# STRANGER THINGS? NEW OBLIGATIONS AND JURISDICTIONS IN INTERNATIONAL INVESTMENT TREATIES AND ARBITRATIONS

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International Investment Treaties and their associated arbitrations have long been thought to be an enclave for the rigorous pursuit of purely commercial interests – usually at the behest of multinationals. On one level this is unsurprising – International Investment Treaties are, after all, all about investment and, indeed, this has been and to a large extent remains the primary focus of the Treaties and the arbitrations brought under them. The concomitant result of that is that human rights and environmental protections have, historically, had little or no relevance to the arbitral tribunal's deliberations and awards.[1] Indeed, of the over 3000 investment treaty instruments[2] in existence[3] only a handful – and it is a recent handful at that – contain any sort of human rights or environmental protection provisions.[4]

On another level, however, the absence of any consideration of human rights and environmental protections (or even "soft law" concepts such as corporate social responsibility) is surprising. Since Nuremberg, public international law has recognised that unrestrained domestic economic behaviour can violate international law.[5] It is now becoming established that human rights[6] and environmental rights[7] should form part of the *ius cogens*. Further, international investment arbitrations stem from treaties – a fact which has two consequences. First, the rights and obligations at issue are ultimately founded in international law.[8] Second, the provisions of Article 31 of the Vienna Convention on the Law of Treaties apply. Article 31(3)(c) requires *"any relevant rules of international law applicable in the relations between the parties" "shall"* be taken into account. Where the parties to an International Investment Treaty are both signatories to any form of treaty providing for human rights or environmental protections, then those treaty provisions could and should be relevant in any subsequent international arbitration.[9]

Thus, it would be odd if International Investment Arbitration did not begin to recognise or consider the application of non-commercial concepts of public international law.

There have been attempts to agree international principles or guidance for corporate conduct since as early as 1977 with a draft UN Code of Conduct in Transnational Corporation. A further attempt at the same document was made in 1992. In 2003, the funders themselves attempted to formulate a framework for addressing environmental and social risks in projects with the "Equator Principles". The UN returned to the fray with the Special Representative's report on *"Guiding Principles on Business and Human Rights"*[10] in 2011. Most recently, in 2014, the UN Human Rights Council established an *"open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights"*, which was tasked with developing a legally binding instrument to regulate transnational corporations' activities in human rights law.[11] No instrument has yet been approved, but the latest draft was published in August 2020.[12]

Yet, such principles are rarely invoked in International Investment Treaties or Tribunal Awards. As at 2012, Dolzer and Schreuer were able to conclude:

> *"Whether or not the object and purpose of investment – treaties – the increased flow of foreign investment – would be promoted or hindered by an extension of the subject matters of the treaties, and a corresponding new design of their nature, will have to be a necessary part of the future discussion of BITs in their traditional scope."*[13]

This article therefore considers the current state of the law in this area. In doing so, it discusses the extent to which there is either a tension in Tribunal Awards or whether there is a visible trend in where the law in this area is or could be going. It starts with what is a striking decision in many ways – *Chevron v Ecuador.*[14]

## Chevron v Ecuador

Until recently, where they referred to them at all, investor-State Awards largely relied on human rights instruments to protect investors' economic activities, rather than to protect those who claim to have been harmed by such activities. That was the position in *Chevron Corp & Texaco Petroleum Corp v The Republic of Ecuador.*[15]

Chevron had taken over Texaco in 2001 in circumstances where a Texaco subsidiary was facing allegations of long-standing pollution in Ecuador. A class action had been brought in the United States and dismissed in 2002 on *forum non conveniens* grounds. In 2003, a different but overlapping set of Plaintiffs had commenced a claim against Texaco in the Superior Court of Nueva Loja in Lago Agrio ("the Lago Agrio Claims"). In 2009, Chevron commenced an International Investment Treaty Arbitration against Ecuador alleging, amongst many other things, that the conduct of the Lago Agrio Claims breached the US – Ecuador BIT.[16]

By 2011, the Plaintiffs had succeeded in the Lago Agrio Claims and obtained a judgment of US$18.2bn.[17] The judgment was appealed and at each stage the judgment was upheld by the Ecuadorean Courts. Meanwhile, the Investment Treaty Arbitration continued.

For present purposes, there are three important awards – the Third Interim Award on Jurisdiction, the First Partial Award on Track I, and the Second Partial Award on Track II.

The Awards must be read in light of the fact that the arbitration was, as per traditional arbitral principles, confined to the parties to or seeking to derive benefit from the BIT – Chevron, Texaco and Ecuador. The Plaintiffs in either set of the underlying proceedings were not parties.

