

INTERNATIONAL LAW AND PRACTICE

What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration

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Abstract

This article provides a framework for systematically analyzing the practice, function, and consequences of human rights references in investment arbitration. In recent years, investment arbitration witnessed an enormous increase of references to external sources. References to human rights are especially interesting as they defy the alleged inherent conflict of investment and human rights, as well as the presumed fragmentation of international law. By applying both quantitative and qualitative approaches, I analyze how and why human rights references are employed in investor-state arbitration and, ultimately, whether they are able to remedy the legitimacy crisis of investment arbitration.

The empirical analysis is based on 46 awards, which include explicit references to human rights instruments. In the first part, this article examines which human rights instruments are referenced in investment arbitration and how the disputing parties as well as the tribunal engage in human rights referencing. In the second step, the article identifies two strategic functions of referencing human rights: guidance in the determination of substantive provisions and argumentative practice. This article further argues that, from a comparative law perspective, references may help to overcome the indeterminacy of investment treaties, provide for the balancing of investment and non-investment concerns, and ensure cross-regime consistency. In the third step, this article elaborates on whether those presumed benefits of referencing human rights can be confirmed on the basis of empirical results. It remains to be seen whether the 'pick and choose' approach of human rights references is capable of uncovering this legitimating potential.

Key words

human rights; investment arbitration; investor-state dispute settlement; legitimacy; references

I. INVESTMENT ARBITRATION, HUMAN RIGHTS, AND THE LEGITIMACY CRISIS

In the last decade, international investment arbitration underwent a significant development. Once considered to be a rather secluded field of law, the growth in the

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number of awards coupled with the rise of regional investment treaties attracted practical and scholarly attention.¹ Most prominently, a mounting appeal for more transparency, participation, and the rule of law emerged,² which is also termed the ‘legitimacy crisis’ of investment arbitration.³

Human rights considerations hold a central position in the debate on the future of investment arbitration. On the one hand, investment lawyers assume that foreign investment fosters sustainable development resulting ultimately in better living circumstances for the people concerned.⁴ Human rights scholars and civil society, on the other hand, argue that foreign investors and governments do not prioritize the obligation to respect and protect fundamental human rights, thereby systematically undermining human rights standards.⁵

While international investment treaties traditionally do not include human rights (e.g., a 2014 OECD study found that only 0.5 per cent of 2,107 investment treaties feature HR considerations),⁶ investment tribunals acknowledge the pressing need to address this criticism. For instance, the tribunal in *Phoenix v. Czech Republic* stated:

To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.⁷

Yet, the definition of fundamental human rights in the *Phoenix* case encompasses only the most severe violations of *jus cogens* norms and remains silent about the majority of human rights applicable in international investment law.⁸

Despite this alleged inherent antagonism, human rights law and investment law also share several important characteristics.⁹ Their similarity becomes visible in the

¹ S.W. Schill, ‘International Investment Law and Comparative Public Law – An Introduction’, in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 3.

² A. Kulick, ‘Investment Arbitration, Investment Treaty Interpretation, and Democracy’ (2015) 4 *Cambridge Journal of International and Comparative Law* 441; M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010).

³ C.N. Brower and S.W. Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chicago Journal of International Law* 471–98; S.D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration. Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521–1625.

⁴ P. Muchlinski, ‘Holistic Approaches to Development and International Investment Law: The Role of International Investment Agreements’, in J. Faundez and C. Tan (eds.), *International Economic Law, Globalization and Developing Countries* (2010), 180; S.W. Schill, ‘Investitionsschutzrecht als Entwicklungsvölkerrecht’, (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 261–308.

⁵ See Statement by Alfred-Maurice de Zayas, Independent Expert on the Promotion of a Democratic and Equitable International Order at the Human Rights Council, 16 September 2015, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16461&LangID=E, accessed 26 December 2016; see also J. Alvarez, ‘Critical Theory and the North American Free Trade Agreement’s Chapter Eleven’, (1997) 28 *Inter-American Law Review* 303–12.

⁶ K. Gordon, J. Pohl, and M. Bouchard, ‘Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey’, (2014) OECD Working Papers on International Investment 2014/01 5.

⁷ *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78.

⁸ For a general overview see S.L. Karamanian, ‘Human Rights Dimensions of Investment Law’, in E. de Wet and J. Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (2012) 236–71.

⁹ See E. de Brabandere, ‘Human Rights Considerations in International Investment Arbitration’, in M. Fitzmaurice and P. Merkouris (eds.) *The Interpretation and Application of the European Convention on Human*

paramount status of the individual¹⁰ and their highly developed dispute settlement bodies.¹¹ Those two elements were crucial for the extraordinary success and prominence of both fields of law in the last two decades. Human rights courts and investment tribunals also face similar challenges, such as an exponentially rising number of cases, growing contestation of member states, and an acute legitimacy crisis.

The most visible linkage between human rights and investment law can be observed in the trend of cross-referencing in investment arbitration.¹² While investment tribunals traditionally lack jurisdiction *ratione materiae* for human rights issues, a rising number of awards feature references to human rights treaties and case law. This trend is exacerbated by the development of *amicus curiae* submissions, which give human rights organizations a direct mode of participating and voicing their concerns in arbitration proceedings.¹³ Human rights concepts are used as benchmarks in the context of state responsibility, the constraint of governmental authority, and the protection of individual rights against the actions of public and private actors. In particular against the background of a 'silent' investment treaty regime, which *prima facie* excludes human rights considerations from the jurisdictional basis of the tribunal, analyzing the actual practice of human rights references in investment arbitration proceedings seems worthwhile.

Those observations reveal that the relationship between investment law and human rights is rather complex and should not be painted in black and white. While there might be a significant potential for conflict, both legal fields also show a significant capacity for interaction.¹⁴ References to human rights imply that at least some form of interaction is taking place and that this affects the system of investment arbitration. For instance, this could indicate that investment arbitration is becoming more human-rights friendly by adjusting substantive or procedural rules. In particular, the previous point is decisive for the future of international investment arbitration as it could serve as a partial remedy for its legitimacy crisis.

This article provides a framework for systematically analyzing the practice, function, and consequences of human rights references in investment arbitration. It

Rights (2013), 183–215; C. Reiner and C. Schreuer, 'Human Rights and International Investment Arbitration', in P.-M. Dupuy, E.-U. Petersmann, and F. Francesconi (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 82–96.

¹⁰ See A. Peters, *Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht* (2014). See also the tribunal's reasoning in *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 170f.

¹¹ See A. von Bogdandy and I. Venzke, *In Wessen Namen? Internationale Gerichte in Zeiten Globalen Regierens?* (2014).

¹² See S.W. Schill and K. Tvede, 'Mainstreaming Investment Treaty Jurisprudence. The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law' (2014) 14 *The Law & Practice of International Courts and Tribunals* 94–129; V. Vadi, *Analogies in International Investment Law and Arbitration* (2015).

¹³ In order to achieve comparability of the cases selected, this article does not cover *amicus curiae* submissions. For more information on the impact of *amicus curiae* submissions on investment arbitrations, see J. Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?', in Dupuy, Petersmann, and Francesconi, *supra* note 9, at 396–421; E. Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', (2011) 29 *Berkeley Journal of International Law* 200–24; S. Schadendorf, 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', (2013) 10 *Transnational Dispute Management* 1.

¹⁴ For an overview, see also M. Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in Dupuy, Petersmann, and Francesconi, *supra* note 9, at 97–114.

argues that both the discussion on the inherent conflict of investment and human rights and the debate on the fragmentation and isolation of investment law from human rights law are not reflected in the practice of international investment arbitration. By applying both quantitative and qualitative approaches, I analyze how and why human rights references are employed in investor-state arbitration and, ultimately, whether they are able to remedy the legitimacy crisis of investment arbitration.

