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Obtaining Damages for Corporate Human Rights Violations in Investment Arbitration

Yasmin Salama

UBC Peter A. Allard School of Law

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ABSTRACT

Over the past decades, transnational corporations have come under increasing public scrutiny for their involvement in human rights abuses, particularly in developing countries. One may think of violent acts against local communities, slave labor, and grand-scale environmental pollution. International investment law protects and safeguards the rights of foreign investors but falls short of holding them accountable to societies where they operate. A few arbitral tribunals have grappled with whether corporations could be held responsible for illegalities that constitute human rights violations inflicted upon the host state and its people. Arbitral case law suggests that the case's outcome as to whether host states ought to be compensated for such violations varies based on how the illegal conduct is framed and the source of the liability-creating rules alleged to have been breached. This article discusses the arbitral treatment of corporate human rights violations by investment tribunals in three treaty-based cases: Copper Mesa v. Ecuador, Urbaser v. Argentina and Burlington v. Ecuador. It draws on recent scholarly work on causation in investor-state arbitration to evaluate their approaches. It concludes by suggesting that if the post-establishment illegality involves actual harm, then bringing it forward as a counterclaim and founding investor's liability on national tort laws, not international human rights law, heightens the likelihood of obtaining compensation.

Introduction

The development of the international investment regime into a powerful global governance mechanism has led to ongoing and controversial discussions about the legitimacy of investor-state arbitration (Franck, 2005; Zwolankiewicz, 2021). A mounting appeal for more transparency, participation, accountability and the rule of law emerged (Brower & Schill, 2009). In the context of Investor-State Dispute Settlement (ISDS) reform, human rights considerations have held a central position in the debate on the future of investment arbitration. The relationship between investment law and human rights has been described as "rather complex and not to be painted in black and white" (Steininger, 2018). It has been argued that Bilateral Investment Treaties (BITs) have an inherent social dimension and should not be perceived as merely seeking economic development (Ortino, 2005). While BITs may be used as "an essential basis for fertilizing human rights protection and promotion" (Mouyal, 2016),

the flaws of the ISDS system are believed to have negatively affected human rights enforcement and realization in the territories of host states (Suda, 2006) and limited the effectiveness of human rights arguments in investment arbitration (Kube, 2019). This article is situated within the strand of scholarship that calls for infusing human rights into investment disputes to promote and protect human rights in the territories of host states. It explores the possibility of using ISDS to claim compensation for human rights violations by delving into the legal mechanics of framing the harm incurred by the host state and its people.

It is worth noting that, as a general rule, International Investment Agreements (IIAs) confers the right to bring claims (locus standi) on investors only. At the same time, the host state may not initiate lawsuits against the investor under investor-state arbitration provisions. However, the host state may raise counterclaims in some instances depending on the applicable arbitration rules along with the different formulations of investment protection provisions, and this possibility is exemplified by the case law discussed herein. Insofar as the object of the investment collides with the local communities' interests without implicating actual harm, certain tribunals have exhibited a progressive approach towards broad public policy arguments advanced by the states based on their national and international law obligations. For instance, while the host state's defence based on health and safety reasons was rejected outright by the tribunal in Metalclad v Mexico in 2000, the state successfully defended the breach of its international investment obligations 16 years later, in Philip Morris v. Uruguay by invoking its international obligations under the Framework Convention on Tobacco Control. The role of international investment law as a sophisticated legal and regulatory framework for the relationships underlying Foreign Direct Investment (FDI) brings forth higher expectations when the case entails actual harm, rather than possible future harm, sustained by the state and its people and caused by the investor's misconduct. While they break no new ground for the actual victims of investor misconduct, lodging counterclaims against the investor has borne some fruit in holding them accountable for their human rights violations in some instances.

This article discusses the arbitral treatment of corporate human rights violations by investment tribunals in three treaty-based cases: Copper Mesa v Ecuador, Urbaser v Argentina and Burlington v Ecuador. Specifically, it examines the implications of designating a human rights violation as a jurisdictional objection, a post establishment illegality and a counterclaim for quantifying the harm incurred by the host state and its peoples. The cases examined represent a category of situations where the host state is faced with a treaty claim filed by an investor who is alleged to have been implicated in human rights violations in the host state's territory. It should be noted that the liability-creating rules may hail from international human rights law (IHRL) or from national laws that implement internationally recognized norms into the domestic legal order. It is often argued that in these factual situations, states are under a positive obligation to intervene by taking measures to safeguard the rights of their local populations (Balcerzak, 2017), the very same measures that are alleged to be in breach of the IIA. This has evoked a particular portrayal of human rights violations in the context of investment arbitration, i.e. that the host state presents investor misconduct as a vindication of intervening measures taken in fulfilment of their human

rights obligations (Meshel, 2015). However, this often falls far from reality. This article argues that these violations have taken different forms that have, in turn, dictated their function in terms of providing redress for ensuing harm. The piece starts with a description of the cases (Section 2). It then sets out to distinguish between defenses and counterclaims that pivot on human rights breaches (Section 3) and concludes by extrapolating general trends from case law (Section 4).