Further, when an Ecuador-based and an international NGO petitioned to be allowed *amicus* status – because of the impact of the Arbitration on the Plaintiffs[18] – that petition was refused.[19]

As far as jurisdiction is concerned, the discussion turned on the relationship between arbitral principles and public international law. Starting with the proposition that the Tribunal has no jurisdiction without the consent of the State or the parties,[20] the Tribunal reasoned that as the underlying Plaintiffs were not parties to the Arbitration, the Tribunal could not have jurisdiction over them.[21] The Arbitral Tribunal then went on, however, to consider the impact of its rulings on the underlying Plaintiffs as a potential bar to jurisdiction. This was rejected as a bar to the Arbitral Tribunal's jurisdiction because any potential impact was not a jurisdictional question but one that turned on the final award and form of decision.[22] Finally, a contractual, private law approach was adopted to the actual issues. Those, the Tribunal decided, were solely between the parties to the Arbitration and if that meant that Ecuador infringed the rights of the underlying Plaintiffs, that would be a matter between Ecuador and them. Thus:

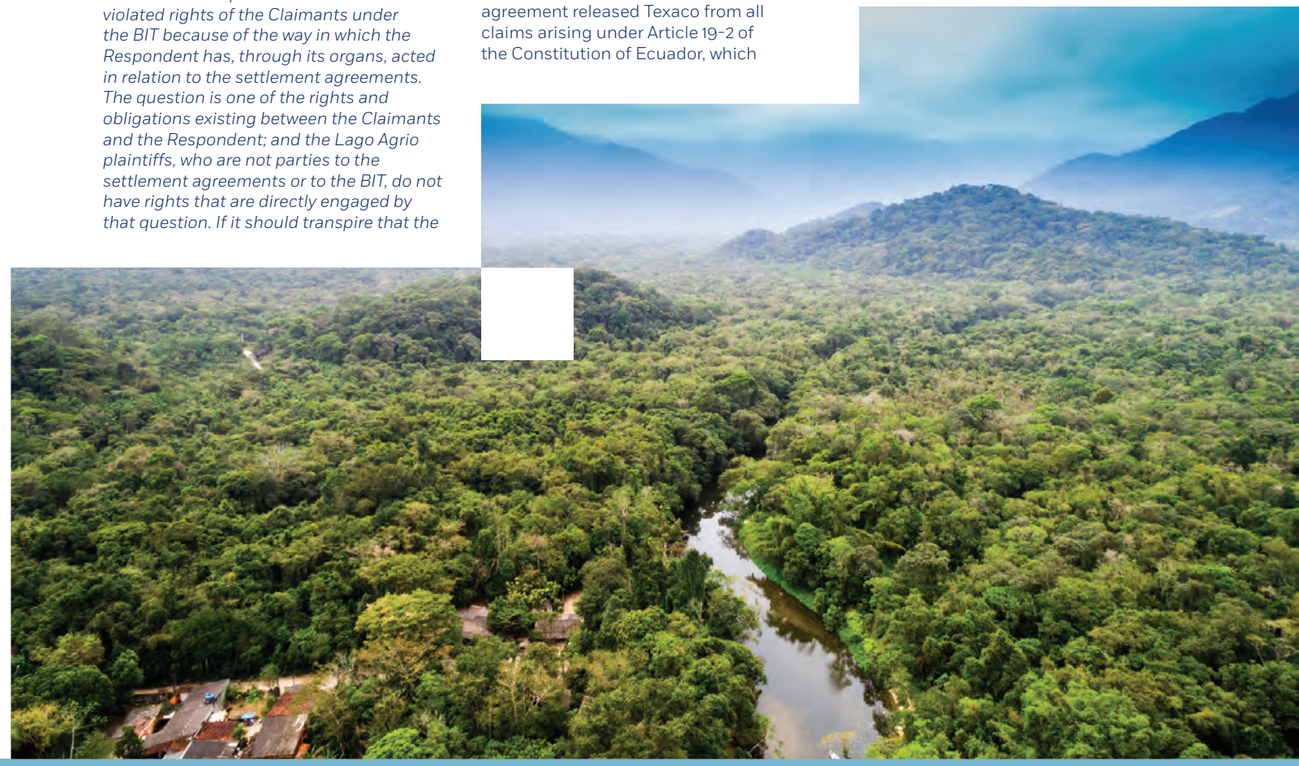
> *"The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has, through its organs, acted in relation to the settlement agreements. The question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties to the settlement agreements or to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal."* [23]

> ***"It would be odd if International Investment Arbitration did not begin to recognise or consider the application of non-commercial concepts of public international law."***

This, it is submitted, is paradigm private law, arbitral reasoning and within the four walls of private law dispute would be entirely uncontroversial. When, however, one moves to the First Partial Award on Track I and the Second Partial Award on Track II, which began to deal with the merits, a different picture emerges.

The First Partial Award concerned the interpretation of a settlement agreement reached in 1995 between Texaco and Ecuador, which was governed by Ecuadorean law (in which none of the Tribunal was qualified).[24] The settlement agreement released Texaco from all claims arising under Article 19-2 of the Constitution of Ecuador, which guaranteed to each person *"the right to live in an environment that is free from contamination"* and provided that "[i]*t is the duty of the State to ensure that this right is not negatively affected and to foster the preservation of nature …"*[25] The question was whether the settlement also released Texaco from any claims individuals might have to enforce their *"diffuse rights"* under Article 19-2 (diffuse rights being *"indivisible entitlements that pertain to the community as a whole such as the community's collective right to live in a health and uncontaminated environment"*).[26]

The Tribunal held that individuals could still claim under Article 19-2 in respect of personal harm suffered as a result of environmental contamination.[27] However, all claims in respect of "diffuse rights" (which do not require a claimant to show personal harm) had been settled. The




