INTERSECTION OF HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW: SOME BRIEF OBSERVATION

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The world has witnessed development and expansion of two distinct areas of international law wherein one deals with protection of human rights and the other with protection and promotion of foreign investment. Protection and promotion of foreign investment lies at very heart of numerous International Investment Agreements (IIAs). On the other hand, series of international treaties have been developed in response to the mandate set forth in the Charter of United Nations.[1] The UN is empowered by the UN Charter to promote "higher standards of living, full enjoyment, and conditions of economic and social progress and development",[2] as well as "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[3]

The ultimate goal of IIAs, as different from the rationale of human rights, is to promote and protect investment flows in capital-importing states. Notwithstanding those two different areas of international law, intersection of international investment law and human rights, as evidenced by some recent investment cases where investment tribunals had to engage with human rights issues in investment arbitration,[4] is obvious; furthermore, characterized with growing trends.

Focusing on the foregoing from a wider perspective, the issue of intersection of human rights and international investment law is quite debatable.

Arguably, such intersection is reflected by the "current challenges facing the world today".[5] That intersection is obvious in several respects; for example, in procedural matters of international investment law, wherein some reliance on human rights jurisprudence, as discussed in several cases below, have sometimes been made by investors and arbitrators for interpretative guidance in determining and applying the substantive protections owed to foreign investors under the investment treaties.[6]

In the ***Mondev v. United States***[7] case, the tribunal acknowledged the potential relevance of certain rulings of the European Court of Human Rights (ECHR) and seems to have held that human rights cases might help

1 Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties, Mapping the role of human rights law within investor-state arbitration", Rights & Democracy, International Centre for Human Rights and Democratic Development, 2009, at 21, available: http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf

2 Article 55 (a) of the Charter of the United Nations, available: http://www.un.org/en/documents/charter/chapter9.shtml

3 Article 55 (c) of the Charter of the United Nations, available: http://www.un.org/en/documents/charter/chapter9.shtml

4 *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award (February 6, 2007), available: http://italaw.com/documents/Siemens-Argentina-Award.pdf; also, see: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (September 1, 2009), available: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5

5 "Developing Countries and New Directions in International Investment Law", report on the third annual forum of developing country investment negotiators, 8-11 November, 2009, Quito, Ecuador, available: http://www.iisd.org/pdf/2010/dci_2009_report.pdf

6 Marc Jacob, 2010, "International Investment Agreements and Human Rights", INEF Research Paper Series, Human Rights, Corporate Responsibility and Sustainable Development, 03/2010, available: http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf

7 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB/(AF)/99/2, Award (October 11, 2002), para: 144, available: http://italaw.com/documents/Mondev-Final.pdf

to clarify, by means of analogy, how certain investment treaty provisions might be construed.[8] In the aforementioned case, a Canadian real estate development company, Mondev International Ltd., filed a claim objecting to its treatment at hands of US courts.[9] In ruling on Mondev's claim that it had not received "treatment in accordance with international law", tribunal examined the case law of the European Court of Human Rights with respect to Article 6 (1) which provides, *inter alia*, with a right to a court hearing.[10] The tribunal admitted that these decisions of the ECHR, while emanating from a different legal order, might provide some guidance by way of analogy.[11]

In ***Tecmed v. Mexico***[12] case, which has been viewed as reflecting "integration of public international law to international investment law",[13] jurisprudence of the ECHR have been used for assistance in interpreting Bilateral Investment Treaty (BIT) obligations owed to investors in relation to expropriation of property.[14]

The aforementioned cases represent examples wherein "human rights jurisprudence have been drawn up – by arbitrators and some investors – in an effort to buttress or inform certain interpretations of protections owed to investors".[15]

Azurix v. Argentina[16] case also serves as an example where arbitrators have taken recourse to the jurisprudence of human rights courts in interpreting the expropriation provisions of investment treaties.[17] Tribunal set out that it would turn to the rulings of the ECHR for "useful guidance for the purposes of determining whether regulatory actions would be expropriatory and give rise to compensation".[18]

A large number of BIT arbitrations have been brought against Argentina in relation to disputes in water and sanitation sector, wherein government's human rights obligations to those living within its territory may come into the framework of investment arbitration in relation to foreign investments in this sector.[19]

In arbitration proceedings under the International Centre for Settlement of Investment Disputes (ICSID), Argentina has made human rights as major part of its defense.[20] Argentina has argued for relevance of human rights law in BIT arbitrations, insisting that its BIT obligations must not be interpreted in isolation from the rest of international law – particularly Argentina argued that the BIT must be construed in a manner

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8 *Idem*. also, see: Peterson, supra note 1, at 23.

9 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB/(AF)/99/2, Award (October 11, 2002), available: http://italaw.com/documents/Mondev-Final.pdf; also, see: Peterson, supra note 1.

10 *Mondev International Ltd. v. United States of America*, supra note 7., also, see: Peterson, supra note 1., also: Dana Krueger, "The Combat Zone: Mondev International, Ltd. V. United States and the Backlash against NAFTA Chapter 11", (2003) 21 *Boston University International Law Journal* 399.