1. THE CASES IN A NUTSHELL

1.1 Copper Mesa v Ecuador

In Copper Mesa v Ecuador, a tribunal constituted under the 1996 BIT between Canada and Ecuador ordered the host state to compensate a Canadian company for the unlawful expropriation of its mining concessions (Copper Mesa v Ecuador, 2012, paras. 11.4-11.5). Copper Mesa's claims challenged measures that allegedly affected its local Ecuadorian subsidiaries that held the relevant concessions (Copper Mesa v Ecuador, 2012, para. 1.9). One of the concessions, the Junín concession, was located adjacent to small villages. Between December 2005 and July 2007, tensions between village residents and Copper Mesa exploded into a series of physical confrontations. Copper Mesa resorted to force and intimidation against local communities by using armed men who physically assaulted individuals, including children, and opened fire at community members blocking the way to the company's mineral concessions. In 2008, the Claimant's three projects were terminated without compensation and with no appeal permitted based on a new law known as the Mining Mandate. In particular, the revocation of the mining license granted for the Junin area was attributed to the claimant's failure to obtain an environmental impact study due to the bitter social conflict with Junin's local communities (Copper Mesa v Ecuador, 2012, paras. 1.107-1.112). The tribunal concluded that Ecuador was aware of Copper Mesa's behaviour and did not do enough to help the company deal with protesters and carry out the project (Copper Mesa v Ecuador, 2012, para. 5.63). The expropriation was found not on the grounds of enacting legislation damaging to the investment but rather on the respondent's unlawful conduct in denying the claimant effective remedies to challenge the termination decision and failing to provide the claimant's investments with both the physical and the legal security. The tribunal decided that the claimant's injury was caused both by the respondent's unlawful expropriation, its failure to provide full protection and security and by the claimant's own contributory negligent acts and omissions.

1.2 Urbaser v Argentina

Filed under the 1991 Argentina-Spain BIT, the dispute in *Urbaser v Argentina* arose out of the termination of a concession for water and sewage services in which the claimant acquired shares in 1999. The claimant argued that the emergency measures taken by the government in response to Argentina's financial crisis in 2001-2002 brought about a major overhaul of the regulatory framework applicable to their investment (Urbaser v. Argentina, 2016, paras. 658-666). The effects of the crisis significantly intensified with the enactment of the Emergency Law in early 2002. Consequently, Argentina argued that the Province of Buenos Aires had no alternative but to terminate the concession, given the claimant's bad management and failure to fulfill their obligations under the concession (*Urbaser v. Argentina*, 2016, para. 807). In its analysis, the tribunal rightly observed that the investor had already been in "a difficult

situation caused by the drop in collectability and the lack of funding" since 2001 and was therefore unable to meet its undertakings under the contract (*Urbaser v. Argentina*, 2016, para. 678). Hence, the tribunal ruled that the government had breached the standard of fair and equitable treatment, albeit with no damages ordered, because this breach had only operated to aggravate the situation for an already financially deficient investment (*Urbaser v. Argentina*, 2016, paras. 845-847). In 2013, Argentina filed a counterclaim alleging that through the claimant's failure to provide the necessary investments, they had breached the human right to water. The tribunal accepted its jurisdiction over Argentina's counterclaim, confirming that the "right to water" is a human right under international law 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 sewage services, but there was no such obligation on the investor (*Urbaser v. Argentina*, 2016, paras. 1205-1206). Urbaser's award was lauded as a victory for human rights for admitting a human-rights counterclaim and adopting a broad approach to defining the scope of the law applicable to the dispute[1].