This article is divided into three sections. [Section 2](#) undertakes a descriptive analysis of 46 investor-state arbitration awards with a particular focus on two indicators: the substantive content of a human rights reference and the actors involved in referencing human rights. Thereupon, [Section 3](#) elaborates on the strategic functions of using human rights references for the process of arbitral decision-making and argumentative practice. [Section 4](#) examines human rights references from the perspective of the comparative public law approach in order to evaluate whether they can remedy the legitimacy deficits. [Section 5](#) concludes by putting several myths related to human rights and investment arbitration under the spotlight.

2. AN EMPIRICAL ANALYSIS OF HUMAN RIGHTS REFERENCES

2.1. Research design and methodological remarks

Empirical research in investment arbitration is still in its infancy.¹⁵ To date, empirical data regarding investment disputes is scarce.¹⁶ This is regrettable in the face of the exponential growth of awards since 2000,¹⁷ which cannot be analyzed systematically on a large scale without first extracting the relevant data. Moreover, investment arbitration is divided across different fora, which makes it very difficult to assemble and survey all potential cases, and even in the available databases the substance of investment awards is generally not digitalized. This lack of accessible data gravely complicates tracking down the challenges faced by investment arbitration and in identifying appropriate suggestions for improvement of the system of investment arbitration. Therefore, the sample of cases does not account for universal assumptions. Rather, the analysis should be seen as a modest first step in tracing the various modes of how human rights references are used in investment arbitration. Hence, the study is primarily explorative.

¹⁵ There exist a limited number of empirical analyses of substantive issues in arbitration awards, see, prominently, S.D. Franck, 'Empirically Evaluating Claims About Investment Arbitration' (2007) 86 *North Carolina Law Review* 1–88. Most recently from the PluriCourts project at Oslo University, see, among others, O.K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *European Journal of International Law* 301–64; D. Behn, 'Legitimacy, Evolution and Growth in Investment Treaty Arbitration: Empirically Evaluating the State of the Art' (2015) 46 *Georgetown Journal of International Law* 363–415; M. Langford and D. Behn, 'Managing Backlash. The Evolving Investment Treaty Arbitrator', (2016) *PluriCourts Research Paper No. 16-14*.

¹⁶ For instance, ICSID only features the basic parameters of the case.

¹⁷ According to UNCTAD, from 1990 until 1999, the number of arbitral decisions issued annually ranged between zero and six. However, starting from the year 2000, the number exponentially increased to around 16 decisions. In the last decade, the annual number of decisions went from 40 to a maximum of 67 in the year 2014. Similar developments can be identified in the number of arbitrations initiated (1990: 0, 2000: 13, 2016: 62) and the follow-on decisions issued (2000: 0, 2016: 23). See also United Nations Conference on Trade and Development, available at investmentpolicyhub.unctad.org/ISDS, accessed 6 July 2017.

An explorative research design possesses several advantages. In contrast to conclusive research focused on testing hypothesis,¹⁸ explorative research aims to provide more general insights into a research field.¹⁹ An explorative study requires neither prior theoretical or empirical studies, nor a large sample. By analyzing original sources, it is more flexible when addressing several questions, e.g., the how, when, and why of human rights reasoning in investment arbitration. In other words, it intends to establish a theoretical framework inductively.

The article analyzes a corpus of 46 textual documents of investor-state arbitration. While 42 of those are awards, the cases concerning *Fraport v. Philippines*; *Teinver v. Argentina*; *Total v. Argentina*; and *Toto v. Lebanon* are procedural rulings. All of the selected cases feature the argumentation of both parties, as well as the tribunals' legal reasoning.²⁰ They all include specific and direct references to human rights in a broad sense. They also encompass a variety of fora, most of them relating to ICSID, but also under UNCITRAL and SCC arbitration rules. The cases range from 1989 to 2015, however, more than 90 per cent of the documents originated since 2005, which can be explained by digitalization of awards from that period. This also mirrors the general trend in the growth of arbitration cases. All selected cases in this article feature at least one explicit reference to human rights in the award/procedural ruling, i.e., the keyword 'human right' or 'human rights' had to be identified at least once in a ruling.²¹ Hence, in approximately 9 per cent of all concluded cases of investment arbitration an explicit human rights reference was found.²²

Due to the lack of a specific dataset on the substantive elements of investment awards,²³ the cases were selected by two different mechanisms to decrease selection bias: on the one hand by thorough screening of the relevant literature and scholarly discussion, on the other, by searching the International Arbitration Database for keywords in the online accessible awards.²⁴ It is important to note that, while the two search mechanisms produced similar numbers of cases,²⁵ one could identify one visible differentiation in the sample. Awards, which were discussed and cited in the academic debate, predominantly featured references introduced by the respondent, whereas the awards gathered by the database show the opposite distribution. In most cases of the database, the claimant first used the human rights reference. This

¹⁸ Most empirical research in investment arbitration is using a hypothesis-testing methodology, which can only account for a limited number and specifications of variables, see, for example, G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013). This lends itself to study specific problems of investment arbitration, but not to illustrate the complexities of legal reasoning and other substantive issues of investment awards.

¹⁹ See R.A. Stebbins, *Exploratory Research in the Social Sciences* (2013).

²⁰ Regrettably, neither individual submissions by the parties nor *amicus curiae* submissions could be included in this article. As arbitration cases differ significantly in the level of transparency regarding the publication of such submissions, coding the available documents would have distorted the data.

²¹ This means that cases which had human rights implications but did not cite human rights, at least in a general sense, could not be included in the analysis.

²² According to UNCTAD, 528 cases were concluded at the time of writing. See also United Nations Conference on Trade and Development, available at investmentpolicyhub.unctad.org/ISDS, accessed 1 October 2017.

²³ The PluriCourts Investment Treaty Arbitration Database (PITAD) seems very promising, however, it was not yet publicly accessible at the time of writing.

²⁴ The database is freely accessible online, see also www.arbitration.org, accessed 26 December 2016.

²⁵ The literature search resulted in 21 cases, while the database search produced 24 cases.

indicates an implicit bias in the academic debate on human rights and investment law and highlights the need for knowledge generated by a structured empirical approach.

2.2. Type and content of human rights references

The first set of indicators examines the type and content of the human rights reference used in the selected cases. In the 46 selected cases, more than 60 individual references to six different sources of human rights were identified.²⁶

The highest number of external references (five) was found in the cases of *Al-Warraq v. Indonesia* and *EDFI v. Argentina*. In *Al-Warraq* this was due to the ambiguity of the concept of ‘basic rights’ in Article 10.1 of the Organisation of the Islamic Conference (OIC) investment agreement. By invoking several human rights references from important international, as well as the most prominent regional treaties, Al-Warraq intended to establish a universal consent.²⁷ While Al-Warraq succeeded in establishing arbitration, his broad interpretation of ‘basic rights’ was rejected. The tribunal found that:

properly interpreted in its context “basic rights” refer to “basic property rights” and is not a general reference to civil and political rights such as the right to a fair trial pursuant to Article 14 of the ICCPR [International Covenant on Civil and Political Rights] relied upon by the Claimant.²⁸

However, the tribunal took the references into account, when interpreting fair and equitable treatment.²⁹

In the case of *EDFI v. Argentina*, Argentina referred in general terms to the Universal Declaration of Human Rights (UDHR), the ICCPR, and the UN Convention on the Rights of the Child, and more specifically, to provisions allowing emergency measures in the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR). Those references were part of Argentina’s argument that ‘obligations under investment treaties do not undermine obligations under human rights treaties, and thus, the Treaty should be construed and interpreted consistently with international canons aimed at fostering respect for human rights’.³⁰ In a very human rights-friendly fashion, the tribunal stated that it ‘does not call into question the potential significance or relevance of human rights in connection with international investment law’, yet, it decided that the measures required from Argentina were not in violation of those obligations.³¹

²⁶ Every reference to one category counts just once for the whole case, meaning that when the ECHR was referred to multiple times in one case, this still counted as one reference to one category; however, a reference to a different instrument such as the ACHR would count as a second reference to the same case.

²⁷ *Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2014, para. 177.

²⁸ *Ibid.*, para. 521.

²⁹ *Ibid.*, para. 522.

³⁰ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 192.