11 *Mondev International Ltd. v. United States of America*, supra note 7.

12 *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 2003, available: http://italaw.com/documents/Tecnicas_001.pdf

13 Yadira Castillo, "The Appeal to Human Rights in Arbitration and International Investment Agreements", Anuario Mexicano de Derecho International, vol. XII, 2012, pp. 47-84, available: http://biblio.juridicas.unam.mx/revista/pdf/DerechoInternacional/12/art/art3.pdf

14 *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, supra note 12, para: 116-122, also, see: Peterson, supra note 1.

15 Peterson, supra note 1.

16 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006), available: http://www.italaw.com/documents/AzurixAwardJuly2006.pdf

17 UNCTAD, 2009, "Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No.2 (2009), International Investment Agreements", UNCTAD/WEB/DIEA/IA/2009/7, at 4, available: http://unctad.org/en/docs/webdiaeia20097_en.pdf; see: *Azurix Corp. v. Argentine Republic*, supra note 16, para: 311-312.

18 *Azurix Corp. v. Argentine Republic*, supra note 16., also, see: UNCTAD, 2009, "Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No.2 (2009), International Investment Agreements", UNCTAD/WEB/DIEA/IA/2009/7, at 5, available: http://unctad.org/en/docs/webdiaeia20097_en.pdf

19 Peterson, supra note 1, at 26., see: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30; *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4; *Anglian Water Group v. Argentine Republic*, UNCITRAL arbitration filed in 2003; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26.

20 *Idem*.

which does not affect the fulfillment of other international obligations between the states signatory of that BIT.[21] In response to the claims related to indirect expropriation, government has argued that "any measures taken were motivated by obligations, binding in international law, to address those breaches by the concessionaire",[22] "which engaged fundamental human rights issues".[23] Argentina has further submitted that "its actions were legitimate and proportionate response – rather than an act of indirect expropriation contrary to the BITs at issue".[24]

That intersection, as seen in several cases above, may raise the following questions – where and how a clear demarcation line between investment protection and protection of human rights to be found? Or, is it even necessary to have such clear line between those two issues? Does that intersection mean that there is a need for the IIAs to contain provisions relating to human rights? And if those provisions are not currently provided in IIAs, could those treaties be regarded as one-sided instruments?

Despite increased number of international investment agreements, such agreements lack precise references to human rights. As already mentioned, many investment treaties, particularly BITs ". . . reflect a fifty-year-old ideology that is not relevant to the current challenges facing the world today. […] the current formulation of BITs does not reflect the objectives of developing states, such as the issue of environment and human rights".[25]

Focusing on the starting point regarding the line of demarcation between investment protection and protection of human rights, as well as presumption about a necessity of having such clear line between those two issues, the following observation could be made. IIAs, from a legal perspective, are international instruments the function and purpose of which, *inter alia*, is concerned with protection and promotion of foreign capital into the host states. Countries, hosting the foreign investment flows, are welcoming Foreign Direct Investment (FDI) in the hope that such investments accelerate their economic growth. In 2011, the developing economies attracted nearly half of global FDI.[26] However, foreign investment could not be seen in isolation from the society and environment of the host state surrounding such investment. That itself reaffirms the needs for foreign investments to "follow minimum standards, including labour and human rights, corporate social responsibility best practices, domestic laws and a respect for the environment".[27]

Foreign investments have been seen as having "potential to act as a catalyst for the enjoyment of an individual's human rights, particularly in developing countries".[28] Such potential could be buttressed by the notion and structure of IIAs whereby foreign investments are often not explicitly obliged to observe human rights.[29] Moreover, IIAs lack a precise reference to human rights obligations.

Thus, from a practical point of view, it could be admitted that there is no need for a separation between investment protection and protection of human rights. There is an obvious intersection between those two issues and as a result thereof, the modern investment policymaking should be concerned with more balanced rights and obligations between states and foreign investors.[30] In light of the foregoing, one could argue that the IIAs must contain provisions relating to human rights.

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21 Peterson, supra note 1, at 28.

22 *Idem*.

23 Counter-Memorial of Argentine Republic in ICSID Case No. ARB/03/19, December 8, 2006, paragraph 794, cited in: Peterson, supra note 1, at 28.

24 Rejoinder of the Argentine Republic in ICSID Case No. ARB/03/19, August 17, 2007, para: 1003-1005, cited in: Peterson, supra note 1, at 28.

25 "Developing Countries and New Directions in International Investment Law", supra note 5.

26 UNCTAD, 2012, "World Investment Report 2012, Towards a New Generation of Investment Policies", United Nations Publication, Sales No. E.12.II.D.3, ISBN 978-92-1-112843-7, at 84, available: http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx

27 "Developing Countries and New Directions in International Investment Law", supra note 5.

28 Jernej Letnar Cernic, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises", (2008) 4 (1) *Hanse Law Review (HanseLR)* 71, at 72.

29 *Idem*.

