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Environmental human rights issues on international investment arbitration and economic development: perspectives and legal approach

Los derechos humanos ambientales en el arbitraje internacional de inversión y el desarrollo económico: perspectivas y enfoque jurídico

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Abstract

This article explores the relationship between International Investment Arbitration and the international standards of Human Rights, including the ones related to the environment. We found that there is an opposition when applying the Human Rights to the International Investment Regimen. We argue that there are sufficient law foundations to make the investor, and specifically the corporations they own, responsible for their violations of other international standards, even though they are not expressly named in investments treaties. But, there is a problem reflected in the lack of enforceability of the International Human Rights Law in the International Investment Regimen.

Keywords: international arbitration, international investment, human rights, environment, investment protection, development economics

Resumen

Este artículo explora la relación entre el Arbitraje Internacional de Inversión y las normas internacionales de Derechos Humanos, incluyendo por tanto las relacionadas con el ambiente. Se encontró que existe una oposición para aplicar los Derechos Humanos en el Régimen Internacional de Inversiones. Consideramos que existen suficientes fundamentos de derecho para que el inversor, y específicamente las empresas que poseen, sea responsable de sus violaciones de los demás estándares internacionales, aunque no estén expresamente en los tratados de inversión. Sin embargo, hay un problema de falta de aplicabilidad de la legislación internacional de derechos humanos en el régimen internacional de inversiones.

Palabras clave: arbitraje internacional, inversión internacional, derechos humanos, ambiente, protección de la inversión, economía del desarrollo

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I. Introduction

In the XXI century, the world has experienced an unprecedented economic integration. Colombia joined the process of economic integration in the 90's with the process of economic openness.¹⁴⁶ Several transnational corporations, especially of minerals and hydrocarbons, have come to the country and invested their capitals; the legal and economic relations between domestic and foreign agents have been tightening more and more. Damage to the environment has been a source of litigation and disputes.

In this context arises arbitration, which can take a role and contribute to a quick and expeditious decision, improving justice decision processes and awards ruling. Universidad Nacional de Colombia professor, Freddy Herrera, has pointed out arbitration as a nongovernmental dispute resolution mechanism in which the parties of a contract agree to the mediation of an arbitrator to resolve a dispute.¹⁴⁷ However, Universidad Nacional de Colombia professor, Rodrigo Uprimny, is skeptical of arbitration mechanisms and warns of privatization of justice in which efficient processes can only be accessed by those who can afford it.¹⁴⁸

Technological development and telecommunications have increased the volume and velocity in which financial capitals flow around the world, from Hong Kong to New York, Singapore to London and Latin American cities to the world. That's why international arbitration emerges as a solution to the urgent need to efficiently and quickly resolve disputes between individuals and organizations.¹⁴⁹

In Colombia, with the entry of multinationals at the mining and hydrocarbons sector, is inevitable the emergence of disputes over the care of the environment and, in general, human rights. Exploitation of rare earth, for example, aimed at smartphones manufacturing has increased child labor and modern slavery.¹⁵⁰ In this sense, it is also important to review the role of international commercial arbitration in resolving disputes about human rights.

The importance of preserving the environment and reconciling the relationship between nature and the capital requires to introduce dispute resolution mechanisms on the basis of sustainability. This new challenge entails a new approach to the problem of the environment in relation to capital, in which a perspective regarding proper use of natural resources is implemented to transform our society into an eco-sustainable one.

¹⁴⁶ Eddy Ramírez, *The Economic Analysis of ADRs* (2006) (lecture taught at the conference *International Arbitration: One of the Most Important ADRs*, Universidad Nacional de Colombia).

¹⁴⁷ Freddy Herrera, *Contractual and Jurisdictional Theories Applied to Arbitration* (2016) (lecture taught at the conference *International Arbitration: One of the Most Important ADRs*, Universidad Nacional de Colombia).

¹⁴⁸ Rodrigo Uprimny, *The Access to Justice and ADRs* (2016) (lecture taught at the conference *International Arbitration: One of the Most Important ADRs*, Universidad Nacional de Colombia).

¹⁴⁹ Chang Hee Pyoun et al., The efficient bus arbitration scheme in SoC environment, in *System-on-Chip for Real-Time Applications, 2003. Proceedings. The 3rd IEEE International Workshop on* 311-315 (IEEE, 2003).