³¹ *Ibid.*, paras. 909–14.

Table 1: *Type of references by human rights instrument*

Human Rights Instrument	Global	Regional	Local
Number of References	11	47	5

Contrary to those two cases, the majority of awards (33) featured references from one instrument alone.³²

Two main substantive topics were identified in the references. While questions surrounding expropriation dominated, many references also relate to the right to a fair trial. Socio-economic rights were only brought forward in three cases. The right to water was invoked in *Impregilo v. Argentina* and *Urbaser v. Argentina*, while the right to health was mentioned in the case of *Philipp Morris v. Uruguay*. This shows that human rights references are predominantly used in substantive issues of investment arbitration, such as expropriation and fair and equitable treatment, which can be appealing both to the claimant as well as the respondent. However, procedural issues might also arise, such as the exhaustion of domestic remedies in *Loewen v. US*.³³

Out of the 46 cases, references to jurisprudence of human rights courts were found in 31 cases, while human rights treaties were referenced in 23 cases.³⁴ The dominance of case law strongly suggests a strong appeal of human rights jurisprudence to actors in investment arbitration, in particular the case law of the European Court of Human Rights (ECtHR) regarding the right to property. However, around half of the cases analyzed featured both references to case law and treaty instruments (24).

Six different sources of human rights references were analyzed in the case sample, which can be clustered into three categories: *global*, *regional*, and *local*. Interestingly enough, *global* human rights instruments are only used sporadically; the UDHR five times, the ICCPR in four cases, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the United Nations Convention on the Rights of the Child only in one award.³⁵

The overwhelming number of references based on *regional* human rights instruments reaffirms this assumption. Regional instruments are legally binding and generally possess high compliance capabilities by means of their dispute settlement bodies. References to case law of those tribunals could indicate judicial dialogue or cross-fertilization of the judicial bodies of human rights and investment law.³⁶ In

³² Annex, Cases No. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 32, 33, 34, 36, 39, 41, 42, 45, 46.

³³ *Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, Award, 5 September 2008, para. 165f. In Cases No. 4, 6, 20, and 46, Annex, it was not possible to link the human rights reference to a specific source.

³⁵ Annex, Cases No. 2, 12, 17, 25, 43, 44. In *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010, para. 201, the tribunal cited 'major international conventions on human rights' without mentioning specific treaties, hence, this case only accounted for one reference.

³⁶ See A.M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99–138; A.M. Slaughter, 'Judicial Globalization', (1999) 40 *Virginia Journal of International Law* 1103–24; A. Wiener and P. Liste, 'Lost Without Translation? Cross-Referencing and a New Global Community of Courts', (2014) 21 *Indiana Journal of Global Legal Studies* 263–96.

total, more than 80 per cent of all references relate to the ECHR and case law of the ECtHR. Thus, there seems to be a significant connection between investment arbitration tribunals and the ECtHR. Besides this Eurocentric dominance, the ACHR was referenced eight times³⁷ and the African Charter on Human and Peoples' Rights (ACHPR) once.³⁸ References to specific case law can also be found in two ACHR references.³⁹ Both relate to expropriation but also include certain issues such as moral damages in the case of *Pezold v. Zimbabwe*,⁴⁰ which are usually not raised when invoking an ECtHR case as reference.

This raises the question as to whether geographical factors, such as membership in a regional human rights system, condition the invocation of certain categories of human rights references. With regards to the respondent, the 46 cases show a great variance. Most cases are filed against states in the Americas, namely 12 cases against Argentina, three against Mexico, two against the United States and Ecuador, and one each against Canada and Uruguay. Fifteen cases relate to European states, most of them from Central and Eastern Europe, and only one case, *Channel Tunnel v. UK and France*, against Western European states. Furthermore, five cases are located in Asia, four in Africa, and one in the Middle East. This regional distribution focused on state parties from the Americas and Europe mirrors the use of the respective regional human rights instruments.

The distribution of the nationality of the foreign investor supports this regional focus on Europe and the Americas. Fifty-two claimants were identified in the empirical material, with the majority of them being well-known multinational corporations.⁴¹ With the exception of two foreign investors from the Middle East, Saudi Arabia and Syria respectively, all other cases concerned companies incorporated in Western, industrialized nations. Most foreign investors originated from Europe (34), 11 claimants came from the US, three from Canada, and one each from Australia and Uruguay.

However, only a third of the cases feature states that are parties to the ECHR. This observation is seemingly contradictory to the overwhelming number of ECHR references throughout all cases. This suggests that the prominence of the ECHR and its case law extends far beyond the reach of its immediate member states and has a special status in the realm of investment arbitration. Perhaps it is due to the legal, mostly Western, education of the arbitrators involved,⁴² or the highly developed case law of the ECtHR, in particular with regards to the right to property. The jurisprudence of the ECtHR thus enjoys high acceptability and hence prudence dictates the reference to the ECtHR rather than the Inter-American Court of Human Rights (IACtHR) is more accepted in an arbitration setting.

³⁷ Annex, Cases No. 2, 12, 13, 23, 25, 30, 37, 40.

³⁸ *Al-Warraq v. Indonesia*, *supra* note 27.

³⁹ Annex, Cases No. 30 and 40.

⁴⁰ *Bernhard von Pezold and Others v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, fn. 95.

⁴¹ Cases No. 8, 12, 30, and 32, Annex, feature two claimants each.

⁴² See Franck, *supra* note 15, at 75–83.

Geographically, references to the ACHR and the ACHPR show a similar effect. While the ACHR was invoked in relation to state parties Argentina and Mexico, it also featured in cases related to disputes involving Indonesia and Zimbabwe. Despite the prominence of the ECHR, the cases show no correlation between the state party involved and the human rights treaty invoked.

The third category, *local*, is not based on an international human rights instrument, but relates to the issue of domestic regulatory space. It encompasses five cases in which the human rights references are originating from the constitutional order of the state parties.⁴³ Three of them relate to the economic crisis in Argentina in the early 2000s and the approval of the Economic-Financial Emergency Law, which made it possible for Argentina to change or renegotiate contracts with private investors, prompting investors to file for expropriation. For instance, in the case of *CMS v. Argentina*, Argentina argued that the obligation towards human rights treaties surpasses the obligation to fulfil an investment treaty:

while treaties override the law, they are not above the Constitution and must accord with constitutional public law. Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing and, therefore, in the Respondent's view, stand above ordinary treaties such as investment treaties.⁴⁴

Two years later in 2007, Argentina again invoked the constitutional status of HR treaties in *Siemens v. Argentina* and *Sempra v. Argentina*. However, the argumentation remained vague and relied on the 'institutional survival and preservation of the constitutional order'.⁴⁵ More recently, in *Philipp Morris v. Uruguay*, Uruguay invoked Article 44 of its Constitution, which obliges the state to protect public health.⁴⁶

Those cases are embedded in an ongoing debate in international investment law, namely, whether foreign investment treaties unduly restrict the regulatory capacity of states. A much-debated example in this regard is an alleged responsibility of the state to ensure sustainable development and the protection of the environment at the expense of legal certainty of the foreign investor.⁴⁷ While the constitutional order was not explicitly mentioned, Argentina employed the same line of reasoning in *Impregilo* and *Urbaser*, invoking human rights treaties to guarantee its inhabitants the human right to water in the face of the socio-economic crisis.⁴⁸

2.3. Actors and their strategic use of human rights references

The second indicator relates to the participant in the arbitration, which introduces the human rights reference. As we have seen already in the last sub-section, the tribunal, the claimant, and the respondent make use of human rights references.

⁴³ Annex, Cases No. 9, 31, 34, 36, 37.

⁴⁴ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, 12 May 2005, para. 114.

⁴⁵ *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 331.

⁴⁶ *Philipp Morris Brands Sàrl, Philipp Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 302.

⁴⁷ See also, L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016).

⁴⁸ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 228.