Tribunal reasoned that, as at 1995, only the State could bring a claim under Article 19-2 in respect of diffuse rights, and therefore the State was entitled to – and did – settle all claims arising from those diffuse rights. Ecuador's Environmental Management Act of 1999 later gave individuals standing to bring claims in respect of diffuse rights, but by that time any claims against Texaco under Article 19-2 had been extinguished by the settlement agreement.[28]

By 2018, the Lago Agrio Claims had been through the Ecuadorean legal system (the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court) and the initial judgment had been upheld. In the Second Partial Award, the Tribunal itself subjected the first instance judgment to close scrutiny including, for example, the underlying evidence[29] and the credibility of the judge at first instance.[30]

The Tribunal found two treaty breaches. It found a breach of Article II(3)(a) requiring Ecuador to extend to investors fair and equitable treatment and treatment required by customary international law.[31] The Tribunal concluded that the first instance judgment had been *"ghostwritten"* for the judge in return for a possible financial reward[32] and that the subsequent appellate courts did nothing to reverse that position when, the Tribunal believed, they should have done so.[33] As a result of that, the Tribunal reasoned, there had been a denial of justice which could be attributed to the Ecuadorean State.[34] In reaching that finding, the Tribunal referred to a number of international human rights instruments concerning due process, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the UN Basic Principles on the Independence of the Judiciary.[35] The consequences were that the first instance judgment was declared unlawful and did not bind Chevron.[36] Further, Ecuador was to make full reparation to Chevron in respect of any injury caused by the enforcement or recognition of the first instance judgment.[37]

The Tribunal also found that Ecuador had breached Article II(3)(c) of the Treaty, an umbrella clause, on the grounds that it had failed to observe the release in the 1995 settlement agreement.[38] In other words, the Ecuadorean courts' finding that the Lago Agrio Plaintiffs' claims had not been settled was a breach of international law by the Ecuadorean State because the Arbitral Tribunal had decided that the claims *had* been settled. Chevron was entitled to full reparation for any losses suffered as a result.

Whichever way one examines it, *Chevron* was a stark case. If the Tribunal was right, then: (a) there was stark judicial corruption which the appellate courts did not rectify; and (b) four tiers of Ecuadorean courts had reached the "incorrect" conclusion on a question of Ecuadorean law regarding the settlement of causes of action under the Ecuadorean Constitution.

At the same time, one has a body firmly following a procedure developed in international commercial arbitration for private law disputes acting as though it was a fully constituted appellate court of the State – overturning domestic decisions and impacting the rights of non-parties to the proceedings.[39] Further:

a) this was a Tribunal doing so precisely in the arena of "diffuse" rights – in this case, access to a clean environment – which are heavily influenced by considerations of policy;

b) it reached a conclusion contrary to the Ecuadorean courts whose constitutional role it was to interpret those rights; and

c) it referred to international human rights instruments which appeal to diffuse rights (such as the Universal Declaration of Human Rights) only for the purposes of protecting Chevron and Texaco's economic interests in their investment.

## A pause – Monetary Gold and International Investment Arbitration

The discussion in Chevron on jurisdiction touched on a decision of the ICJ - *Monetary Gold*.[40]

*Monetary Gold* concerned the repatriation of World War II gold – the UK and Italy wanted the gold but, in truth, the gold belonged to Albania, a State that was refusing to participate in the case. Therefore, an issue was the extent to which the ICJ could bind a non-participating State.

The ICJ held as follows:

> *"In the present case, Albania's legal interests would not only be affected by a decision,but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.*
>
> *It is also contended that any decision of the Court on the questions submitted by Italy in her Application will be binding only upon Italy and the three respondent States, and not upon Albania. It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."*[41]

Thus, the ICJ held, there could be no jurisdiction in that case to decide issues that would affect Albania and Albania was a non-consenting party. At the State – State level, of course, *Monetary Gold* poses no difficulty. The cases at the ICJ are inter-State with those States representing by whatever route all applicable, domestic third parties.

At the International Investment Arbitration level, the position is more complicated. Not only is the basic arbitration that between a non-State Party (piggy backing on the State's Treaty) and a State – but in this area of social, political and human rights, it is probable that other parties' rights will be involved – indigenous groups and NGOs to name but two. It therefore falls to see how *Monetary Gold* has been applied in the context of international investment arbitration.

In *Chevron*, Ecuador relied on *Monetary Gold* to contend that the Tribunal did not have jurisdiction because non-consenting third parties would be affected by any Award. The Tribunal held that that it did not have to decide whether *Monetary Gold* applied because any third party issues were between those parties and the Respondent State.[42] Thus, on one view, at this stage, the Tribunal's views were inclusionary – it had jurisdiction to decide the wider environmental issues.[43] Yet, when one places that particular conclusion in the context of the decision as a whole, one sees that the Tribunal refuses the application for amici curiae in 2011; decides inclusive jurisdiction in 2012; and then in 2018 sets its face against *"diffuse"* social claims and does so while asserting that it was not adjudicating on the rights of the individuals who had initially brought those claims.[44] That seems, at first blush, problematic.