30 UNCTAD, 2012, "World Investment Report 2012, Towards a New Generation of Investment Policies", supra note 26.

The need for human rights to be respected by all economic actors has been widely accepted and thus it has been a matter of discussion at the *global forum*.[31] The UN review of investment treaties identified lack of examples of obligations imposed on investors or their home states,[32] and whilst exploring the issue of governance of transnational business today, the need for a balance and its scarcity has been demonstrated in interim report of the Special Representative of the Secretary-General.[33]

Arguably, as intersection of investment law and human rights is apparent, based on business and human rights dynamic, international investment instruments have to address the human rights issues. Importance of enacting provisions relating to human rights in IIAs might be seen not only on the need for, as well as an idea of, making human rights an integral part of investment policymaking and thus securing an implementation of various aspects of human rights under the investment treaties, but such close relationship between investment and human rights provisions in IIAs might support a creation of level playing field in an entire sphere which itself ensures "a balance between the right of States to regulate and the demand/rights of investor".[34]

Whenever some *balance*, between rights and obligations held by the states and foreign investors, is created, IIAs might be regarded as more reciprocal instruments rather than one-sided agreements.[35]

Despite the necessity for a reference to human rights in IIAs, today, no such clear reference could be found in various models of the BITs.[36] Very minor exceptions are found in some international instruments. Good example of that is Investment Agreement for the COMESA Common Investment Area.[37] Another exception to the lack of human rights references could be found in preambular paragraph of the draft 2007 Norwegian Model BIT.[38] Comparable to the draft 2007 Norwegian Model BIT, slightly different preambular language is found in Free Trade Agreement between the EFTA states and Singapore of 2002, chapter IV of which is dedicated to investment.[39] In both cases, however, preambular text does not correspond to substantive provisions of the instrument, thus it does not grant rights to, nor does it amount to any obligation undertaken by state

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31 Howard Mann, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities", IISD Publication, February 2008, available: http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf; also, see: UNCTAD, 2007, "Recent developments in international investment agreements (2006-June 2007), IIA Monitor No.3 (2007), International Investment Agreements", UNCTAD/WEB/ITE/IIA/2007/6, available: http://unctad.org/en/docs/webiteiia20076_en.pdf

32 UNCTAD, 2001, "Social Responsibility, Series on Issues in International Investment Agreements", UNCTAD/ITE/IIT/22, United Nations Publication, Sales No. E.01.II.D.4, ISBN 92-1-112514-6, available: http://unctad.org/en/docs/psiteiitd22.en.pdf; also, see: Peterson, supra note 1, at 14.

33 Interim Report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, Commission on Human Rights, E/CN.4/2006/97, 22 February 2006, "Promotion and Protection of Human Rights", para 18, available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement; also, see: UN, 2007, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", Report of the Special Representative of the Secretary-General (SRSG) on the issues of human rights and transnational corporations and other business enterprises, Human Rights Council, A/HRC/4/035, 9 February 2007, para 2-3, available: http://inni.pacinst.org/inni/corporate_social_responsibility/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf

34 UNCTAD, 2012, "World Investment Forum, International Investment Agreements, Annual Conference", Thirteen Session, Doha, Qatar, 23 April 2012, available: http://unctad.org/meetings/en/SessionalDocuments/td472_en.pdf

35 Luke Peterson, "Investment Protection Treaties and Human Rights, in Human Rights, Trade and Investment Matters", Amnesty International, May 2006, at 20, available: http://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf

36 For example, no precise reference to human rights are found in the Model BITs of Germany (2005), France (2008), China (2003), India (2003); see: Jacob, supra note 6, at 9.

37 see: Article 7 (2) (d), available: http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf

38 "Reaffirm their [of the treaty parties] commitments to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Right", available: http://www.pca-cpa.org/showpage.asp?pag_id=1391; also, see: Jacob, supra note 6, at 10. It is worth noting that this draft Model BIT was abandoned following the public input; see: Damon Vis-Dunbar, "Norway shelves its draft model bilateral investment treaty", investment treaty news, 8 June 2009, available: http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/

39 Preamble of Free Trade Agreement between the EFTA states and Singapore indicates: "REAFFIRMING their [of the agreement parties] commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights", available: http://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf

party or an investor; such wording is just useful tool for treaty interpretation.[40]

Despite such scarcity of human rights provisions in existing IIAs and other international instruments containing investment related provisions, some models of human rights provisions have been drafted by the International Institute for Sustainable Development (IISD).[41]

Balanced approach towards and between investment law and human rights enshrined in BITs and other IIAs as well as in various international instruments containing investment related provisions should be favoured even for the purposes of creating reliable and predictable investment atmosphere in a host state.[42] Whenever there is a conflict between investment law provisions and some fundamental human rights, it is likely that human rights commitments undertaken by a country prevail over investment commitments.[43] Unlike human rights or other areas of international law, international investment law, which was derived mostly from customary international law some of which still exists today in that respect,[44] is concerned with certain guarantees for foreign investors. Despite the diversity of spheres international law is concerned with, different areas of contemporary international law as well as sources thereof may interact each other.[45] In this regard, we may come up with a point relating to overlap of investment and non-investment obligations and possible involvement of more than one area of international law particularly in investment jurisprudence.[46]