Table 2: *First introduction of reference by actor*

Actor	Respondent	Tribunal	Claimant
Number of Cases (in total: 46)	19	13	14

In the 46 cases, all actors actively employed human rights references, albeit in varying degrees. The respondent, usually the state party in investor-state arbitration, introduced human rights references in most cases (19).⁴⁹ In particular, cases featuring Argentina showed a line of argumentation heavily based on human rights considerations, see, for instance, *EDFI v. Argentina* and *Urbaser v. Argentina*. In 13 cases, the tribunal used human rights references for the first time,⁵⁰ while references introduced by the claimant also accounted for 14 cases.⁵¹ In general, one can say that the respondent references human rights to justify its non-compliance with the investment treaty in place, while the claimant tries to invoke rights for his benefit. The claimants have used the references with regard to questions of expropriation, as well as procedural safeguards for the investor, such as the right to a fair trial or the right to be heard. The latter is embedded in the fair and equitable treatment of a foreign investor. An interesting example in this regard is *Al-Warraq v. Indonesia*, when the foreign investor relied on Articles 11 UDHR, 14(2) ICCPR, 6(2) ECHR, 8(2) ACHR, and 7(1)(b) ACHPR to support his 'right to be presumed innocent until proven guilty' and continued with an extensive use of human rights references also for his alleged 'right to be informed about the charges' and 'right to not be tried in absentia'.⁵² This clearly shows that the use of human rights in investment arbitration is not only an instrument of states to account for human rights obligations, or more poignantly, to use human rights obligations as an excuse for violating investment treaties. In fact, the investors themselves are willing to use arguments based on human rights instruments.

There are multiple ways in which one actor can respond to another using human rights references. As the proceedings follow an adversarial style, the invocation of human rights references by one actor can be picked up by the other, thereby demonstrating the latter's willingness to confront the use of human rights references in investment arbitration. In those cases, the responding actor might comment on the specific human rights reference or even attempt to rebut it with another reference. Due to the final nature of the award, the disputing parties cannot pick up a reference, which is first introduced by the tribunal in its legal reasoning.⁵³ Hence, the total number of cases with regard to the question of responsiveness by other actors only amounts to 33.⁵⁴

⁴⁹ Annex, Cases No. 3, 7, 9, 10, 12, 16, 19, 20, 26, 27, 30, 31, 32, 34, 37, 38, 41, 44, 46.

⁵⁰ Annex, Cases No. 1, 5, 13, 15, 21, 22, 24, 25, 28, 36, 40, 42, 45.

⁵¹ Annex, Cases No. 2, 4, 6, 8, 11, 14, 17, 18, 23, 29, 33, 35, 39, 43.

⁵² *Al-Warraq v. Indonesia*, *supra* note 27, paras. 177–84, 202–4, 240–6.

⁵³ In practice it is very likely that the tribunal raised human rights references earlier in the proceedings, however, it was not possible to code this in the available data.

⁵⁴ In those cases, the reference was first introduced by the respondent or the claimant.

Table 3: *Responding to references by actor*

	Respondent	Tribunal	Claimant
Introduction by Respondent (in total: 19)	/	13 (7 prior discussed by Claimant)	7
Introduction by Claimant (in total: 14)	6	12	/

In the great majority of cases, more precisely in 27 of 33 documents, another actor picked up the human rights reference during the proceedings. As more than one actor can pick up a reference, 36 interactions were identified.

The respondent only accounts for six instances,⁵⁵ similar to the claimant, which responded seven times to references introduced originally by the respondent.⁵⁶ Most striking, however, is the number of responses by the tribunal, which replied in 25 cases.⁵⁷ Twelve of those are cases in which the claimant used human rights references for the first time.⁵⁸ In 13 cases, the tribunal responded to a reference introduced by the respondent. However, in nine of those 13 cases the claimant had commented on the reference, too.⁵⁹ Hence, in 21 cases, the tribunal felt the need to respond to references first introduced or discussed by the claimant. This is a very significant distribution, which strongly suggests a correlation between the human rights argumentation and discussion of the claimant and the tribunal. For instance, in *Fraport v. Philippines*, the tribunal, in the 'Decision on the Application of Annulment', engaged extensively not only in an examination of whether Fraport's right to a fair trial has been violated by the tribunal in the earlier award, but also discussed whether principles enshrined in human rights such as in *dubio pro reo* and *nullum crimen sine lege* can be 'transposed into the context of international arbitral proceedings' – even though the Committee decided in the end that human rights instrument are not applicable.⁶⁰ With regards to the 19 cases in which the respondent introduced the reference, the tribunal only responded to 13. In six of 19 cases in which the respondent introduced a human rights reference neither the claimant nor the tribunal picked up the reference,⁶¹ while in 12 of 14 cases a claimant-introduced reference was addressed by at least one other actor.⁶² This ratio indicates an important role of human rights references made by the claimant in investment arbitration: human rights arguments introduced by the claimant supposedly have a stronger impact than those introduced by the respondent.

⁵⁵ Annex, Cases No. 2, 14, 18, 35, 39, 43.

⁵⁶ Annex, Cases No. 3, 12, 16, 19, 26, 30, 34.

⁵⁷ Annex, Cases No. 2, 3, 4, 6, 8, 10, 11, 12, 16, 17, 19, 23, 26, 29, 30, 31, 33, 34, 35, 38, 39, 41, 43, 46.

⁵⁸ Annex, Cases No. 2, 4, 6, 8, 11, 17, 23, 29, 33, 35, 39, 43.

⁵⁹ Annex, Cases No. 3, 12, 16, 19, 26, 30, 31, 38, 44.

⁶⁰ *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, paras. 188–203, 193.

⁶¹ Annex, Cases No. 7, 9, 20, 27, 32, 38.

⁶² Annex, Cases No. 2, 4, 6, 8, 11, 17, 23, 29, 33, 35, 39, 42.

Broadly speaking, responses to a human rights reference can either be in support of or contesting human rights-based arguments. The sample shows a near split distribution. The case of *Toto v. Lebanon* is a pertinent example for an inclusive approach as the tribunal goes to great lengths to take into account Lebanon's obligations under Article 14 ICCPR and the 'fair hearing' interpretation of the ICCPR Commission – even though Lebanon did not ratify the Optional Protocol to the ICCPR and thus cannot be summoned before the Commission.⁶³ Section 3 will elaborate in more detail on the reasons for including human rights and favouring an inclusive approach.

In contrast, tribunals contest the invocation of human rights references basing it on their limited jurisdiction. In the words of the tribunal in *Biloune v. Ghana*, this means '[the] Tribunal's competence is limited to commercial disputes ... other matters – however compelling the claim or wrongful the alleged act – are outside this Tribunal's jurisdiction'.⁶⁴

Similar arguments have also been advanced by the investor. For instance, in *Pezold v. Zimbabwe*, the claimant refrained from accepting the respondent's justification of a 'margin of appreciation' as the 'principle has developed in the context of human rights adjudication under the European Convention for Human Rights, and is not apt for use in the context of BIT claims'.⁶⁵ Moreover, the tribunal emphasized:

that due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law.⁶⁶

The case of *Rompétrol v. Romania* is particularly insightful as Rompétrol (on behalf of its directors) had already sued Romania at the ECtHR on similar charges of harassment including arrest, detention, criminal investigation, and wiretapping. The ECtHR found Romania in violation of Article 6§1 of the Convention.⁶⁷ Yet, Rompétrol argued during the investment arbitration, 'Romania's reliance on human rights jurisprudence is misplaced'.⁶⁸ Rompétrol pursued an independent line of argumentation based on the investment treaty alone and did not rely on the findings of the ECtHR in favour of the investor. However, Rompétrol did not support a strict exclusionary position towards human rights references, but rather 'argues that human rights standards set a "floor", but not a "ceiling" that would limit the level of protection that might be granted under the Treaty, so that ECHR case law can

⁶³ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras. 158–60. 'ICCPR Commission' is the wording of the tribunal, the correct designation is the UN Human Rights Committee.

⁶⁴ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, §B Jurisdiction over the Dispute.

⁶⁵ *Pezold v. Zimbabwe*, *supra* note 40, para. 459.