This question of third party rights and Monetary Gold was considered again in *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited*.[45] Here, the contractual dispute was between Niko and the immediate Respondent, yet the wider dispute embraced the Bangladeshi State and its National Oil Company – Petrobangla. The Tribunal reasoned as follows:

> *521. "In the present case the Tribunal is not called upon to adjudicate upon the responsibility of Petrobangla and Bangladesh. Its task is rather to determine the rights and duties of Niko and BAPEX in connection with the performance of the JVA. However, in the course of such a determination, it may have to consider issues in matters which Petrobangla and Bangladesh have assigned to BAPEX.*
>
> ...
>
> *524. As far as the people of Bangladesh or private third parties are concerned the Tribunal does not have jurisdiction, and therefore has no intention to adjudicate any claims they may have."*

Like *Chevron*, therefore, one has an assertion of an inclusive jurisdiction to consider issues where, insofar as the parties to the contractual arrangements purportedly so contend, third parties may be affected but the same disavowal of any intent to affect those wider third parties. This is a paradox.

## The other side of the coin – Urbaser v Argentina

In *Urbaser SA & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*,[47] (*"Urbaser"*) the Tribunal took an alternative approach to human and environmental rights, considering them as rights that States might invoke against investors rather than other way around.

*Urbaser* was a standard International Investment Arbitration until the Republic of Argentina submitted a counterclaim with its Counter Memorial. In that, Argentina submitted that the Claimant investor had, by failing to invest, breached the *"basic human right to water and sanitation"*.[48]

The Claimant's immediate response was that, as BITs existed solely to protect the investor, there was no scope for a counterclaim by the State of this nature. Thus *"the asymmetric nature of BITs prevents a State from invoking any right based on such a treaty, not even a right to submit a counterclaim against an investor. The main aim of such treaties is, indeed, to protect the investor's rights... to grant the investors a one-sided right of quasi-judicial review of national regulatory action."*[49] This was a direct appeal to the historical perceptions of BITs as instruments solely to protect the investor. It was an appeal that the Tribunal rejected – at least as a matter of jurisdiction – by pointing to the breadth of the dispute resolution clause.[50]

When the Tribunal came on to the substantive merits, the Tribunal posed the question as follows:

> *"The question is then whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal."*[51]

The Tribunal then went on to consider the wording of the BIT. Here the BIT stated that *"where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party or by general international law, the Parties and their investors shall be subject to whichever terms are more favorable"*.[52] This, the Tribunal explained, imported general principles of international law and therefore the BIT could not be viewed as a set of rules in isolation.[53]

The Tribunal then moved onto the objection that a private corporation could not be responsible for compliance with human rights. To this the Tribunal said:

> *"A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore*

*not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals."*[54]

Part of this reasoning was that as the corporation qua investor could invoke international law, there was, of necessity, a two-way street. If the investor corporation could invoke international law, there was no reason in principle as to why international law could not be invoked against the corporation.

The Tribunal cross referring to *Guiding Principles on Business and Human Rights* then stated:

> *"The Tribunal may mention in this respect 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. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual."*[55]

The Tribunal went on to hold that this would include the Universal Declaration on Human Rights then pithily saying *"The Declaration may also address multinational companies"*[56] before adding:

> *"it is therefore to be admitted that 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."*[57]

If this were thought to be the highwater of this section of the reasoning, it was not. The Tribunal, having considered the Vienna Convention on the Law of Treaties, the ICSID Treaty and the *ius cogens*, set out what it regarded as the norms of international law and concluded that such norms *"must certainly prevail"* over *"any contrary provisions of the BIT"*.[58]

That was, however, as far as this debate went. The Tribunal recognised that it was common ground that *"the human right to water and sanitation is recognised as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewerage services"*[59] before holding:

> *"However, this does not answer the question whether Claimants' as investors were bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services. Respondent does not, in fact, go so far. Indeed, it argues that such human right was incumbent on Claimants because providing for water and sewage was AGBA's and therefore its shareholders' obligation under the Concession. Even if this obligation could be imposed upon Claimants, Respondent does not state that such obligation is based on international law. It merely asserts that the performance obligation under the Concession had the effect of supplying the services that are part of the population's human right to access to water. Respondent also states that Claimants had violated human rights obligations clearly applicable to international companies. This argument does not reference any particular international law obligation, but relies only on AGBA's obligations based on the Concession Contract. And while Respondent correctly introduces the principle of pacta sunt servanda as a principle of international law, it identifies the relevant pactum as Claimants' obligation to invest in expansion work, thus relying again on the Concession Contract and admitting that international law does not provide a cause of action for the Counterclaim."*[60]

Thus, in part because the way that Argentina had framed its case, any supposed human rights obligation was transferred back into the private law arrangements between the parties. This was made clear:

> *"While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law."*[61]

Once the dispute between the parties had been returned to the contractual arena, then any debate over a right to water had to be passed through that lens – as the Tribunal reasoned.[62] The result was that whilst there was a theoretical involvement of international law and soft rights, the analysis ultimately returned to the traditional arbitral ground of the contract wording.

Yet, the Tribunal also said this:

> *"The 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. This is not a matter for concern in the instant case."*[63]

Thus, whilst the path to positive obligations lay through the Contract (at least insofar as the case in *Urbaser* was presented), the Tribunal left open the possibility that a negative obligation could be directly and positively enforced in an investment treaty arbitration.