1.3 Burlington v Ecuador

In April 2008, a US oil and gas company filed a claim before the International Centre for Settlement of Investment Disputes (ICSID) under the 1993 United States-Ecuador BIT concerning ownership interests in oil reserves in the Amazon rainforest between 2000-2006. Burlington contended that substantial changes to the then-applicable tax regime were introduced by new legislation that imposed a 50 percent tax on extraordinary profits made by oil companies which later increased to 99 percent. Following the failure of renegotiation attempts between the parties, Ecuador took possession of the production facilities and annulled the contracts with Burlington by a ministerial decree. In its decision, the tribunal found that the physical taking of the oilfields without compensation constituted an unlawful expropriation of Burlington's investment (Burlington v Ecuador, 2012, para. 545). The tribunal dealt separately with a counterclaim filed by Ecuador, arguing that Burlington's activities had resulted in significant environmental damage in breach of its national environmental law. Despite being found in domestic law, the tribunal considered the investor's misconduct through the counterclaim and held them liable for the environmental damage in Blocks 7 and 21 in the form of significant soil and groundwater pollution (*Burlington v Ecuador*, 2012, para. 1099). According to Ecuador, it was found that "close to 2.5 million cubic meters of soil and all groundwater locations tested [had been] polluted with hydrocarbons, heavy metals or both" (Burlington v Ecuador, 2017, para. 52).

2. CLASSIFYING INVESTOR MISCONDUCT BY PROCEDURAL PHASE

The prevailing view in investment arbitration is that determining whether there is a covered investment

[1] The tribunal noted that the BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights, para. 1200.

under the *rationae materiae* jurisdictional requirement is confined to the "making" of the investment and does not extend to acts that occur post-establishment. Even though human rights violations are more likely, given their nature, to occur during the operation of the investment, they have formed the subject of objections lodged against the jurisdiction of the arbitral tribunal to hear a principal claim brought by the investor[2] as well as the admissibility of counterclaims[3]. Analysis in this article will be confined to how human rights violations have been designated in the liability phases of a principal claim and a counterclaim. The common thread that these three cases share is that there is a class of victims who suffer harm, at least of non-pecuniary nature, as an inevitable consequence of the investor's misconduct and that harm warrants reparation.

Conceptually, human rights violations may underpin a post-establishment illegality defence that could either challenge the claim's admissibility or attenuate host state liability on the merits. Grounded in the doctrine of unclean hands (Jarrett, 2019), the state founds its defence on an investor's outright breach of applicable laws during the post-establishment phase[4], be it the host state's domestic law or international law. In principle, illegality in national legal systems is recognized, albeit to varying degrees, as a ground based on which a court may refuse to adjudicate a dispute to avoid granting non-compliant claimants assistance in the form of judicial remedies (Douglas, 2014). In the same vein, the principle of unclean hands has also been invoked, though with limited success, before international courts and tribunals as an objection to the admissibility of claims (Crawford, 2002). Nevertheless, there appears to be a near consensus in investment arbitration jurisprudence that only establishment illegalities may produce the ultimate result of depriving an investor of exercising any arbitral remedy under the treaty (Dumberry, 2016), regardless of whether it takes aim at the tribunal's jurisdiction or the claim's admissibility[5].

In Copper Mesa, unclean hands were invoked by the host state to argue that the investor's involvement in acts of violence against local communities in breach of both Ecuadorian criminal law and IHRL should render the claim inadmissible (Copper Mesa v Ecuador, 2012, para. 5.36). Reflecting the prevailing view, the tribunal dismissed Ecuador's objection to admissibility since the alleged violations were subsequent to the legal acquisition of the investment. It ruled that it was a question for the merits and opted to consider it under the doctrine of 'contributory fault.' This concept, which constitutes the second defence that can have human rights violations as its foundation, applies to cases where

[2] As in the case of *Cortec Mining v Kenya*, where an establishment illegality related to domestic environmental regulations led to the dismissal of the claim.

[3] As in the case of *Aven and others v Costa Rica* where the counterclaim based on environmental obligations was found inadmissible.

[4] But see (Jarrett, 2019) at 134. Jarrett's theory advocates for another condition for a finding of post-establishment illegality on the merits, namely the 'beneficial relationship to the investment'. This requirement is not warranted in the context of this article due to the nature of the investor's misconduct herein addressed.

[5] For a contrarian view, see (Dumberry, 2016) *at* 231, arguing that the doctrine of unclean hands should also be a valid ground to bar admissibility even if the investor's misconduct is not related to the establishment phase.

'the individual victim of the breach has materially contributed to the damage by some willful or negligent act or omission' according to article 39 of the ILC Articles on State Responsibility. The tribunal eschewed delving into the conceptual difference between contributory fault and unclean hands and instead followed the line of reasoning adopted in similar cases: the investor misconduct should be countered with a reduction in damages[6] (*Copper Mesa v Ecuador*, 2012, para. 6.91-6.96). Copper Mesa's misconduct may be conceived of as an affront to state sovereignty that instigated the state to take a measure of reprisal, thus indirectly contributing to its loss. Both post-establishment illegality (if considered on the merits) and contributory fault rest upon investor misconduct with a causal link, however remote, to the investor's loss and typically operate as a partial defence to the host state's breach of an investment treaty, ultimately resulting in reduced compensation.