⁶⁶ *Ibid.*, para. 465.

⁶⁷ *Affaire Association des Personnes Victimes du Systeme S.C. Rompétrol et S.C. Geomin S.A. et Autres v. Roumaine*, Application no. 24133/03, Judgment (only available in French), 25 September 2013.

⁶⁸ *The Rompétrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 60(d).

only be of assistance by analogy'.⁶⁹ In the perspective of Rompetrol, the level of protection for private actors offered by investment law is actually higher than the one ensured by human rights instruments, which constitute only minimal standard of protection. The tribunal confirmed the exclusionary position and found that it 'is not competent to decide issues as to the application of the ECHR within Romania'.⁷⁰

On the basis of the insights gained by a quantitative and qualitative analysis of 46 cases, we can conclude that human rights are referenced by all actors involved in investment arbitration with a strong preference for references to case law of regional human rights instruments from Europe and Latin America. Contrary to popular perception, foreign investors, which mainly hail from Western, industrialized nations, are not averse to invoking human rights instruments in their argumentation. In fact, a variety of arguments, especially on the right to property and to a fair trial are based on analogical reasoning to human rights instruments. Moreover, the data suggests a correlation between the reasoning of the foreign investor and the inclination of the tribunal to engage in human rights-based argumentation. Together with the near absence of references to international human rights instruments, in particular with regards to economic, social, and cultural rights, the results of this section caution against the proposal that human rights references could lead to a more human rights-friendly system of investment arbitration. However, the quantitative analysis could not provide insights on the question of why human rights references are nonetheless an appealing instrument in legal reasoning in investment arbitration. This will be examined in the next section.

3. THE STRATEGIC FUNCTIONS OF HUMAN RIGHTS REFERENCES IN INVESTMENT ARBITRATION

The last section has identified several important patterns in the practice of human rights references in investment arbitration. In the following, I examine the significance of human rights references in investment arbitration. For the tribunal, human rights references provide guidance in the arbitral decision-making, in particular by assisting in the determination of substantive provisions of the BIT. However, as we have seen from the empirical material, the respondent and the claimant also repeatedly reference human rights. Thus, the second section argues that human rights references can be a special instrument of legal reasoning to reshape the dispute in the language of 'rights'.

3.1 Guidance in the determination of substantive provisions

Two traditional legal sources prevail in integrating human rights arguments into investment arbitration. The first is to rely on Article 31(3)(c) VCLT, which allows taking into account 'any relevant rules of international law applicable in the relations

⁶⁹ Ibid.

⁷⁰ Ibid., para. 87(i).

between the parties' in the interpretation of a BIT.⁷¹ This provision could extend the scope to a human rights treaty applicable between the two signatory parties to the BIT. The second, more widespread, possibility is offered by 'relevant principles of international law' as prescribed by several BITs and Article 38(1) ICJ Statute.⁷² In this scenario, the human rights references serve the function of systemic integration, which 'requires the Tribunal to take ... governing norms of international law into account when interpreting and applying [the respective BIT]'.⁷³ As such, human rights references provide 'useful guidance [e.g.] for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation'.⁷⁴

This form of legal guidance can at most amount to 'guidance by analogy' in the words of the tribunal in *Mondev v. US*, as the human rights instruments in question 'emanate from a different region, and are not concerned ... specifically with investment protection'.⁷⁵ The tribunal in *Pezold v. Zimbabwe* raised the same argument in order to reject the margin of appreciation invoked by the respondent,⁷⁶ but accepted to 'take some heed from *Castillo-Paez v. Peru* (IACHR)' for assessing moral damages.⁷⁷ Here, the tribunal makes a fine, yet crucial, distinction between importing 'external' concepts on the one hand, and being guided or inspired by 'external' legal sources, on the other. In other words, the tribunal rejects doctrines which did not derive from the investment arbitration system, but is open to take into account non-investment related sources of international law in arbitral decision-making.

Human rights references are a useful instrument for the tribunal to determine substantive provisions of the investment treaty in place. For instance, in many cases dealing with expropriation, the state party as well as the tribunal explicitly applied the concept of 'margin of appreciation' to decide whether regulatory measures are justified.⁷⁸ The dominance of references dealing with expropriation issues can be explained by the structural similarity of both concepts in human rights and investment law. However, other scholars highlight that the concept of property in Article 1 of the First Additional Protocol and the jurisprudence of the ECtHR is

⁷¹ See, for example, *Al-Warraq v. Indonesia*, *supra* note 27, para. 177.

⁷² *Channel Tunnel Group Limited and France-Manche SA v. The Secretary of State for Transport of Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de l'Équipement, des Transports, de l'Amenagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, PCA, Award, 30 January 2007, para. 109f.; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 238 (also referring to the eponymous textbook by Ian Brownlie).

⁷³ *Al-Warraq v. Indonesia*, *supra* note 27, para. 203.

⁷⁴ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 312. The function of 'relevant guidance' is also mentioned by *Rompétrol v. Romania*, *supra* note 68, in order to assess standards of due process, para. 89(c).

⁷⁵ *Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 144.

⁷⁶ *Pezold v. Zimbabwe*, *supra* note 40, para. 459.

⁷⁷ *Ibid.*, fn. 95.

⁷⁸ *Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, fn. 170; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, fn. 270; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 247; *Pezold v. Zimbabwe*, *supra* note 40, para. 453.

actually quite different from expropriation clauses in most BITs,⁷⁹ hence 'reference to the jurisprudence of the ECtHR is insufficient reason to apply proportionality in investor-state arbitration'.⁸⁰ Yet, this clearly does not affect the overwhelming use of human rights analogies related to expropriation. For the proportionality analysis of regulatory measures in expropriation claims, human rights references serve to deal with supposed conflicts between human rights and international investment law.⁸¹

The most prominent example in this regard is the case of *Tecmed v. Mexico*, which also serves as a precedent to several other cases in this article.⁸² In *Tecmed* the tribunal had to decide on the concept of regulatory expropriation, which is generally undertheorized in most BITs. In order to do so, the tribunal relied on two sources of external references, the case of *Baruch Ivcher Bronstein v. Peru* at the IACtHR and four cases at the ECtHR including the frequently cited case of *James and Others v. UK*.⁸³ By relying on the *Ivcher Bronstein* case, the tribunal emphasized that it 'should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced'⁸⁴ when analyzing whether an indirect expropriation took place. The ECtHR case law came into play when the tribunal had to decide on the proportionality of the expropriatory measure of the Mexican National Ecology Institute in the name of the public interest. In this regard, the European case law serves to introduce a 'reasonable relationship of proportionality' between the means employed and the aims sought and the concept of 'legitimate interest' of the investor.⁸⁵ The tribunal thus imported concepts originating from the European and American human rights jurisdiction into the substantive issues of the investment arbitration to guide its evaluation whether an indirect expropriation took place.

3.2. Argumentative practice

By invoking a reference or an analogy from an external source, the rational actors also intentionally shape the judicial discourse as they attempt to shift the balance of power in the arbitration process in their favour. This is in line with a prominent stream of legal thought that characterizes international law as an *argumentative practice*, which 'is about persuading target audiences such as courts, colleagues, politicians, and readers of legal texts about the legal correctness – lawfulness, legitimacy, justice, permissibility, validity, etc – of the position one defends'.⁸⁶

⁷⁹ See, U. Kriechbaum and C. Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law', in S Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Lucius Wildhaber* (2007), 743–62.

⁸⁰ G. Bücheler, *Proportionality in Investor-State Arbitration* (2015), 151. For a critical discussion of *Tecmed*, see *ibid.*, at 141–51.

⁸¹ See critically, J. Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement', in F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration* (2017).

⁸² See for instance the case of *Azurix v. Argentina*, *supra* note 74.

⁸³ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras. 116, 122.

⁸⁴ *Ibid.*, para. 116.

⁸⁵ *Ibid.*, para. 122.

⁸⁶ M. Koskeniemi, 'Methodology of International Law', (2007) MPEPIL.