It is well established, that the normative superiority of rules of *jus cogens* is not disputed in international law jurisprudence and, peremptory norms prevail over all other inconsistent rules of international law.[47] Moreover, there is an "intrinsic relationship between peremptory norms and human rights".[48] Some

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40 Jacob, supra note 6, at 10., also, see: Mann, supra note 31., also: Article 31 (2) of Vienna Convention on the Law of Treaties, 1969, available: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

41 Article 21 of IISD Model International Agreement on Investment for Sustainable Development provides the following: "(B) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations. […] (E) All Parties shall ensure that their Laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties", see: IISD, 2006, "IISD Model International Agreement on Investment for Sustainable Development, Negotiator's Handbook", 2nd edition, by Howard Mann, Konrad von Moltke, Luke Eric Peterson, Aaron Cosbey, available: http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf

42 Hirsch has argued that "[t]he development of regulatory rules that apply to overlapping spheres necessitates striking a balance between the competing rules and aims that lie at the heart of different domains of international law", see: Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations in International Investment Law", The Hebrew University of Jerusalem, Faculty of Law, Research Paper No. 14-06, November 2006, Submitted to the ILA Committee on International Law on Foreign Investment, 31 March 2006, Published by the International Law Forum of the Hebrew University of Jerusalem Law Faculty, at 3, available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430

43 Aldo Caliari, "UNCTAD's Investment Policy Framework for Sustainable Development: Potential and Issues", Investment Treaty News, International Institute for Sustainable Development, January 14, 2013, available: http://www.iisd.org/itn/2013/01/14/unctads-investment-policy-framework-for-sustainable-development-potential-and-issues/; also, see: Aldo Caliari, "Investment Policy for Sustainable Development, UNCTAD Proposes (September 2012), Rethinking Bretton Woods", September 10, 2012, available: https://www.coc.org/rbw/investment-policy-sustainable-development-unctad-proposes-september-2012

44 Christoph Schreuer, "Sources of International Law: Scope and Application", Emirates Lecture Series 28, The Emirates Center for Strategic Studies and Research, at 11-12, available: http://www.univie.ac.at/intlaw/wordpress/pdf/59_sources.pdf

45 *Ibid*, at 10-11.

46 Hirsch, supra note 42, at 4-5., Hirsch has argued that "the interrelationship between international investment and non-investment obligations are not necessarily contradictory. Legal rules deriving from these international spheres often complement and reinforce each other. […] international tribunals may in some cases interpret international investment treaties' provisions in light of non-investment treaties. […] even where investment and non-investment rules are clearly inconsistent, this conflict may lead not only to a normative determination of which rule trumps the other. Additional legal consequences of such incompatibility may arise with regard to the appropriate remedies (particularly regarding the amount of compensation) or the burden of proof".

47 *Ibid*, at 7. also, Article 53 of the Vienna Convention on the Law of Treaties, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norms of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

48 Andrea Bianchi, "Human Rights and the Magic of Jus Cogens", (2008) 19 (3) *The European Journal of International Law* 491, at 491, available: http://www.ejil.org/pdfs/19/3/1625.pdf

fundamental human rights are safeguarded by peremptory norms and provisions of the UN Charter.[49] While investment tribunals have often employed various provisions of the Vienna Convention on the Law of Treaties (VCLT), such tribunals lack the references to Article 30 or 53 of the VCLT relating to the primacy of the rules of *jus cogens* or the UN Charter provisions over investment treaties.[50] The dearth of balance between investment and human rights provisions, in turn, may lead to further difficulties in case host states try to justify a breach of investors' rights relying on their obligation to protect international human rights within their jurisdiction or if foreign investors try to invoke the superior status of some international human rights.[51]

In some cases, a breach of BIT provision by a state could really be justified whenever human rights obligations are invoked by the state and there is a conflict between such BIT and those human rights which are considered as *jus cogens*; on the other hand, however, state's measure may fall within a breach of obligations undertaken towards the foreign investors under the BITs.[52]

It stems from the foregoing that depending upon which human rights obligations are met at the crossroads of human rights and foreign investment, either the host states' measures, infringing foreign investors' rights, are found to be justified as those are invoked to protect human rights, or such measures are considered as a breach of commitments undertaken by a host state towards the foreign investor under the BIT provisions. Such picture, in general, makes a lifespan of foreign investment in a host state quite unpredictable. Today's world is much globalized than it was in the second half of the 20th century when the first BIT saw the light. Any business and economic activities, particularly foreign investment, requires a reliable and predictable atmosphere in a host state. Such atmosphere in turn affects a development of investment activities in a capital-importing country. In addition thereto, it is also true that today's investment activities may not be seen in isolation from the society and environment surrounding such investment in a host state. Current investment policymaking must take into account a wide range of social, human and environmental dimensions of a capital-importing state. It is those dimensions which appear at the crossroads of human rights and foreign investment and which may undermine any investment project if they are not accepted for investment policymaking consideration.[53] Thus, it could be argued that inclusion of human rights in investment policymaking would be a step towards creation of balance between human rights obligations and investment provisions. Such balance might be in the best interests of host states as well as of foreign investments.