¹⁵⁰ Kaushik Basu & Pham Hoang Van, The economics of child labor, 88 *American economic review*, n.º 3, 412 (1998).

Arbitration can be defined as a jurisdictional method to resolve disputes having to do with contractual agreements.¹⁵¹ Alternatively, arbitration as the set of codes and procedures that are established between the parties to cope with an uprising or potential controversy.¹⁵²

Arbitration is the alternative dispute resolution system chosen for Investor-State dispute settlement in investment treaties. Since the end of World War II, there has been three basic types of investment agreements: bilateral investment treaties, (BITs), bilateral economic agreements containing investment chapters (for example, free trade agreements, or economic partnership and cooperation treaties); and (3) multilateral investment-related agreements. This body of investment treaties constitutes an international regime that has the following features: "it has been bilaterally, rather than multilaterally, constructed; it decentralizes and privatizes decision making processes; and it is not based on a multilateral international organization."¹⁵³

In recent years, international arbitration has been widely accepted because of its confidentiality and flexibility.¹⁵⁴ For this specific issue, one of the advantages of arbitration is that one can select arbitrators who have specific knowledge in environmental legislation.

It is worth paying attention to arbitration because it works in an international legal framework with well-defined institutions - so far successfully - provides fair, neutral, expert and efficient means to resolve multinationals disputes. Arbitration enables public and private actors in different jurisdictions to cooperatively resolve complex international disputes in a neutral, durable and satisfactory manner.¹⁵⁵

In that order of ideas, this paper argues for recognizing relationships between two of the most important figures of international relations: the system of protection of human rights and investment protection regime in the international arena. Then, one wonders, within the context of this work, if investors are individuals whose rights holders demand compliance by the receiving State. The answer is not obvious, as these rights have not been agreed by them but by the States which are national.¹⁵⁶

In practical life, the two systems intersect when, for example, third parties (international companies) manage human rights services. For example, when the water service is managed by an international company. In this case, the State must wield a set of guidelines to the third party, to recognize these commitments to which it is bound, in access drinking water to the population. Following this scenario, what is more prevalent? Does the investment protection or the right of the population to water supply as happened with Aguas Argentinas?¹⁵⁷

¹⁵¹ Pierre Véron. Arbitrage et Propriété Intellectuelle, (1994), http://www.veron.com/publications/Colloques/Arbitrage_et_propriete_intellectuelle_pdf_texte.pdf?card=677 (last visited on September 25, 2016).

¹⁵² Caivano Roque, Planteos de inconstitucionalidad en el arbitraje, 2 *Revista Peruana de Arbitraje* 107, 129 (2006).

¹⁵³ Jeswald Salacuse, Emerging Global Regime for Investment, 51 *Harv. Int'l LJ* 427, 427 (2010).

¹⁵⁴ Andreas Lowenfeld, *International litigation and arbitration* (West Publishing Company, 1993).

¹⁵⁵ Gary Born, *International arbitration and forum selection agreements: drafting and enforcing* (Kluwer Law International, 2010).

¹⁵⁶ Xavier Andrade Cadena, *Renuncia al arbitraje previsto en un tratado: el caso ecuatoriano*, (2010), <http://www.latinarbitrationlaw.com/renuncia-al-arbitraje-previsto-en-un-tratado-el-caso-ecuatoriano/> (last visited on September 25, 2016).

¹⁵⁷ Javier Echaide, *El derecho humano al agua potable y los tratados de protección recíproca de inversiones* (2013) (PhD diss., Universidad de Buenos Aires).

In the case of Argentina,¹⁵⁸ the Government insisted that despite the obligations arising under the BIT, should not be interpreted these commitments claiming a vacuum divorced from the rest of the international law. Argentina emphasized in particular that BITs should be interpreted so as not to affect the fulfilment of other international obligations between the States compromise to other international agreements.¹⁵⁹

Several cases submitted to international arbitration show the confrontation between the regimes of protection of investment and the protection of human rights. Now, we cite some of these cases to know what rights they have had contrasting referees.