*Urbaser* was considered in *David Aven v Republic of Costa Rica*[64] ("*David Aven*"). Putting aside the procedural debate over whether the counterclaims are strictly and legally factually linked to the claims[65] or whether the more liberal "based on" *Urbaser* test is applied,[66] the interesting aspect of *David Aven* is that the Tribunal spelt out when an investor might become subject to international law obligations under a Treaty.

It conducted a two-stage enquiry: jurisdiction then merits. At the first stage, The Tribunal examined Art 10 of the DR-CAFTA[67], which provided that a State Party could not be prevented from imposing environmental measures, and considered Costa Rica's argument that this provision imposed affirmative obligations on investors in international law – i.e. the provision elevated a State's domestic environmental measures to the plane of international law.[68] The Tribunal applied the *Urbaser* reasoning that, as investors had the benefit of international law, they could not be relieved of such obligations as international law may impose. Those obligations were particularly marked, the Tribunal found, in the environmental sphere which, relying on International Court of Justice caselaw, was to be treated as *erga omnes* (i.e. of common concern to all States).[69]

Thus, the Tribunal found that it would have *prima facie* jurisdiction over counterclaims brought by the State under Art 10 of the DR-CAFTA, and went on to consider the merits.[70] It was here that the claim failed. Properly interpreted, Art 10 of the DR-CAFTA did not in fact impose affirmative obligations on investors and, in any event, the counterclaim was raised too late in the proceedings to be admitted.[71] As with *Urbaser*, therefore, the claim succeeded in theory but failed in practice.

There is one other way in which international investment arbitration has taken account of human or environmental rights not by way of counterclaim but by denying the claim altogether – as simply not worthy of the protection of the BIT.

At around the same time of the Award in *David Aven*, was the Award in *Cortec Mining Kenya Ltd v Republic of Kenya*[72] ("*Cortec Mining*"). Here the Tribunal was considering a claim based on a mining licence issued by the Kenyan State. This mining licence was issued for Mrima Hill which was protected as a nature reserve, a forestry reserve and a national monument.[73] The claim failed (without a counterclaim) because the person granting the licence lacked jurisdiction so to do and the Claimant had failed to comply with Kenyan regulatory requirements including obtaining an Environmental Impact Assessment. This compliance failure led the Tribunal to apply the following test:

***"If the investor corporation could invoke international law, there was no reason in principle as to why international law could not be invoked against the corporation."***

***What is emerging in the latest iteration of BITs is the direct application of non-commercial or soft rights by the words of the BIT itself.***

*"In the Tribunal's view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State"*[74]

As the Tribunal in *Cortec Mining* made clear, non-compliance with regulatory frameworks (here obtaining an Environmental Impact Assessment) was a *"serious breach of the "investors" obligations"* and showed *"serious disrespect for the fundamental public policies of the host country in relation to the environment and resource development"*.[75] This compromised *"a significant interest of the Host State"* which manifested *"a gravity to the act of non-compliance that is proportional to the harshness of denying access to the protections of the BIT"*.[76]

The approach in *Cortec Mining* has procedural and intellectual advantages. Procedurally, the debates over counterclaims and whether they can be brought is avoided. The claim fails within the four walls of the arbitration. Intellectually, there is no need to attempt to resolve the paradox of a private process determining the rights of others. The difficulty with *Cortec Mining*, however, is that it only works as a means to curtail further exposure by the State. The claim fails but there is no remedial payment from the investor for any past wrongs.[77]

## The treaties

As can be seen, the wording of the Treaty at issue had a direct outcome on the deployment of environmental rights within the arbitration in *David Aven*. There the Tribunal held that, if the Treaty imposed affirmative obligations on investors, those obligations could be enforced by States by way of a counterclaim. What is emerging in the latest iteration of BITs is the direct application of non-commercial or soft rights by the words of the BIT itself.

The most interesting developments are those in relation to corporate social responsibility. Obviously this is not a concept which flows from international law and would reflect the softest of soft power provisions. Yet BITs are incorporating CSR wordings.

These wordings can range from the indicative to the more wide-ranging.

At the indicative end of the scale Art 16 of the Investment Agreement between Hong Kong SAR and Australia[78] provides:

> *"The Parties affirm the importance of each Party encouraging enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party."*[79]

A slightly less indicative form of words can be found in the Belarus – India BIT[80] at Article 12:

> *"Investors and their enterprises operating within the territory of each Party shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anticorruption."*

At the more wide-ranging end of the scale, Article 14 of the Brazil – Ethiopia BIT[81] provides:

1. *"Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the post State and the local community, through the adoption of a high degree of socially responsible practices, based on the principles and standards set out in this Article and the OECD Guidelines for Multinational Enterprises (MNEs) as may be applicable on the State Parties.*[82]

2. *Investors and their investment shall endeavour to comply with the following principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:*[83]

   a) *Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;*

   b) *Respect the internationally recognized human rights of those involved in the investors' activities;*

   c) *Encourage local capacity building through close cooperation with the local community;*

   d) *Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;*

   e) *Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;*

   f) *Support and- advocate for good corporate governance principles, and develop and apply good practices of corporate governance;*

   g) *Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the investment and the societies in which its operations are conducted;*

   h) *Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programmes for professional training;*

   i) *Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;*

   j) *Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and*

   k) *Refrain from any undue interference in local political activities.£*

Perhaps the most interesting set of provisions is, however, contained within the SADC Model BIT. The SADC Model starts by defining an investment as one which complies with the laws of the host state. Thus, the Model takes within itself the Kim – Cortec Mining principles – an investment which does not comply with the Host Statal law, is not an investment within the BIT and is not protected.

