on Trade and Development (UNCTAD), *Policy Options for IIA Reform: Treaty Examples and Data* (Working Draft, June 24, 2015).
- Awdi v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).
- Free Trade Agreement between Canada and the Republic of Peru, Article 812.1.
- Free Trade Agreement between Canada and the Republic of Peru, Annex 812.1(b).
- Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, paras. 415-416, 738 (Nov. 30, 2017).
- Bear Creek Mining Corporation v. Republic of Peru*, Award, paras. 600-604. See also *Bear Creek Mining Corporation v. Republic of Peru*, Partial Dissenting Opinion of Professor Philippe Sands QC.
- In some cases, investors have also sought protections under human rights law related to the right to property. See, e.g., *Rosenzweig and Bonded Warehouses v. Poland*, Eur. Ct. H.R. 51728/99 (2005); *Zlinsat Spol. S.R.O. v. Bulgaria*, Eur. Ct. H.R. 57785/00 (2008).
- The Core International Human Rights Instruments and their Monitoring Bodies*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.
- Decisions regarding the treatment of OAO Yukos Oil Company ("Yukos") offer an interesting example of differences in awards provided by investment arbitration tribunals and human rights tribunals. Yukos brought an investment arbitration claim against the government of Russia, as well as a human rights claim in the European Court of Human Rights. Three related UNCITRAL awards provided more than US \$50 billion to the investor—the largest investment arbitration award to date. While Yukos also prevailed in the European Court of Human Rights, the Court awarded a relatively small €1.8 billion (approx. US\$2.5 billion) in damages (although this, too, was significantly higher than any other compensation award provided by the Court). See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (July 18, 2014); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (July 18, 2014); *OAO Neftyanaya Kompaniya Yukos v. Russia*, Eur. Ct. H.R. 14902/04 (2014).
- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Merits and Provisional Measures, Decision, Afr. Comm'n H.P.R., No. 276/03 (Nov. 25, 2009).
- African Commission: Landmark \$2.5 Million Award to DR Congo Massacre Victims; Anvil Mining rebuked for its role in Kilwa killings; new criminal investigation ordered*, Institute for Human Rights and Development in Africa, 4 August 2017.
- Communication 393/10, *Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo* (2017), para. 154.
- "*Institute for Human Rights and Development and Others v Democratic Republic of Congo*, Communication 393/10" ESCR-Net < <https://www.escri-net.org/caselaw/2018/institute-human-rights-and-development-and-others-v-democratic-republic-congo>>.
- Human rights instruments create binding obligations for states that have ratified them. States that have signed a treaty but not yet ratified it are prohibited from taking steps to undermine rights set out in the treaty. In addition, some human rights are considered to be binding under customary international law, and therefore bind states regardless of whether or not they have ratified a treaty setting out such rights.
- U.N. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. A/HRC/4/18, annex (Feb. 5, 2007).
- African Commission on Human and Peoples' Rights, Decision 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, paras. 147–162.
- Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 124 (June 15, 2005); Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 172 (November 28, 2007). In these cases, the Inter-American Court recognized that the affected communities were not indigenous to the region, but that they possessed a profound and "all-encompassing relationship" to their traditional lands, which were of "vital spiritual, cultural and material importance," providing both primary means of subsistence and also a source of their identities. See *Moiwana v. Suriname*, paras. 86(4), 132-133; *Saramaka v. Suriname*, paras. 82-85, 114.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(1), June 8, 1977, 1125 U.N.T.S. 3.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 1(1), 19, May 14, 1954, 249 U.N.T.S. 240; see also UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage art. 1, adopted by the thirty-second session of the UNESCO General Conference, Paris, Oct. 17, 2003.

29. Some domestic law also has extraterritorial reach relevant to investment, such as prohibition of corrupt practices. Laws with extraterritorial applicability can thus also influence investor actions in other jurisdictions.
30. Kuala Lumpur Kepong Berhad, KLK Response to RAN's Report Titled "Conflict Palm Oil in Practice," Apr. 8, 2014, [https://www.rspo.org/file/2014_04_08_KLK's_Response_to_RAN's_Article_\(ConflictPalmOilProduction\)FINAL.pdf](https://www.rspo.org/file/2014_04_08_KLK's_Response_to_RAN's_Article_(ConflictPalmOilProduction)FINAL.pdf).
31. *Isu v. Ofoj* [2014] P.G.N.C 216; N5518 (Mar. 3, 2014).
32. Kuala Lumpur Kepong Berhad, Announcement: Kuala Lumpur Kepong Berhad ("KLK" or "The Company") – Acquisition of a subsidiary: Collingwood Plantations PTE LTD ("Acquisition"), May 22, 2014, <http://www.bursamalaysia.com/market/listed-companies/company-announcements/1147985>.
33. ANDREA SHERBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS (IFC and the U.N. Special Rep. of the Secretary-General on Business and Human Rights 2009), <http://documents.worldbank.org/curated/en/502401468157193496/pdf/452340WP0Box331ation1Paper01PUBLIC1.pdf>.
34. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), GUIDELINES FOR MULTINATIONAL ENTERPRISES § II(A)(5), at 19; see also 21-22.
35. UN Principles for Responsible Contracts: Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations, Principle 4, pp. 15-18.
36. See, e.g., *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award (March 3, 2010), paras. 171-184; *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), paras. 212-236.
37. While human rights are generally deemed held by individuals or peoples, they are sometimes ascribed to investors or companies. The European Court of Human Rights, for example, has found that a government's actions can violate the rights of a company, both under the European Convention on Human Rights and under the Convention's First Protocol (which includes the protection of property). A human rights treaty that applies to an investor thus might also affect the relationship between an investor and a government. Here, too, the obligations are assigned to the government, rather than the investor.
38. U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, Principle 4, at 12, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011). See also the Commentary to Principle 4, id. at 14.
39. This treaty is presumably the 1993 bilateral investment treaty entered into between Germany and Paraguay, although it is only referred to as a "bilateral treaty" and a "bilateral commercial treaty" in the judgment. *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, paras. 137, 140 (Mar. 29, 2006).
40. *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 140 (Mar. 29, 2006).
41. For further discussion, see Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, "Human Rights Law and the Investment Treaty Regime," in Surya Deva and David Birchall (eds.), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd, forthcoming). A draft version of the chapter is available on the Columbia Center on Sustainable Investment's website, accessible here: <http://ccsi.columbia.edu/work/projects/human-rights-law-and-the-investment-treaty-regime/>.
42. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016). For commentary, see Edward Guntrip, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?" EJIL Talk! (February 10, 2017) <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>>.
43. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, para. 36.
44. Edward Guntrip, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?" EJIL Talk! (February 10, 2017) <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>>. See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), paras. 1143-1155.
45. Guntrip, supra note 45. See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), paras. 1194-99.
46. Silvia Steininger, "What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration" (2018) 31 *Leiden Journal of International Law* 33.



A sulphur mine, Mount Ijen, East Java, Bondowoso.



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Columbia Center on Sustainable Investment

Jerome Greene Hall
435 West 116th Street
New York, NY 10027
Phone: +1(212) 854-1830
Fax: +1(212) 854-7946