In the relevant literature, two different positions can be identified which aim to explain the appeal of human rights arguments for the argumentative practice in investment arbitrations: on the one hand, Thomas Wälde prominently argues in *Thunderbird v. Mexico* that the similar structure of human rights and investment law results in higher persuasiveness of the analogies to human rights case law adopted in arbitral tribunals. He referred to the ECtHR as '[t]he judicial practice most comparable to treaty-based investor-state arbitration ...'.⁸⁷ A similar institutional design between human rights and investment tribunals certainly facilitates the transfer of norms and legal standards enshrined in case law. This could also be an incentive to practice judicial dialogue, which normally results in the mainstreaming of common concepts and ideas across different legal spheres.⁸⁸

On the other hand, several authors claim that human rights possess a certain normative authority, which makes them attractive to rational actors. By using analogies from human rights instruments, the actor engages in the 'rhetoric of rights'. He thereby taps on a higher source of authority embodied in the normative superiority of global, inalienable human rights. In other words, human rights in this sense are an instrument in legal reasoning to claim authority and the moral high ground in a dispute. The shift in the focus of arbitration from the primarily technical to the normative manifests itself in using existing human rights jurisdiction as the relevant point of reference. By framing the dispute in the language of rights and invoking a reference to human rights case law, the actor suggests that a more authoritative body has already solved the decisive question.⁸⁹ As Jonathan Gorman elaborates, 'there is a widespread respect for rights as if they were absolute standards of morality or law ... Thus, the increasing use of the concept of rights is often not out of a proper respect for the rights held by others, but rather a demand that the rights held by oneself should be respected'.⁹⁰ Indeed, this could explain the empirical observation that human rights references are not only used by state parties, but also by the investors. Analyzing the case sample reveals that actors have different assumptions when referring to human rights.

For the claimant, referring to human rights is an opportunity to expand his or her standing vis-à-vis the state party, as, 'most of the rights provided by a BIT, that means fair and equitable treatment, most favoured clause, minimum standard of treatment, prohibition of discrimination and access to judicial proceedings ... are designed to protect investors but are vaguely worded and are themselves indeterminate'.⁹¹ Those indeterminate rights of the investor mirror (similarly) indeterminate fundamental human rights guarantees of the right of equality and justice, which facilitates the inclusion. Similar to the investor, state parties also perceive an asymmetry in

⁸⁷ *Thunderbird v. The United Mexican States*, UNCITRAL, NAFTA, Arbitral Award, 26 January 2006, Separate Opinion by Thomas Wälde, para. 141.

⁸⁸ Schill and Tvede, *supra* note 12, see also more generally, P.-M. Dupuy, 'Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in Dupuy, Petersmann, and Francesconi, *supra* note 9, at 45–62.

⁸⁹ M. Koskeniemi, *The Politics of International Law* (2011), 141.

⁹⁰ J. Gorman, *Rights and Reason* (2014), 1f.

⁹¹ Y. Castillo, 'The Appeal to Human Rights in Arbitration and International Agreements', (2012) 12 *Anuario Mexicano de Derecho Internacional* 47–84, at 73.

investment law, because the state parties are the only ones legally bound to provide and protect certain guarantees included in the respective BITs. Those obligations could also be in conflict to equally binding human rights treaties ratified by the state parties. Furthermore, it is generally acknowledged that a sovereign authority has to be responsible for and should act in the interest of its population. Tribunals use human rights references to guide, support, and explain their legal reasoning, so as to provide legitimacy to its decision. Investor-state arbitration is based upon the voluntary participation of all actors involved and the resulting awards are supposed to be final without appeal, hence, there is a higher need for the tribunal to expand and elaborate its underlying reasoning to the parties submitting to its arbitration. For instance, the tribunal may be more inclined to respond to human rights references discussed by the claimant, because the investor has more leverage in a procedural sense in deciding which form of investment arbitration to choose or how to enforce the award. This could explain the significant empirical link between the discussion of a reference by the claimant and a response by the tribunal.

Notably, the tribunals only reference cases of human rights when the case law amounts to 'consistent jurisprudence',⁹² emphasizing an integrationist perspective. This becomes apparent in the frequent use of ECHR cases *James v. UK* (1986) and *Mellacher v. Austria* (1989) on the right to property by the tribunal. In this sense, the assumption of Jonathan Fry might hold true that 'many of the human rights cases cited by arbitral tribunals are some of the most important human rights cases. Moreover, arbitral tribunals seem to rely on these cases in their decisions, not merely in their *obiter dicta*. These points suggest that arbitral tribunals are not throwing in references to human rights cases merely for the sake of appearances'.⁹³ While it was not possible to conclusively verify this presumption in the empirical data, Fry's observation supports the argument of this section that human rights references serve several strategic functions for all actors involved. They can provide guidance by analogy and support the determination of substantive provisions, while also being a crucial instrument in the argumentative practice of investment arbitration. However, after the macro-level analysis of patterns of human rights references in investment arbitration (Section 2) and the micro-level analysis of the functions of human rights references in arbitration cases (Section 3), the final questions remain with respect to the effect that the practice of human rights references might have on the meta-level, the system of investment arbitration.

4. THE QUEST FOR LEGITIMACY: HUMAN RIGHTS REFERENCES FROM THE PERSPECTIVE OF THE COMPARATIVE PUBLIC LAW APPROACH

While the preceding sections illuminated the merits of human rights references for the process of arbitration and the actors involved, human rights references also have

⁹² *Continental v. Argentina*, *supra* note 78, fn. 407; see also *Mondev v. US*, *supra* note 75, para. 141 ('in a series of decisions').

⁹³ See J. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity', (2007) 18 *Duke Journal of Comparative & International Law* 77–149, fn. 15.

the potential to generate legitimacy for the system of investment arbitration. This can be achieved by analyzing references as part of the comparative method of legal reasoning in investment arbitration.

4.1. The comparative public law approach to investment arbitration

Investment treaty tribunals are heavily engaged in using external references as part of their comparative method in legal reasoning.⁹⁴ While there is an increasing trend to accept comparative methods as part of the legal reasoning in most constitutional or administrative domestic courts, treaty interpretation in international law tended to be more reserved on the matter.⁹⁵ However, in recent times a comparative approach began to thrive in several fields of international law, the most prominent being international human rights law.⁹⁶ The same trend can be observed in international investment arbitration as the practice of international investment arbitration features an exceptional and growing number of references to external sources of jurisprudence. This trend thus defies the fragmentation thesis of international law and in particular a supposed isolation of investment law from other legal regimes.⁹⁷

In recent years, several scholars spoke out in favour of both, applying a comparative public law approach in studying the process of investment arbitration and the use of comparative law in the reasoning of arbitration tribunals.⁹⁸ According to Stephan Schill, a comparative approach in investment treaty arbitration can achieve six objectives: (i) clarify vague principles; (ii) balance investment protection and non-investment concerns; (iii) offer a uniform interpretation method; (iv) ensure cross-regime consistency; (v) legitimize by showing analogue solutions of domestic and international courts; and (vi) suggest modifications.⁹⁹ Those six functions of a comparative public law approach in investment treaty interpretation are of utmost importance especially in the discussion surrounding the legitimacy crisis, as they mirror the criticism voiced against investment arbitration in recent years and propose various starting points for a democratic transformation.

This is not an isolated proposal. Valentina Vadi also stresses the legitimizing factor of the comparative approach, which ‘can build coherence at the international

⁹⁴ See Schill, *supra* note 1; Schill and Tvede, *supra* note 12; V. Vadi, ‘Critical Comparisons: The Use of Comparative Law in Investment Treaty Arbitration’, (2010) 39 *Denver Journal of International Law and Policy* 67–100, at 69.

⁹⁵ See M. Bothe, ‘Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte (1976) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 280–99; M. Adenas and D. Fairgrieve, *Courts and Comparative Law* (2015).