The Model then moves through:[85]

a) A common obligation against corruption (Art 10). Art 10.3 specifically provides that a breach of Article 10 is a breach of domestic law and therefore falls outwith the Treaty;

b) Under Art 11, both investors and their investment *"shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments"*;

c) Art 13 requires compliance with environmental and social assessment screening criteria and assessment processes. This is to be public and readily available at the local level. The assessments must also include assessments of the human rights of persons potentially impacted by the investment *"including the progressive realisation of human rights in those areas"*;

d) Art 14 allows for proportionate environmental management, planning and decommissioning;

e) Art 15 imposes minimum standards for human rights, environment and labour. In relation to human rights there is a direct duty on investors to respect them and not breach them – either directly or indirectly. As far as labour rights are concerned, there is a mandatory duty to act in accordance with the ILO Declaration. In respect of human rights, labour rights and environment, there is a levelling up of compliance – investors must not act contrary to the applicable domestic or international standards – whichever is higher;

f) Art 16 requires investments to meet or exceed national and international standards for corporate governance;

*"Any international lawyer used to dealing with "soft" obligations has an understandable degree of cynicism as to whether those soft obligations can ever be deployed as concrete rights on which the client might wish to rely or obligations which can reliably said to have been breached."*

g) Art 17 provides for liability in the investor's Home State for acts, decisions or omissions in the Home State where those acts, decisions or omission lead to significant damage, person injuries or loss of life in the Host State; and

h) Art 19 allows breaches of the BIT to be taken into account in the assessment of the merits or the damages payable as well as for counterclaims to be made in the international investment arbitration. Art 19 also allows for direct claims to be made by the Host State and individuals and organisations within it against the investor for breach of the BIT.

As can be seen, the SADC Model BIT contains a whole suite of provisions covering corporate social responsibility, the environment, labour standards and human rights. These provisions are mandatory and imposed directly on the investor and the investment. Rights to claim for breaches of the provisions are given both in any international investment arbitration but also in the courts of the Home State and the Host State. Finally, if there is a breach of the Host State law, the investment is stripped of protection under the BIT.

As a document, the SADC Model BIT therefore marks a significant departure from previous treaty wordings. It is also significantly different from the BITs currently in place in Southern Africa.[86] The drafters have explicitly taken into account the various policy developments outlined above. Politically, the SADC Model could be said to represent a relocation of power away from the traditionally capital-exporting countries to the traditionally capital-importing companies.[87] Negatively, investor advocates would say that due to the need to price the risks of investor liability, the cost of investment will be higher and a greater price will be demanded of the Host State. On the other hand, and put positively, this might mean that Host States, seeing that they are protected from investor abuses, might well be more receptive to investment and less likely to impose protectionist countermeasures.

Legally, the SADC Model BIT studiously avoids the use of nebulous wording – that of best endeavours or guiding principles. Instead the language is of hard-edged obligations by reference to international and domestic standards. This drafting therefore represents a concerted effort to translate inchoate soft law principles into black-letter rights and obligations and does so at both the international and the domestic level. This has ramifications on many levels.

First, the SADC Model BIT undoubtedly breaks with the post-World War II consensus on international law and it does so both generally and specifically. Generally, the SADC Model bypasses the historic debates over monism versus dualism and/or over whether one can divine grundnorms in international law. Specifically, a considerable number of BITs have recognisable genetic origins in the limited Friendship, Commerce and Navigation Treaties entered into at the end of World War II. The SADC Model BIT manifestly does not.

Second, any international lawyer used to dealing with "soft" obligations has an understandable degree of cynicism as to whether those soft obligations can ever be deployed as concrete rights on which the client might wish to rely or obligations which can reliably said to have been breached. The SADC by deliberately avoiding the language of soft obligations is a deliberate retort to such cynicism. If the SADC Model BIT were adopted, then it would provide a platform for substantive arguments as to the meaning and implementation of international law provisions in a specific commercial context.

Third, that does, however, raise questions as to how Tribunals would deal with soft rights as and when they arise. The forays by Tribunals in allowing for soft rights have, whilst answering the questions in theory, either avoided the substantive question or found the case effectively "not proven". Other than the individual merits, there are we suggest four reasons for this:

a) **The status of companies under international law.** Cases like *Urbaser* and *David Aven* reflect the growing view that companies can have obligations under international law, but then fail to identify any affirmative obligations they might be subject to.[88] This issue would fall away if treaties like the SADC Model BIT were widely adopted, but that will be a slow process. Many States are reluctant to impose burdens on their companies for the benefit of third-party States.