Arguably, *at first sight*, such balance between human rights and investment issues might be achieved by means of enacting directly human rights provisions into investment treaties. However, in that respect, in

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49 Hirsch, supra note 42, at 7., also, Article 55 of the UN Charter, "[…](c) universal respect for, observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", and Article 56 of the UN Charter, "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set out in Article 55", available: http://www.un.org/en/documents/charter/chapter9.shtml. It's worth mentioning, in addition thereto, that in accordance with Article 103 of the UN Charter, the Charter's provisions prevail over other incompatible treaties unless peremptory norms of international law are involved. see: Hirsch, supra note 42, at 7., also, Article 103 of the UN Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail", available: http://www.un.org/en/documents/charter/chapter16.shtml

50 Hirsch, supra note 42, at 7.

51 *Idem*.

52 Ayala has argued that "when there exist a BITs which falls in conflict with such principles of international human rights law considered as *jus cogens*, it is possible for states to breach the BIT treaty in order to comply with its human rights obligations. The actual problem is that there are many human rights principles which are not considered to be *jus cogens*; furthermore, they are considered as second-generation human rights; such are the ones usually implicated in investment disputes, and it is in these situations in which the measures taken by the state would be found by the arbitrator tribunal to be in violation of its BIT obligations, this being a consequence of the absence of explicitness of BITs, which allows states to take required measures in order to comply with its human rights obligations", see: Yira Segrera Ayala, "Restoring the Balance in Bilateral Investment Treaties: Incorporation Human Rights Clauses", Revista de Derecho, Universidad del Norte, 32, 139-161, 2009, at 154, available: http://ciruelo.uninorte.edu.co/pdf/derecho/32/6%20RESTORING%20THE%20BALANCE.pdf; also, see: Oliver De Schutter, "Confronting the Global Food Challenge, A Human Rights Approach to Trade and Investment Policies", November 2008, available: http://www.iatp.org/files/451_2_104504.pdf

53 Luke Eric Peterson, Kevin R. Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration", IISD Publication, 2005, at 33, available: http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf

addition to substantive part of international investment law, possibility of investment tribunals to accept fully and examine carefully human rights arguments of non investment issues must also be considered.[54]

Under the arbitration mechanisms contained in BITs and other IIAs, foreign investor is able, when an investor believes that it has been denied some treaty protection, to sue the host state before international arbitration tribunal. It's worth noting that no single arbitration forum exists to hear such claims brought by foreign investors against host states. There are several arbitration options available under the BITs and other IIAs each of them with different procedural norms.[55] As seen, investment arbitration has already and will come up again with human rights issues in arbitration and have to deal with the relevant human rights issues raised by respective parties. However, investment arbitration, in general, differs from as how human rights courts adjudicate relevant cases. Some features of investment arbitration, not common with the human rights courts, could be noted herein.

There is no entire requirements for arbitration claims to be publicly available; thus in most cases, arbitration awards are confidential and hearings are conducted in privacy.[56] Among the various investment arbitration forums, ICSID seems to be the most chosen one.[57] Details of disputes and some of the decisions under the ICSID are publicly registered before its panel, albeit under Article 48 (5) of the ICSID Convention, consent of the parties for an award to be published is required.[58] Unlike investment arbitration, principle of *transparency* seems to be more safeguarded in Regional Human Rights Courts (European Court of Human Rights or Inter-American Court of Human Rights) where claims are publicly available and hearings are open to public unless specific circumstances call for privacy.[59]

In addition to *transparency*, there is another feature that distinguishes investment arbitration from human rights courts. *Adjudicators* – meaning that in investment arbitration, arbitrators are appointed to hear a single case; they could be drawn from law firms, academia or have held governmental position; most of arbitration panels are comprised of three people, one arbitrator is selected by each of the parties and a third, the president, is usually selected by the two party-appointed arbitrators.[60] In Human Rights Courts, however, *adjudicators* are full-time judges who sit for a set period of time.[61]

There is also a difference regarding *a process by which individuals bring claims* for treaty violation – that means that under the international human rights system, for an access to UN human rights bodies and

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54 Peterson and Gray have argued that "inclusion of investor responsibilities in investment treaties, would necessarily require that investment tribunals grapple more frequently and at an ever-greater level of sophistication with human rights norms. This presupposes ever-greater human rights expertise on the part of arbitrators, and invest these Tribunals with greater authority as fora where human rights concerns will be elaborated and interpreted. It must be stressed that investment tribunals would not become an adjudicative forum for human rights norms. Rather, they would only adjudicate investor rights, but in a manner which conditioned these investor rights on compliance of the investors with minimum human rights responsibilities. Naturally, it should be asked whether these ad-hoc Tribunals can be expected to have the legitimacy to be entrusted with such a critical task". see: *Ibid*, at 36.

55 Some of the options are as follows: International Centre for Settlement of Investment Disputes (ICSID), https://icsid.worldbank.org/ICSID/Index.jsp; United Nations Commission on International Trade Law (UNCITRAL), http://www.uncitral.org/; Stockholm Chamber of Commerce (SCC), http://www.sccinstitute.com/; International Chamber of Commerce (ICC), http://www.iccwbo.org/

56 Peterson, supra note 1, at 16-17.

57 Ayala, supra note 52, at 143.

58 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 48 (5): "The Center shall not publish the award without the consent of the parties", available: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm; also: *Ibid*, at 144.