⁹⁶ See K. Dzehtsiarou and V. Lukashevich, ‘Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court’, (2012) 30 *Netherlands Quarterly of Human Rights* 272–98; C. McCrudden, ‘Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared’, (2012–2013) 15 *Cambridge Yearbook of European Legal Studies* 383–416.

⁹⁷ See E. Benvenisti and G.W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, (2007) 60 *Stanford Law Review* 595–631; M. Koskeniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, 13 April 2006. See also R. Hofmann and C.J. Tams, *International Investment Law and General International Law. From Clinical Isolation to Systematic Integration?* (2011).

⁹⁸ See Schill, *supra* note 1; S.W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’, (2011) 52 *Virginia Journal of International Law* 57–102; Vadi, *supra* note 12.

⁹⁹ See Schill, *supra* note 98, at 88.

law level',¹⁰⁰ but also generate a “circuit of legitimation”, so that reference to a leading case lends dignity to more recent cases'.¹⁰¹ The persistent practice of referencing leading cases ‘weaves a complex tapestry of references, each replying to and reinforcing all the others, which in turn creates a global jurisprudence’.¹⁰² Furthermore, resorting to ‘comparative reasoning allows the interpreter a fresh approach to her own system, and it can be perceived as an “instrument of progress”, mutual understanding and dialogue among civilisations’.¹⁰³

Referencing human rights instruments in investment arbitration naturally differs from the use of comparative methods in domestic courts. Most of the times, neither the tribunal nor the claimant or the respondent truly engage in comparing the interpretation of one provision across various legal systems. Human rights references are used sporadically, but nevertheless strategically: foreign investors draw analogies to case law of human rights tribunals to advance their claim, while state parties seek to justify their actions by demonstrating their obligations to human rights treaties.

Indeed, the theoretical and empirical discussion in this article has pointed out that the comparative approach to investment treaty interpretation is not only a legal technique, but also an inherently normative endeavour. Comparative reasoning has the potential to respond to the legitimacy challenge of investment arbitration and to cautiously transform the system from within. This course of action seems to be more effective, expeditious, and less complicated than most proposals focusing on a complete overhaul of the institutional framework.

4.2. Human rights references and legitimacy from a comparative perspective: A critical evaluation

Yet, the question remains if using human rights references can actually fulfil those high hopes put forward by proponents of the comparative approach?

Following the arguments proposed by Schill,¹⁰⁴ human rights references could be of great value to three conflictive issues in particular. They could help, first, to reduce the indetermination of legal concepts in investment law, second, to balance investment and non-investment concerns, and third, to ensure cross-regime consistency. In this sense, the legitimacy of investment arbitration is endangered by the absence of predictable jurisprudence, an inherent pro-investment bias at the expense of non-investment concerns, and procedural obstacles such as a lack of transparency, among others. From a theoretical perspective, one would expect that more determinate concepts account for more stability, that the inclusion of human rights helps to minimize the structural bias of the investment regime, and cross-regime consistency leads to more systemic integration of investment arbitration into the international law system. Yet, the empirical results of this study contradict the optimistic theoretical expectations in part.

¹⁰⁰ See Vadi, *supra* note 12, at 18f.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ See Schill, *supra* note 98, at 88.

First, to solve the problem of indetermination, it was shown that especially the concepts of expropriation and fair and equitable treatment are appealing to actors. Certainly, cases such as *Tecmed*, which effectively used human rights to narrow down the applicable provisions, had a huge impact on the concept of regulatory expropriation. However, in many cases human rights are only of limited value as they are themselves indeterminate, the respective case law is innumerable and very often features conflicting results.¹⁰⁵ This suggests that the use of human rights analogies could specify a concept, however, another human rights case could be invoked to support the opposite interpretation. Thus, it seems unlikely that the use of human rights reference contributes much to obtain objective, universal standards and definitions for the majority of investment law provisions.

From a democratic perspective, it is highly problematic to ‘outsource’ the determination of crucial elements in investment law to external institutions that are not legitimized to exercise this form of authority over the subjects of investment law. Neither private nor public actors in investment law have ever consented to submit to this external jurisdiction. This suggests that the value of human rights references to determine concepts of investment law is varying. As a result, certain human rights references are a valuable tool to concretize indeterminate concepts in investment law. This holds true for those concepts that share a strong similarity to human rights norms such as the right to property and expropriation.¹⁰⁶ However, I argue that one should exercise caution as relying too much on external concepts and case law to counter the inherent indetermination and inconsistency in the myriad of investment treaties could lead to even deeper rifts and contestation in the system of international investment arbitration.

Second, regarding the balancing of investment and non-investment concerns, it was evident that the use of human rights in the form of references in investment arbitration is mainly motivated by procedural-interpretative and rational-strategic motives.¹⁰⁷ With the exception of the three cases of *Impregilo*, *Urbaser*, and *Philipp Morris* no balancing exercises between investment and non-investment concerns manifested itself in the empirical analysis of the use of human rights references. The case study primarily featured human rights, which can be used to the advantage of both actors involved in the arbitration. In this sense, the right to health in the case of *Philipp Morris* and the right to water in *Urbaser* and *Impregilo* were very isolated instances in the empirical material when fundamental non-investment concerns in the form of human rights were invoked by the respondent.

This result is in line with the claims of human rights organizations that foreign investment and its legal protection severely damage natural resources and economic development. In their view, investment tribunals only take human rights into account when the rights invoked could serve investment concerns.¹⁰⁸ It is remarkable that the empirical analysis shows not even state parties using third-generation rights

¹⁰⁵ Koskenniemi, *supra* note 86.

¹⁰⁶ See [Section 3.1](#).

¹⁰⁷ See [Section 3.2](#)

¹⁰⁸ See also Alvarez, *supra* note 5, at 308.

in their reasoning. Consequently, third-party interests that are not in favour of investments are not strengthened by the use of human rights references. However, the very prominent *amicus curiae* submissions in the cases of *Aguas del Tunari v. Bolivia*, *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, and *Biwater Gauff v. Tanzania* voiced environmental and social concerns during the arbitration proceedings.¹⁰⁹ With a view on the new line of 'constitutionalist' reasoning by Argentina discussed above and the increasing participation of human rights NGOs as *amicus*, it is likely that non-investment concerns are creeping up on the side-lines of investment arbitration, for instance through state parties that wish to justify their 'right to regulate'.

First steps of this development can be found most recently in the award of *Urbaser v. Argentina*, where the tribunal found for the first time that it enjoyed jurisdiction over a HR counterclaim. With regards to the human rights obligation invoked by the respondent, the tribunal determined that:

international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.¹¹⁰

While this does not mean that multinational companies are bound by the same human rights standards as stated, 'the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights'.¹¹¹ Thus, in light of the principle of systemic integration, the 'BIT cannot be interpreted and applied in a vacuum'.¹¹² Ultimately, the tribunal found that the 'right to water' only obliges state parties to 'provide' and not private actors to 'abstain'. As the respondent did not bring forward any other international law obligation of the claimant, the respondent's counterclaim was dismissed. The tribunal concluded that:

[t]he situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.¹¹³

However, it did not clarify which particular human right bind foreign investors.¹¹⁴ It remains to be seen whether future cases will adopt this human rights-friendly view

¹⁰⁹ See H.L. Bray, 'ICSID and the Right to Water: An Ingredient in the Stone Soup', (2014) 29 *ICSID Review* 474–83.

¹¹⁰ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1195.

¹¹¹ *Ibid.*, para. 1199, see also para. 1209ff.

¹¹² *Ibid.*, para. 1200.

¹¹³ *Ibid.*, para. 1210.

¹¹⁴ See also E. Guntrip, 'Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?' *EJIL: Talk!*, 10 February 2017, available at www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/, accessed 27 October 2017.

of the *Urbaser* tribunal and provide clarification which non-investment concerns must be taken into account by the foreign investor.

Third, it is questionable whether human rights references actually increase cross-regime consistency between human rights and investment law. While references are an important indicator for an evolving harmonization between two legal regimes, they are only of limited value in this specific relationship. The case law of investment tribunals features a great amount of references to various legal regimes. Moreover, the tribunal in *Cementownia v. Turkey* considered taking into account evidence brought forward in a related procedure by the claimant at the ECtHR.¹¹⁵ Yet, human rights courts neither link nor include any kind of reference to investment treaties or cases of investor-state arbitration.