Against the Mexican government an important case occurred, in which a Spanish company accused the State authorities of failing to comply with the obligation to provide investment protection, as they had not prevented demonstrations denouncing social facilities inverter, where toxic wastes were treated.¹⁶⁰ On that occasion, the Arbitral Tribunal found that in the absence of strong evidence to establish a causal link between the discontent of the opposition to the landfill of waste and a Mexican government agency, there was no damage to the inverter. However, the case gives rise to consider what would have been the situation if he realized the sufficiency of evidence: which side of the scales would lean towards the Tribunal? How it would balance the right to peaceful demonstration and the obligation to protect foreign investment?

II. Investment arbitration and environment

In order to understand the dynamics between investment protection and environment in each country is crucial to take into account what sort of development model that country has. Environment is as relevant as governments want it to be.¹⁶¹ Foreign direct investment (FDI) is one of the most important sources of capital in developing countries, but is also a conflicting one. The more natural assesses a country has, there are more incentives to investment in that country. Nonetheless, it is crucial to expand on our conception of economic development by adding others welfare categories to get a multi-faced and more suitable understanding of social development and its relationship with FDI.

Some affirm that protection of BIT's does interfere with the attainment of environmental or human rights goals.¹⁶² On the other hand, it can be argued that FDI can be too problematic for improving and evolving environmental regulations, because it could freeze that regulations, especially in developing countries, due to the fact that FDI is a long-term process and investors could oppose

¹⁵⁸ Suez, Sociedad General de Aguas de Barcelona S.A., y Vivendi Universal S.A. v. Argentine Republic, ICSID Case N.º ARB/03/19, Decision on liability (July 30, 2010).

¹⁵⁹ Luke Eric Peterson, *Derechos Humanos y tratados bilaterales de inversión* (Montreal, Quebec: Centro Internacional de Derechos Humanos y Desarrollo Democrático, 2009).

¹⁶⁰ Técnicas Medioambientales TECMED S.A. v. Estados Unidos Mexicanos, ICSID Case N.º ARB (AF)/00/2, Award (May 29, 2003).

¹⁶¹ Sergio Vásquez, Investment Arbitration and Environment, lecture taught at the conference *International Arbitration: One of the Most Important ADRs* at the Universidad Nacional de Colombia, 2016.

¹⁶² Giorgio Sacerdoti, Investment protection and sustainable development: key issues, *Bocconi Legal Studies Research Paper* 2445366 (2014).

and veto any attempt to change environmental regulations by the dread of losing their profit margins.¹⁶³

It could be argued that even if a foreign investor has been persuaded by a government to make an investment, that investor doesn't have to expect that the government is not going to shift its own environment regulatory, as a result of either domestic policy or environmental political decisions.¹⁶⁴ Nevertheless, in real practice some of the clauses regularly used in this kind of treaties restrict the government's ability to make political choices, at least as far as environment is concerned. These authors pay much attention to the three most common conditions in IIT's which are: Fair and equal treatment, Non-indirect expropriation, and the umbrella clause. These requirements are believed to be ambiguous and easily misinterpreted in regard to environmental protection, which is not usually aimed.¹⁶⁵

Gordon, Pohl & Bouchard studied closely the sustainable development programs and the promotion of responsible business conduct in International investment treaties (IIT's).¹⁶⁶ These scholars intend to show the empirical relationship between FDI and environmental issues, for doing so they use a large sample of countries and their investment treaties.

As shown in Figure 1, there are very few verdicts in which is cited an important international environmental agreement. As we see, this data would appear to back the view that in spite of all the efforts, what has prevailed most is the interest of investors and not the environment. Following this could be argued that there might be a conflict between foreign investment and environment.

¹⁶³ Konrad Von Moltke, *An International Investment Regime?: Issues of Sustainability* (International Institute for Sustainable Development, 2000).

¹⁶⁴ M. Thow & B. McGrady, Protecting policy space for public health nutrition in an era of international investment agreements, 92 *Bulletin of the World Health Organization*, n.º 2, 139-145 (2014).

¹⁶⁵ Christiane Gerstetter & Nils Meyer-Ohlendorf, Investor-state dispute settlement under TTIP—a risk for environmental regulation?, *Heinrich Böll Stiftung TTIP Series* (2013).

¹⁶⁶ Kathryn Gordon et al., Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey, in *OECD Working Papers on International Investment*, n.º 1 (2014).