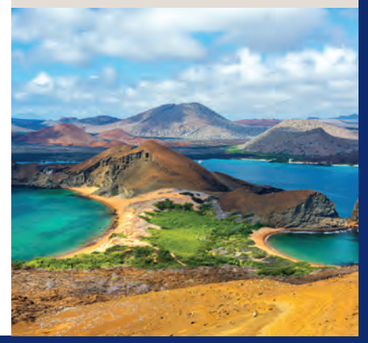
b) **Parties and the scope of arbitration.** All practitioners in this area are familiar with the bilateral, confidential arbitration process. In the last decade, issues of joinder and tripartite arbitrations have had to be resolved.[89] The process, however, retains the essential elements of the private law procedure it inherited from international commercial arbitration (with some innovations, such as greater receptivity to amici curiae submissions).

c) **Expertise and familiarity.** There are a limited number of arbitrators that operate in this field. Many, if not most, have their background in commercial law and then the jurisdictional issues that arise in international arbitration and international investment arbitration. Many will not be familiar with soft rights and the issues that may arise in resolving claims which turn on soft rights.

d) **Transparency and accountability.** There has been a constant critique of international investment arbitration as being not-transparent and lacking the accountability to engage in questions of soft rights and policy.[90] The point is often made that such issues are better dealt with by the Courts which are transparent and accountable. One can see how a Tribunal selected from within the international arbitral community (which is in turn self-selecting) can be seen to lack accountability. Awareness of this lack of accountability may act as a self-denying ordinance precluding Tribunals from vigorous intervention in soft rights issues.[91]

## Conclusions

There is undoubtedly a nascent stream of jurisprudence supporting the incorporation and application of soft rules of international law in international investment arbitration. This is matched by proposed new wordings for BITs. It is, however, only nascent. It is reasonable to expect there will be further development in this area. Yet, the creation of a coherent approach to soft rights will always face difficulty given the ultimate tension between arbitration's private, contractual and commercial foundation and the "diffuse" rights at issue.