59 Peterson, supra note 1, at 17-18.

60 *Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators*, at: Pia Eberhardt & Cecilia Olivet, "Profiting from Injustice, How Law Firms, Arbitrators and Financiers are fuelling an Investment Arbitration Boom", Corporate Europe Observatory and the Transnational Institute, November 2012, at 35, available: http://corporateeurope.org/publications/profiting-from-injustice

61 Peterson, supra note 1, at 17-18.

regional human rights courts, *exhaustion of domestic legal remedies* is required;[62] in contrast with that, there is rarely any exhaustion requirement in investment arbitration, however, there may be some minimal waiting periods prescribed in respective investment treaty prior to initiating international claim.[63]

Human rights issues, as already seen, have been raised before investment tribunals and arguably such issues will continue to be raised.[64] However, taking into account the differences between adjudication mechanisms of human rights issues by human rights courts and the system and procedure of arbitrating investment disputes by investment tribunals, one may claim that there is a lack of grounds for accepting that human rights issues to be adjudicated sufficiently by investment tribunals.[65] Therefore, investment arbitration system also poses adversities through the process of creation of balance between human rights and investment law issues. Arguably, certain reform and further development of investment arbitration system is also required[66] in order to cure inconsistent arbitral decisions whenever non investment issues are raised before investment tribunals.

Arguably, the need for BITs and other IIAs to take the human rights issues into account is based on the grounds of safeguarding various human rights issues, as well as labour and environmental standards in capital-importing states and creating a balance between investment law and human rights issues. However, it must be further submitted that integration of human rights and investment law issues is not accompanied merely by overlap of two different areas of *international law* and adversities through such overlap. Such integration must be further examined in light of public versus private law paradigm.

Much criticism has been referred to the alleged one-sidedness of the BITs and other investment instruments. Those instruments, by means of which capital-importing states are merely the guarantors of FDI through the lifespan thereof and foreign investors on the other hand lack the relevant obligations towards the host states,[67] are in fact one-sided. It's worth mentioning, in addition thereto, that BITs as well as other investment treaties are international instruments which are concluded by and between the states; and private investors per se are not parties to such treaties. Arguably, the primary objective of business is to make a profit and develop its activities and expand economic opportunities.[68] Foreign investors, being involved in business activities, cannot make the laws and regulations in a host state. It is the state itself that has the power to create the laws and regulations as well as enforce them. Moreover, from legal perspective, "[t]he orthodox vision

62 *Idem*.

63 *Idem*.

64 *Idem*.

65 *Idem*.

66 For a discussions regarding a suggestion to establish an Investment Arbitration Appellate body, please see: Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", (2005) 73 (4) *Fordham Law Review* 1522, at 1606-1625, available: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4062&context=flr; also, see: Erin E. Gleason, "International Arbitral Appeals: What Are We So Afraid Of?", (2007) 7 (2) *Pepperdine Dispute Resolution Law Journal* 269, available: http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1093&context=drlj

67 However, some BITs stipulate, as basic duty on investors, to establish their investment pursuant to the laws and regulations of the host state. Example of this is the BIT between Lithuania and Croatia, Article 1 of which indicates the following: "For the purpose of this Agreement […] The term "investment" shall mean every kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made *in accordance with the laws and regulations* of the other Contracting Party. . . ", available: http://investmentpolicyhub.unctad.org/Download/TreatyFile/872; Such requirement is common for the most Lithuanian investment treaties, see: Global Arbitration Review, "Investment Treaty Arbitration, Lithuania, Overview of Investment Treaty Programme", available: http://www.globalarbitrationreview.com/know-how/topics/66/jurisdictions/30/lithuania/; also, see: Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, Damon Vis-Dunbar, "Investment Treaties & Why They Matter to Sustainable Development: Questions & Answers", IISD Publication, 2012, at 35, available: http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf

68 The New York Times Magazine, September 13, 1970, "The Social Responsibility of Business is to Increase Its Profits", please visit: http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html; also, see: Milton Friedman, *Capitalism and Freedom*, 1962; However, Weschka has argued that "[f]rom a moral standpoint, MNEs are not only responsible for the financial benefit of their shareholders but for the well-being of all stakeholders, i.e. for their employees, the indigenous population, consumers and in general everyone affected by their business activities", see: Marion Weschka, "Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?", Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 626 (2006), at 627, available: http://www.zaoerv.de/66_2006/66_2006_3_a_625_662.pdf

of international human rights law generally binds only the states because it is principally designed to protect individuals from the excesses of state power".[69] From some practical point of view, on the other hand, many foreign enterprises which invest in a host state own huge capital, more than even the budget of such capital-importing states, particularly of some developing countries.[70] Such enterprises have a capacity to "affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means that they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed".[71] Foreign investment in many newly independent countries and transition economies are sometimes made on informal relationship between the governments and foreign investors.[72] It is the worst scenario where business and politics may interact with each other that in turn may lead to increased risk of disrespect for the law in general, as well as various human rights in capital-importing states. From those points of view, there is an obvious interconnection between private investment entities and those societies where such entities operate. The aforementioned interconnection may in turn cause some adverse effect on those societies. Therefore, an actual integrity of business and society might constrain business enterprises, including foreign investments to be more accountable for respect of human rights, as well as labour standards and environment.