Name of International Agreement	No. of documents citing the agreement at least once ⁴⁸
International Environmental Agreements	
Aarhus Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Trans-boundary Air Pollution of 1979 (1998)	1
Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989)	2
Esposo Convention on Environmental Impact Assessment in a Trans-boundary Context (1991)	1
North American Agreement on Environmental Cooperation (1993)	2
OSPAR Convention - Convention for the Protection of the Marine Environment of the North-East Atlantic (1992)	4
Resolution adopted by the General Assembly: 1803 (XVII). Permanent sovereignty over natural resources (1962)	2
Rio Declaration on Environment and Development (1992)	3
Stockholm Convention on Persistent Organic Pollutants (2001)	1
Stockholm Declaration on the Human Environment (1972)	1
UNESCO Convention concerning the Protection of the World Cultural Property and Natural Heritage (1972)	1
United Nations Convention on the Law of the Sea (1982)	3
United Nations Framework Convention on Climate Change (1992)	1
United States - Mexico Treaty Relating to the Utilization of Water (1944)	1
International Human Rights Agreements	
Charter of Fundamental Rights of the European Union (2000)	1
Convention on the Prevention and Punishment of the Crime of Genocide (1948)	7
European Convention on Human Rights (1950)	27
Indigenous and Tribal Peoples Convention No. 169 (1989) different	1
Inter-American Convention on Human Rights (1969)	2
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	8
International Covenant on Civil and Political Rights (1966)	5
International Covenant on Economic, Social and Cultural Rights (1966)	1
Resolution adopted by the General Assembly: 61/295 United Nations Declaration on the Rights of Indigenous Peoples (2007)	1
Universal Declaration of Human Rights (1948)	3
International Anti-Corruption Agreements	
African Union Convention on Preventing and Combating Corruption (2003)	1
Council of Europe Civil and Criminal Law Conventions on Corruption (1999)	1
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)	3
United Nations Convention Against Corruption (2003)	1
Miscellaneous International Agreements	
Jay Treaty (1794)	2

 Figure 1. Environmental Agreements cited in investment arbitration cases¹⁶⁷

¹⁶⁷ Retrieved from *Id.*

All of the foregoing hints that in IIT's have not Environment as the priority but FDI. Lastly, investment treaties must be rebalanced to take into account the role of environmental issues, in accordance with a social and sustainable development model.¹⁶⁸

III. Investment arbitration and human rights

Regarding invocation of the human rights legislation in the procedural actions of investment treaties, arbitrators do not take seriously these issues arguing that there is not a mandate to take into consideration violations of human rights protocols, owing to they only are courts of limited jurisdiction. Most of the time, in order to protect an investor, arbitrators only determine whether there is a violation of an investment treaty or not, despite the fact that the human rights legislation is present when they have to analyze and interpret treaty obligations.¹⁶⁹

According to professor Pablo Rey Vallejo,¹⁷⁰ even if that violations of human rights cannot in principle be subject to the knowledge of the arbitrators because of jurisdiction, when the violations of these universal principles permeate the core of investments, under Article 42 (1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arbitrators may also take into account provisions of international law in order to resolve conflicts.¹⁷¹

But it seems that this provisions only are applied in one way, for the benefit of the investor, as there are some cases, which applied human rights obligations to protect investors and shelter them under investment treaties. Sometimes the human rights themselves have been used as a defense and protection for investors in International investment treaties.¹⁷²

At the same time, in some circles the human rights obligations of hosts States with third parties, in the arbitration proceedings, have been growing in importance. It is crucial to determine whether the human rights of those who are not involved in an arbitration proceeding may be pertinent to resolve the dispute or not.

Yadira Castillo asserts that the protectionist trait of bilateral investment treaties faces the challenge to protect public interests granted by the States, such as rights of minorities etc.¹⁷³ On the other hand, Bohoslavsky says that it is not possible to interpret the BITs as devoid of the authority of the human rights treaties.¹⁷⁴

Governments are calling on to use human rights arguments to communities or people living under its jurisdiction to compel arbitrators to consider their relevance in the allegations of violations of

¹⁶⁸ Kate Miles *The origins of international investment law: empire, environment and the safeguarding of capital* (Cambridge: Cambridge University Press, 2013).

¹⁶⁹ *Supra* note 159.

¹⁷⁰ Pablo Rey Vallejo, El arbitraje de inversiones y los retos de la globalización, 38 *Revista de Derecho Privado*, n.º 3, (2007).