This utter silence from human rights courts is remarkable as several cases in recent years were adjudicated both in human rights and investment tribunals. While this form of ‘parallel’ adjudication is rather unusual and most cases, albeit substantially related to some extent, focus on different claims, they yield the most likely opportunity for spill overs between investment and human rights tribunals.¹¹⁶ Those ‘parallel’ cases include, among others, the aforementioned case of *Rompetrol v. Romania* and its parallel dispute at the ECtHR,¹¹⁷ the prominent case of *Yukos v. Russia*¹¹⁸ and its related litigation at the ECtHR,¹¹⁹ as well as the highly politicized case of *Chevron v. Ecuador*,¹²⁰ which had significant repercussions at the Inter-American human rights system.¹²¹ While no open conflict or blunt rejection has taken place between the two adjudication tribunals, this silence is telling.

Moshe Hirsch has uncovered how the ‘socio-cultural distance’ of human rights and investment law can explain this fragmentation between the human rights and the investment regime.¹²² Factors such as different socialization processes of human rights and investment lawyers result in dissimilar legal cultures and different views regarding the role of adjudicators and the tribunal. While human rights courts emerged out of a public law paradigm, zealously protecting both individual rights and *erga omnes* obligations, investment tribunals have invariably operated under a private law framework and are established *ad-hoc*. Thus, investment tribunals generally refrain from occupying a law-making role. Moreover, as mentioned earlier, importing external concepts from an arbitration based on a bilateral investment

¹¹⁵ See *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, §98.

¹¹⁶ See also C. Brown, ‘Investment Treaty Tribunals and Human Rights Courts’, (2016) 15 *The Law and Practice of International Courts and Tribunals* 287–304.

¹¹⁷ See *Affaire Association des Personnes Victimes du Systeme S.C. Rompetrol et S.C. Geomin S.A. et Autres v. Roumaine*, *supra* note 67.

¹¹⁸ *Yukos Universal Limited (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227.

¹¹⁹ *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04. In the case sample, the *Yukos* case at the ECtHR was repeatedly referred to in *Hulley v. Russia*, *Renta, Quasar de Valors et al. v. Russia*, and *RosInvestCo v. Russia*.

¹²⁰ *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, PCA Case No. 2009-23.

¹²¹ See the *Request for Precautionary Measures before the Inter-American Commission on Human Rights* by the Lago Aggio plaintiffs on 9 February 2012.

¹²² See M Hirsch, ‘The Sociology of International Investment Law’, in Z. Douglas, J. Pauwelyn, and J.E. Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP 2014); M. Hirsch, *Invitation to the Sociology of International Law* (OUP 2015).

treaty to a multilateral human rights framework could cause serious democratic challenges to the consent-based nature of international dispute settlement.

This plays out in a twofold manner. On the one hand, human rights courts refrain from using references to investment law and arbitration in their reasoning. On the other, investment tribunals are equally selective when employing external human rights references. As identified above, human rights are only invoked when it is in the benefit of the respective actor. This 'pick and choose'-approach of investment tribunals does not lead to a thorough, substantive cross-regime consistency between the human rights and investment regime, but rather serves as a form of window-dressing.

Using human rights references only as a form of window-dressing in investment arbitration has serious consequences for the authority of human rights as well. Several scholars critically claim that actors themselves, by invoking human rights in a superficial and selective manner, are themselves destroying the normative authority of human rights. Martti Koskenniemi famously analyzed this process as 'human rights mainstreaming'.¹²³ For the human rights community, the empirical results of this study confirmed, '[i]f the institutional outcomes are not changed, then the change of the vocabulary will only end up stunning the capacity for transformation that was originally sought'.¹²⁴

5. CONCLUSION

In this study, I discovered that the role of human rights reference in investment arbitration is contingent on the mode and nature of the reference in the arbitration proceedings. The empirical analysis contained herein provided insight into the links between the interaction of the actors and the consequences of the nature of the reference. The theoretical section determined that human rights references can serve two particular functions, namely, providing guidance in the interpretation and determination of substantive rules, and benefitting the actors' legal reasoning in framing and shaping the dispute within the 'rhetoric of rights'. By linking those observations to the systemic perspective of the comparative approach to investment law, the study carved out the crucial role references and analogies can play with regard to the legitimacy of the system of investment law.

The study was successful in putting several myths related to human rights and investment arbitration under the spotlight. On the one hand, the study debunked the myth that human rights law and investment law are inherently in conflict with each other. The empirical results suggest that human rights and investment concerns should not be pigeonholed, but have the potential to complement each other in the practice of investment arbitration. They cannot be detached from the legal reasoning in investment arbitration, but rather signal the possibility to balance and harmonize both systems. On the other hand, the study corroborated the

¹²³ See M. Koskenniemi, 'The Politics of International Law – 20 Year Later', (2009) 20 *European Journal of International Law* 11.

¹²⁴ *Ibid.*, 13.

claim that, to date, human rights in the sense of third party interests (in particular economic and social rights as well as third-generation human rights) only played a very limited role in investment arbitration. Most of the time human rights references are used apologetically, and not even the state parties feel compelled to voice non-investment concerns. This significantly reduces the legitimizing effect of human rights references and analogies, as they cannot truly unfold their potential to balance investment and non-investment concerns.

6. ANNEX: LIST OF CASES

1. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006)
2. *Hesham T. M. Al Warraq v. The Republic of Indonesia*, UNCITRAL, Award (15 December 2014).
3. *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008)
4. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007)
5. *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006)
6. *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, (27 October 1989)
7. *Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008)
8. *Channel Tunnel Group Limited and France-Manche SA v. The Secretary of State for Transport of Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de l'Équipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, PCA, Award (30 January 2007)
9. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 (12 May 2005)
10. *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008)
11. *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009)
12. *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012)
13. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011)
14. *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, UNCITRAL, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010)
15. *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (redacted version) (17 July 2006)
16. *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013)
17. *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010)

18. *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010)
19. *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (18 July 2014)
20. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011)
21. *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001)
22. *Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, Award (5 September 2008)
23. *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007)
24. *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010)
25. *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award (11 December 2013)
26. *Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2 (11 October 2002)
27. *National Grid PLC v. The Argentine Republic*, UNCITRAL, Award (3 November 2008)
28. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012)
29. *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (redacted version) (23 April 2012)
30. *Bernhard von Pezold and Others v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015)
31. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016)
32. *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award (4 August 2010)
33. *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012)
34. *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013)
35. *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award (12 September 2010)
36. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009)
37. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007)
38. *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2007)
39. *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011)
40. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003)

41. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012)
42. *Total, S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010)
43. *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009)
44. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016)
45. *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award (1 July 2009)
46. *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011)

Other cases included in the study:

Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005)

Affaire Association des Personnes Victimes du Systeme S.C. Rompetrol et S.C. Geomin S.A. et Autres v. Roumaine, ECtHR Application no. 24133/03, Judgment (only available in French) (25 September 2013)

Bronstein v. Peru, IACtHR Case 11.762, Judgment (6 February 2001)

Castillo-Paez v. Peru, IACtHR Case No. 10.733, Judgment (3 November 1997)

Chevron Corporation and Texaco Petroleum Corporation v. Ecuador, UNCITRAL, PCA Case No. 2009-23

Clementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009)

James and Others v. UK, ECtHR Application no. 8793/79, Judgment (21 February 1986)

Emilio Augustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000)

OAo Neftyanaya Kompaniya Yukos v. Russia, ECtHR Application no. 14902/04, Judgment (15 December 2014)

Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009)

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), Award (9 April 2015)

Thunderbird v. The United Mexican States, UNCITRAL, NAFTA, Arbitral Award (26 January 2006)

Yukos Universal Limited (Isle of Man) v. Russia, UNCITRAL, PCA Case No. AA 227