Obviously, foreign private entities must be held accountable for human rights violations not only from a moral standpoint, but they should be "legally responsible under binding international law, which is enforceable and provides for the compensation of damages for victims".[73] However, such direct obligation on private entities for violation of human rights "is not yet reality",[74] as it is still contentious whether private entities and corporations could be regarded as subjects of international law.[75] However, indirect responsibility of private entities for human rights violations may be established, meaning that states as the primary duty bearers to protect human rights should ensure that private entities and corporations do not infringe human rights into their territories.[76]

Thus, states have the primary duty to protect human rights, whereas private entities and corporations must respect human rights.[77] However, it is another issue as how far do states protect human rights against infringement of those rights by private entities, including Multinational Enterprises (MNEs). Moreover, it is important to consider whether national laws and relevant regulations are sufficient to guarantee a level required for protection of human rights into the capital-importing states. Arguably, considering an actual integrity of foreign investments and societies that in many cases displays close and harmonious relationship between foreign enterprises and capital-importing state's governments, and taking into account an economic power and

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69 David Kinley, Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", (2004) 44 (4) *Virginia Journal of International Law* 931, at 935.

70 Weschka, supra note 68, at 625-626.

71 Peter T. Muchlinski, *Multinational Enterprises and the Law*, 2nd edition, Oxford University Press, 2007, at 516.

72 Amanda Perry, "Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence", (2000) 49 *International and Comparative Law Quarterly* 779, at 784 – 792.

73 Weschka, supra note 68, at 627., also, see: United Nations Human Rights Office of the High Commissioner for Human Rights, "Corporations must be held accountable for human rights violations", available: http://www.ohchr.org/EN/NewsEvents/Pages/CorporationsMustBeHeldAccountableForHRViolations.aspx

74 *Idem*.

75 *Idem*. also, see: José E. Alvarez, "Are Corporations "Subjects" of International Law?", (2011) 9 *Santa Clara Journal of International Law* 1., also, see: Muchlinski, supra note 71, at 517.

76 Weschka, supra note 68, at 628., also, see: Peter T. Muchlinski, "Human Rights and Multinationals: Is There A Problem?", (2001) 77 *International Affairs* 31, at 42., also: David Miller has argued that "[i]t is a truth widely if not yet universally acknowledged that the protection of human rights is one of the main aims of global governance – not the only aim, for sure, but one of the main reasons for thinking that governance must exist on a global and not merely a national level. When states are unable to protect the human rights of their citizens, or indeed are actively involved in violating those rights on a significant scale, then 'the world community' has a responsibility to step in and ensure that these rights are protected", see: David Miller, "The Responsibility to Protect Human Rights", Memo for the workshop on Global Governance, Princeton University, 16-18 February 2006, available: http://www.princeton.edu/~pcglobal/conferences/normative/papers/Session6_Miller.pdf

77 IPIECA, The global oil and gas industry association for environmental and social issues, *Human Rights Training Tool*, 3rd edition, September 2012, available: http://www.ipieca.org/publication/human-rights-training-toolkit-3rd-edition

international mobility,[78] and "dependence of many countries on international direct investment",[79] it is doubtful that capital-importing states may take efficient actions against private entities and corporations that violate human rights within their territories.[80] Moreover, national laws and regulations relating to human rights, as well as labour and environmental standards of many developing capital-importing states may become capable of producing a required effect when a host state reaches a certain level of its economic development. All of the foregoing means that protection of various human rights, as well as labour and environmental standards into the capital-importing states apparently lacks legal, institutional and policymaking mechanisms.

By virtue of the fact that in many cases, some of private investment entities as well as MNEs themselves lack an interest in respecting human rights, and considering difficulties with placing a direct responsibility on them for the human rights violations,[81] numerous alternative initiatives have been developed with the aim to hold those entities accountable for "the sociocultural welfare"[82] and "human rights of […] the people living in host countries".[83] However, those initiatives have mainly resulted in adoption of voluntary guidelines,[84] codes and conducts for business entities.

One of the recent guidelines, unanimously endorsed on June 2011 by the United Nations Human Rights Council,[85] is the United Nations Guiding Principles on Business and Human Rights (UNGP).[86] As introduced, the UNGP has been "designed to provide for the first time a global standard for preventing and addressing the risk of adverse impact on human rights linked to business activity".[87] The UNGP is a guiding tool for businesses and states in implementation of the UN "Protect, Respect and Remedy" Framework for managing business and human rights challenges.[88] However, it must be considered that the UNGP "will not bring business and human rights challenges to an end".[89] Those Guiding Principles are

78 Weschka, supra note 68, at 628.

79 *Idem*.

80 *Idem*.