¹⁷¹ Carlos Ayala Corao, Arbitraje internacional, defensa de inversiones y derechos humanos, 9 *Revista Comité de Arbitraje*, 3 (2003).

¹⁷² *Supra* note 159.

¹⁷³ Yadira Castillo, The Appeal to Human Rights in Arbitration and International Investment Agreements, 12 *Anuario Mexicano de Derecho Internacional*, 47 (2012).

¹⁷⁴ Juan Pablo Bohoslavsky & Juan Bautista Justo, Protección del derecho humano al agua y arbitrajes de inversion, CEPAL – *Colección Documentos de proyectos* (Santiago de Chile: Naciones Unidas, 2011).

human rights.¹⁷⁵ One example is the case of Sociedad General de Aguas de Barcelona S.A. against the Republic of Argentina, in which the State argued the human right to water for citizens to justify accusations against the investors.¹⁷⁶

Furthermore, the language used by States that supports human rights proposes a change in the logic of investment arbitrations, since any guarantee of BITs is challenged by the protection of essential public interests by States, with particular reference to economic, social and cultural rights.¹⁷⁷

IV. Different perspectives on the challenges in the relationship between the International Investment Arbitration and the international standards of human rights

a) Integration or fragmentation of the international law?

Initially, human law and investment law were perceived as things that have nothing to do with each other. However, over the years, from the academy, people were realizing the ties that existed between these two regimes and today it is difficult to find someone who defends their separation. Now the question is not whether or not there is a relationship between them, but rather how these relationships are. The meeting zone between the two may be conflicting, so we will see some areas where there has been divergence.

b) Is the International Investment Regime positive or negative for human rights?

Some think that International Investment Regime (IIR) is in itself harmful to the International Human Rights Law (IHRL). Specifically, IIR can become an obstacle that impedes or restricts the regulatory power of the State, and therefore also their chances to fulfil their obligations regarding the protection of human rights, because doing so would imply that the host State has to pay compensation to investors.

On the opposite side, some think that IIR has positive effects on human rights, as it can contribute to the economic development of the host State, which in turn correlates with greater protection of rights and a better standard of living in general.

A more eclectic position says that foreign investment is not *per se* negative or positive. The problem is that the current arbitration system does not give the same consideration to human rights as with the rights of investors, it is limited to protect the foreign investor.

Finally, others claim that the problem is one of jurisdiction, since the existing regime does not expressly authorize tribunals to deal with allegations of violations of basic human rights.

c) Are companies subjected to the obligation to respect and protect human rights?

¹⁷⁵ *Supra* note 159.

¹⁷⁶ *Supra* note 158.

¹⁷⁷ *Supra* note 173.

The State has obligations to human rights, it is something out of discussion. However, they are different positions on whether companies are required by the International Human Rights Law. Some people say that investors have to take responsibility for the abuses that they commit under IHRL, as well as international law protects their rights against host State abuses.

Whether considering that the existing legislation is not binding enough for business or as an attempt to make them understand their responsibilities, in the new treaties is more common to see reference to respect for fundamental rights in the host State. On the other hand, also codes of conduct had been adopted, for example, the Guiding Principles on Business and Human Rights by the United Nations' Human Rights Council.¹⁷⁸ The interpretive guide says “[w]hile they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law.”¹⁷⁹

d) Proposed solutions

While there are different approaches to the problem regarding the relationship between human rights law and investment law (and specifically, in the regime of international arbitration), all seem to indicate that the main problem is that international law does not have a mechanism to deal to human rights violations arising out of the activities of foreign investors.

Among the classic proposed solutions for the existing conflict, we found:

- ✓ To withdraw from the International Centre for the Settlement of Investment Disputes (ICSID) framework.
- ✓ Making explicit references to human rights in the new treaties or re-writing the old ones.
- ✓ Adopting voluntary codes of conduct by the transnational corporations.
- ✓ Expanding Jurisdiction in the ICSID to allow States or non-State actors to bring claims against Investors.
- ✓ Developing a jurisprudence that acknowledges the obligations upon the investors.

However, some consider several of these solutions as unsatisfactory: the first one for being too extreme and it does solve the problem in its substance.