# ENDNOTES

1. See eg discussion in Harrison, James, Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions (2009). Warwick School of Law Research Paper. Available at SSRN: https://ssrn.com/abstract=1706713.
2. For the purposes of discussion here mainly Bilateral Investment Treaties ("BITs") or Free Trade Agreements ("FTAs").
3. Aust Handbook of International Law at 345.
4. Some of these are discussed below.
5. See eg the conviction of Albert Speer for war crimes and crimes against humanity arising out of the use of slave labour and prisoners of war. It is to be noted that the Tribunal found that Speer was aware of the conditions in which "workers" were kept but was not directly involved in them. Thus, Speer's war crimes were essentially economic in nature, i.e. the industries he administered used slave labour, even if Speer did not administer the programme that enslaved them.
6. See discussion in Oppenheim at Section 377.
7. See Shaw International Law CUP 8th Ed 2017 p 642 at fn 14.
8. See Loewen Group v USA ICSID Case No ARB(AF)/98/3 at [233].
9. This is an exceptionally crude summary of Stratos Pahis' ICJ Paper Bilateral Investment Treaties and International Human Rights Law: Harmonisation through Interpretation to be found at: https://www.icj.org/wp-content/uploads/2012/06/treaties-law-interpretation-themetic-report-2012.pdf.
10. See https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
11. UN Human Rights Council, Resolution 26/9 (https://www.ihrb.org/pdf/G1408252.pdf).
12. See https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
13. See Rudolph Dolzer & Christoph Schreuer Principles of International Investment Law OUP 2nd Ed 2012 at 27
14. For a general review of the subject area – see Coleman, Cordes and Johnson "Human Rights Law and the Investment Treaty Regime" CCSI Working Paper 2019 June 2019 Columbia Center on Sustainable Investment
15. UNCITRAL PCA Case No 2009 – 23 – case documents are at https://www.italaw.com/cases/257.
16. This crude summary of the facts is taken from the Third Interim Award on Jurisdiction dated 27 February 2012 at https://www.italaw.com/sites/default/files/case-documents/ita0175.pdf.
17. This portion is taken from the Second Partial Award on Track II dated 30 August 2018 at https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf.
18. See https://www.italaw.com/sites/default/files/case-documents/ita0165.pdf at [4.1].
19. See https://www.italaw.com/sites/default/files/case-documents/ita0170.pdf.
20. At [4.61]. This was discussed in the context of Case of the Monetary Gold Removed From Rome in 1943 (Italy v France et al) (Preliminary Question) [1954] ICJ Rep 19 ("Monetary Gold") – as to which see below.
21. At [4.65].
22. At [4.66].
23. At [4.70].
24. See https://www.italaw.com/sites/default/files/case-documents/italaw1585.pdf
25. At [23]-[24].
26. At [97].
27. At [100].
28. At [106]-[107].
29. See eg [5.116 ff].
30. At [5.150].
31. At [10.6].
32. At [5.230 – 2].
33. At [8.28 ff].
34. At [8.43 ff].
35. At [8.57].
36. At [9.34]. The Tribunal ruled that Chevron was not obliged to comply with the Lago Agrio Judgment as a matter of international law, rather than ruling on the effect of the Judgment under Ecuadorean law. However, since the Tribunal also ruled that the Judgment should not be enforced by the Ecuadorean or any other State court, this seems a distinction without a difference.
37. At [9.36].
38. At [10.9]
39. At [10.10]. The Tribunal declared that the Judgment should not be enforced by any State, which impacted the Lago Agrio Plaintiffs' rights under the Judgment and purported to impact the right or obligation of third-party State courts to enforce the Judgment.
40. Case of the Monetary Gold Removed From Rome in 1943 (Italy v France et al) (Preliminary Question) [1954] ICJ Rep 19
41. At [32 – 3].
42. See [4.70] supra.
43. For a discussion as to the broader inclusionary/exclusionary aspects of Tribunal jurisdiction and Monetary Gold – see Noam Zamir "The applicability of the Monetary Gold principle in international arbitration" Arbitration International, Volume 33, Issue 4, December 2017, Pages 523–538
44. See reasoning at [4.70] supra
45. ICSID Case No. ARB/10/18; see also Bear Creek Mining v Republic of Peru ICSID Case No ARB/14/2 discussed at fn 65 below
46. Much of the learning in international arbitration circles on Urbaser falls into a debate – positive or negative – over jurisdiction and procedure – for that see eg https://academic.oup.com/arbitration/search-results?page=1&q=Urbaser&fl_SiteID=5430&SearchSourceType=1&allJournals=1.
47. ICSID Case No ARB/07/26
48. See [1156].
49. At [1120].
50. At [1143]. See Roussalis v Romania ICSID Case No ARB/06/1 at [868 ff] for a contrary example where a textual analysis of the BIT was taken to exclude counterclaims because of asymmetry.
51. At [1186].
52. Art VII(1)
53. At [1192].
54. At [1194]; see also David Aven v The Republic of Costa Rica UNCT/15/3 at [737 ff]
55. At [1195].
56. At [1196].
57. At [1199].
58. At [1203].
59. At [1205].
60. At [1206].
61. At [1210 ff].
62. At [1212].
63. At [1210].
64. UNCT/15/3
65. See Saluka Investments BV v. Czech Republic UNCITRAL at [39]; Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia UNCITRAL at [689 – 94].
66. Urbaser supra at 1151.
67. Dominican Republic – Central America Free Trade Agreement.
68. See David Aven [734 – 5].
69. At [738].
70. At [742].
71. At [743 – 746].
72. ICSID Case No ARB/15/29
73. At [345].
74. Kim v. Uzbekistan ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 at [413]
75. At [348 – 51].
76. At [352] citing Kim at [408]; [362 – 5].
77. Compare, however, the different outcome in Bear Creek Mining Corporation v Republic of Peru ICSID Case No ARB/14/2. There, failings on the part of the Claimant mining corporation to obtain the requisite licences, did not constitute grounds for holding that the claim fail outwith the BIT nor for reducing the damages payable – see [668] – though the Partial Dissenting Opinion of Professor Philippe Sands disagreed on this point – see [35 ff]. Bear Creek is also noteworthy for the party based approach adopted in Chevron – the affected indigenous people not being a party to the arbitration was a relevant factor in the majority's decision – see [666].
78. https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/Documents/a-hkfta-investment-agreement.pdf.
79. For good measure Art 15 of the same Treaty is a David Aven-type environmental measures clause.
80. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018-.
81. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3816/brazil---ethiopia-bit-2018-. This BIT wording is not an outlier as far as Brazil is concerned, the Brazil – Suriname and Brazil – Guyana BITs have parallel wording.
82. This type of best efforts provision is common – see eg the Morocco – Nigeria BIT - https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.
83. This is consistent with the decision Cortec Mining – namely that the investor must comply with Host State laws to merit protection under the BIT.
84. https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf. For a detailed consideration of the SADC Model BIT see F Seatzu & P Vargiu "Africanising International Investment" SPILJ Vol 2 No 1 (2015) 1 – 22
85. I focus here on the traditionally soft law international law elements of the Model BIT. The Model BIT also contains radical (in international law terms) provisions as to expropriation where the usual "non-discriminatory" requirements have been removed – see Art 6.
86. See eg the Benin-Canada BIT which relies exclusively on soft, white letter obligations
87. Put crudely from the First to the Developing World
88. For recent commentary on this subject, see Markus Krajewski "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application" Business and Human Rights Journal Volume 5, Issue 1, January 2020, pp. 105-129 (taking a sceptical view as to whether companies will or should become subject to obligations under BITs); and Andrés Felibpe López Latorre "In Defence of Direct Obligations for Businesses Under International Human Rights Law" Business and Human Rights Journal Volume 5, Issue 1, January 2020, pp. 56-83 (taking a more optimistic review).
89. For a review of the current position on joinder – see Dongdoo Choi "Joinder in international commercial arbitration" Arbitration International Volume 35, Issue 1, March 2019, Pages 29–55
90. For just one example see "Accountability in International Investment Arbitration" 2016 Charles N Brower Lecture by Professor Kaufmann- Kohler at https://lk-k.com/wp-content/uploads/2017/07/KAUFMANN-KOHLER-Accountability-in-International-Investment-Arbitration-Brower-Lecture-31-March-2016.pdf and for more detail https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf.
91. In part the SADC avoids this problem and also concerns about accountability by allowing for claims in Home and Host State Courts.