81 Monshipouri, Welch & Kennedy have argued that "MNCs have thus far shown meager interest in the sociocultural welfare or human rights of the vast majority of the people living in host countries. MNCs are under no legal – much less ethical – obligations to the governments of the countries within which they operate, even as their policies and actions affect hundreds of millions of people. Conversely, it is states that ate accountable to the transnational business and economic private regimes set by the MNCs. In the absence of international regulatory agencies, MNC have been entirely free to devise their own rules, creating an environment less hospitable or indifferent to human rights", see: Mahmood Monshipouri, Claude E. Welch Jr. and Evan T. Kennedy, "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities", (2003) 25 (4) *Human Rights Quarterly* 965, at 987-988.

82 *Ibid*, at 987.

83 *Idem*.

84 For example: *OECD Guidelines for Multinational Enterprises* which are non-legally binding and represent recommendations providing principles and standards for responsible business conduct for multinational corporation. Originally the Guidelines were adopted by the OECD in 1976 and revised in 1979, 1982, 1984, 1991, 2000 and 2011, please see: "Guidelines for multinational enterprises", http://www.oecd.org/investment/mne/2011update.htm; also: *United Nations Guiding Principles on Business and Human Rights (UNGP)*, which are a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity, see: UN, 2011, "Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework", HR/PUB/11/04, available: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; for Guidelines please also see: United Nations Global Compact, "UN Framework, Guiding Principles for the Implementation of the UN "Protect, Respect and Remedy" Framework", available: http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html

85 UN News Centre, "UN Human Rights Council endorses principles to ensure businesses respect human rights", available: http://www.un.org/apps/news/story.asp?NewsID=38742#.UaE_30BvDDs

86 UN, 2011, "Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework", HR/PUB/11/04, supra note 84.

87 United Nations Human Rights Office of the High Commissioner for Human Rights, "New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council", available: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164

88 *Idem*. as indicated "Under the 'State Duty to Protect,' the Guiding Principles recommend how governments should provide greater clarity of expectations and consistency of rule for business in relation to human rights. The 'Corporate Responsibility to Respect' principles provide a blueprint for companies on how to know and show that they are respecting human rights. The 'Access to Remedy' principles focus on ensuring that where people are harmed by business activities, there is both adequate accountability and effective redress, judicial and non-judicial", see: *Idem*.

89 UN, 2011, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other enterprises", John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United*

not intending "in the creation of new international law obligations".[90]

The UNGP recognizes "(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached".[91] It stems from the UNGP that states have a primary duty to protect individuals from corporate violations of human rights, whereas private entities should respect human rights.

The UNGP sets out that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".[92] With respect to business enterprises, the UNGP indicates that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".[93] Moreover, business enterprises' responsibility for respecting human rights requires that those enterprises "(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impact".[94]

Obviously, the UNGP is a step forward towards "preventing and addressing the risk of adverse impact on human rights linked to business activity".[95] However, from a legal perspective, the UNGP is non-binding mechanism; as well as no clear enforcement mechanisms for the standards are set out.[96] Moreover, state duty to protect and corporate responsibility to respect are interdependent, meaning that "Corporate responsibility to respect depends on State implementation of its duty to protect".[97] That has a potential of making the whole idea of *protect* and *respect* absolutely misbalanced, particularly into the developing states. Many foreign enterprises and corporations have enormous power and influence, whereas states, particularly developing ones may not be able or even willing to confront those enterprises that bring investment into those states.[98]

Based upon our discussion, the following conclusion could be made. Considering a growing process of globalization and interdependence of public and private actors, as well as a power and an influence of foreign direct investment makers, it becomes obvious that the IIAs should be converted from *one pillar* into *double pillar* mechanisms wherein those investment agreements and treaties should seriously consider various human rights issues. Without that approach, intersection of human rights and investment issues is concerned with substantive as well as procedural difficulties. Investment arbitrators are sometimes relying on certain rulings of the ECHR in order to clarify, by means of analogy, how certain investment treaty provisions might be construed.[99] However, as it has been argued, "analogy without theory is blind".[100] It is apparent that the general system of investment arbitration also exhibits serious difficulties when human rights issues are raised before the investment tribunals. Considering the foregoing, it is apparent that some further legal, institutional and policymaking improvements are needed.

Nations "Protect, Respect and Remedy" Framework, Advance Edited Version, 12 March 2011, A/HRC/17/31, at 5, available: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

90 *Idem*.

91 "Guiding Principles on Business and Human Rights", supra note 84.

92 *Idem*.

93 *Idem*.

94 *Idem*.

95 United Nations Human Rights Office of the High Commissioner for Human Rights, "New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council", supra note 87.

96 Phebe Mavungu Clement, "UN Guiding Principles on Business and Human Rights: Weaknesses and Way Forward", XII International Human Rights Colloquium, Sao Paulo, 14 October 2012, available: www.conectas.org/arquivos/multimidia/PDF/182.ppt

97 *Idem*.

98 *Idem*.

99 Peterson, supra note 1, at 23.

100 Ronald Dwarkin, "In Parise of Theory", (1997) 29 *Arizona State Law Journal* 353, at 371.

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