Responding to the possibility of volunteer commitments, Weiler states that: “[t]he adoption of a voluntary approach to the regulation of transnational corporations in such an important area as human rights seems to indicate a tacit acknowledgement by the drafters of these codes that there exists only the most limited of means whereby these norms can be enforced.”¹⁸⁰

He also makes an emphasis on the need for enforcement of the regulation, affirming that

“it is essential under any regulatory model (international or otherwise) that a credible threat of enforcement exists that can be implemented with adequate monitoring and

¹⁷⁸ Human Rights Council. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (A/HRC/17/31).

¹⁷⁹ Office of the United Nations High Commissioner for Human Rights. The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, HR/PUB/12/02, 2012, 1.

¹⁸⁰ Todd Weiler, Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order, 27 *Boston College International & Comparative Law Review* 429, 435 (2004).

verification processes, [...] which means that *an independent and credible enforcement procedure* has to be put in place.”¹⁸¹

Moreover, there are drawbacks of focusing on responding with regulatory changes in the new generation of treaties: “[w]hile legislative (treaty-based) responses offer the most promising long-term solutions, they do not, of course, apply retroactively. In the meantime, jurisprudential innovation that pushes arbitrators to engage with and balance competing legal rules is necessary. The existing law provides the framework necessary for them to do so.”¹⁸²

V. The issue from our perspective

Foreign investors may eventually endanger or violate fundamental rights. This can happen with the negligence or even complicity of the host State, but this do not make the investor free of responsibility of his acts.¹⁸³

However, the scenario is not very flattering to the State that wants to protect those rights. Even in the occasion in which local regulations are followed by the investor, i.e. the investor operates under the established standards, there would be an impediment to the State to act for the progressive realization of economic, social and cultural rights.

We believe that the greatest barrier to harmonization is the issue of corporate responsibility to respect human rights. Is there such a responsibility in the current system? If so, what is the scope?

We can say that human rights apply as an obligation for investors in any frame jurisdiction, even in arbitration; as either a specific written norm, a customary rule or as a general principle of international law. This universal obligation finds its fundament in human dignity: “[t]he most promising theoretical basis for human rights obligations for non-state actors is to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity.”¹⁸⁴

That is, the center of human rights is the dignity of the human being, the obligations are seeking means to that end, but they should not be seen as static or as the essence of IHRL. The important thing is not the source of the violation (public / private) but the violation of the law itself, and we should not put any impediment that does not allow legal substantial protection enforcement. Of

¹⁸¹ Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 *Boston College International & Comparative Law Review* 429, 436 (2004).

¹⁸² William W. Burke-White, *Inter-Relationships between the Investment Law and Other International Legal Regimes* 11 (October, 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Burke-White-FINAL.pdf> (last visited on October 15, 2016).

¹⁸³ We are against to this kind of opinion: “[w]hile states should be held responsible for the abuse of their citizens’ rights, investors ought not to be held responsible for the myopia (or perhaps even negligence) of the host state (and by extension, its own people in democratic states) in the context of BITs affecting human rights standards, because states expressly agreed to such arrangements.” James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity*, 18 *Duke Journal of Comparative & International Law* 77, 105 (2007).

¹⁸⁴ Andrew Clapham, *Non-State Actors*, in *International human rights law* 533 (Daniel Moeckli et al. eds., 2nd ed., Oxford: Oxford University Press, 2013).

course, the subject of proceedings for enforcement is something that should be improved, but, as to the substantive law, it is not correct to demand a kind of exhaustive list of obligated entities.

The big challenge is that companies increasingly come to have more and more power, compared to the time when the human rights system was formed, where the main threat was the state / ruling. So, is to expect this system has not spoken specifically about the issue of business. However, we can say that the requirement of respect for human rights is a responsibility of everyone. States are the primary obligor, and take three types of obligations under international law: to respect (refrain from interfering with or curtailing the enjoyment of human rights), to protect (protect individuals and groups against human rights abuses) and to fulfil human rights (take positive action to facilitate the enjoyment of basic human rights).¹⁸⁵ It is clear that the obligations of non-State actors do not necessarily have to be the same nor to have the same magnitude.

For positivism lovers, there is already international legal insight that approaches the responsibility of non-State actors:” [n]o one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.”¹⁸⁶

Also, in the specific case of corporations, the HRC ruled: “[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”¹⁸⁷

Moreover, we can also address the observance of human rights in the specific case of international investment arbitration, because human rights are integrated to international law under Article 31(3)(c) of Vienna Convention on the Law of Treaties, as they constitute ‘relevant rules of international law applicable between the parties’.

We can also talk about the *ius cogens* nature of investors obligations, as human rights rules are usually recognized as part of the *ius cogens*.¹⁸⁸ So, we can affirm that “as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *ius cogens* and not to give effect to parties’ choices of law that are inconsistent with such principles.”¹⁸⁹ We do not have to wait that the treaties expressly enshrine a clause of obligation to respect human rights, which is not necessary given the universal nature of human rights. We must put aside positivism and accept that there are rules that applies even if they are not stated in each agreement or treaty. Sure there may be an explicit mention of how specifically these rules will take place, but in no way they create an obligation to respect human rights, as this existed previously.

¹⁸⁵ United Nations Office of the High Commissioner of Human Rights, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited on October 15, 2016).

¹⁸⁶ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 10, GENERAL A/RES/53/144 8 March 1999.

¹⁸⁷ The Human Rights Council endorsed the Guiding Principles in its Resolution 17/4 of 16 June 2011.

¹⁸⁸ Andrea Bianchi. Human Rights and the Magic of Jus Cogens, 19 *European Journal of International Law*, n.° 3, 491-508 (2008).

¹⁸⁹ *Methanex Corporation v. United States of America*, Final award of the Tribunal on Jurisdiction and Merits, (August 3, 2005), <http://www.italaw.com/cases/documents/696> (last visited October 15, 2016).

In the other side, there is the clean hands doctrine.¹⁹⁰ Can you protect a right to property when it was formed or exercised in violation of other human rights? No, following the principle *nemo auditur propriam turpitudinem allegans* (“nobody can benefit from his own wrong”). If the violation of the human right to property was a response and a necessary intervention to prevent or mitigate the violation of human rights, the State should not carry the burden of compensated the investor:

“[t]hough it is still considered as a controversial principle, tribunals in investor – state arbitration are already using the clean hands doctrine to deny BIT protection to illegal investments. This is mostly done through “in accordance with the law” provisions that are found in many BITs. A number of tribunals have also held that there exists an implicit obligation for investors not to violate the law of the host state to be worthy of BIT protections. Several tribunals have declined jurisdiction over disputes where investors had not made their investments in accordance with the host State’s law. This is because these investors did not have “clean hands” and could therefore not benefit from the protection granted by the treaty.”¹⁹¹

We can also see the problem as an ‘legitimate expectations’ issue under foreign investment contracts, that is the pre-establishment information available to the foreign investor at the time of the conclusion of the investment contract, and we know that human’s rights are already established.

Now, another challenge is that investors not only have obligations to respect human rights, if not they themselves also have human rights, as Clapham described:

“[f]irst, the whole point of privatization is to remove certain activity from the state-run sphere, increasing flexibility and usually diminishing accountability. The usual consequence is that the protections that have developed with regard to state activity no longer apply and, although in theory new private remedies should apply, such remedies tend not to include human rights protection in name. The same act therefore gets relabelled. What was once a human rights violation becomes a civil wrong, a tort, or a breach of contract. Second, the new entity which has taken on the former responsibilities of the state has something that the state did not have. The new non-state entity may have competing human rights which can be enforced or weighed against anyone claiming their rights against this non-state actor.”¹⁹²

VI. Conclusions

There are sufficient law foundations to make the investor, and specifically the corporations they own, responsible of their violations of others international standards that may not be explicitly named in investments treaties, as human rights including environmental issues.

Globalization and entry of transnational corporations requires arbitration to protect foreign investment while also protecting human rights.

¹⁹⁰ *Supra* note 182, in 9.

¹⁹¹ Patrick Dumberry and Gabrielle Dumas-Aubin, *The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, (2013), <https://ssrn.com/abstract=2404058> (last visited on October 15, 2016).

¹⁹² *Supra* note 184, in 536.

International arbitration should have a central role in resolving environmental conflicts and human rights concerning foreign investment to take advantage of its efficiency, speed and knowledge. These have to be done without a bias in favor of investors.

The problem right now is the lack of enforceability of the International Human Rights Law in the International Investment Regime, rather than insufficient obligations on investor to respect humans' rights.