Both Urbaser and Burlington heralded the beginning of the evolution toward a more symmetrical investment treaty regime by allowing counterclaims to be advanced by host states. Here, the state does not invoke investor misconduct as a defence to its liability, in which case the investor's claim cannot be adjudicated without entertaining the state's defence, but rather as a free-standing cause of action against the investor and bears no relation to the ultimate fate of the principal claim. A counterclaim must, however relate to the same investment at the center of the dispute but involve an independent set of facts, a requirement that was endorsed by the tribunal in Urbaser (Urbaser v. Argentina, 2016, para. 1151).

A decisive factor in allowing a counterclaim is to determine whether it falls within the scope of the parties' consent, whereas such consent is presumed regarding all pleas of defences based on facts that constitute an integral part of the dispute. In Burlington, the parties' consent was given effect through a specific agreement in which they explicitly agreed to the tribunal's jurisdiction over Ecuador's counterclaims (Burlington v Ecuador, 2017, para.s 60-62). It bears mention that Ecuador had not invoked any relevant international environmental norms nor presented evidence in its pleading that domestic laws serve to incorporate international obligations. As for Urbaser, the tribunal held that the wording of the treaty's dispute resolution clause allowed either party to submit a dispute in connection with an investment (Urbaser v. Argentina, 2016, para. 1143). In determining jurisdiction, Argentina's argument that the counterclaim finds support in IHRL and is 'not based on domestic law only' weighed heavily in favour of finding a legal connection between Argentina's counterclaim and the claimant's claim (*Urbaser v. Argentina,* 2016, para. 1151).

While jurisdiction was upheld in both cases, damages have been granted in only one of them: Burlington, where the counterclaim exhibited no link whatsoever to obligations having an international

[6] It is worth noting that none of the five investment treaty awards that the tribunal cited as precedent for the application of Article 39 of ILC articles involved allegations of the same nature as those recorded in *Copper Mesa*, i.e. human rights violations in breach of international law.

pedigree, in contrast to Urbaser, where this was rather indicative of a strong legal connection. This begs the question: could the tribunal's jurisdiction over the counterclaim in Urbaser have been denied if it had been solely based on domestic law as in Burlington? The reason the case was dismissed in Urbaser is the tribunal's ruling that the obligation to provide access to water under human rights law is an obligation typically borne by states and not by private parties (*Urbaser v. Argentina,* 2016, para. 1208). This suggests that if Argentina was to accrue any benefit from the tribunal's expansive interpretation of the scope of applicable law, it should have presented its claim as a defence to the alleged treaty violation rather than a counterclaim.

3. IMPLICATIONS OF COPPER MESA, URBASER AND BURLINGTON AWARDS

The difficulties associated with imposing human rights obligations on corporations continue to be an intractable reality, mainly because these entities are not formal legal actors under international law and therefore are not directly bound by it. Up to the time of writing this article, there have been no international legal instruments that impose binding environmental and human rights responsibilities on Transnational Companies (TNCs), justifying the turn to soft law (Poorhashemi, 2020) to fill this gap. The ongoing debates and initiatives regarding this issue are driven by polarized objectives between the voluntary Corporate Social Responsibility (CSR) movement, which primarily aims at shielding corporations from liability and demonstrating their capacity to self-regulate, and the accountability movement that is directed at generating legally binding obligations that could be invoked by third parties (Bijlmakers, 2018).

From a traditional international law perspective, only states can be addressees of international human rights obligations to respect, protect, and remedy human rights. The 2011 UN Guiding Principles on Business and Human Rights (UNGP) are believed to be an extension of this traditional understanding as it only urges private actors to respect human rights and not to infringe on them, thereby setting a global non-legal standard for their expected conduct toward the society (Rose, 2016). The 2003 Draft Norms preceded the UNGP on the Responsibilities of Transnational Corporations and other Business Enterprises concerning Human Rights ('Draft Norms'), which fell on the stony ground due to the breadth of direct legal liabilities that they imposed on corporations (Miretski & Bachmann, 2012).

There have been attempts in the literature to establish the responsibility of corporations under international law because of their increased economic and political influence. It has been argued that the term 'every organ of the society' included in the preamble of the 1948 Universal Declaration of Human Rights (UDHR) may be broadly interpreted to include both the state and non-state actors (Weissbrodt & Kruger, 2005). Reinisch also relies on

Article 30 of the UDHR and similar language in the 1966 UN Human Rights Covenants[7] to conclude that the core of human rights obligations is binding on all parts of society, including non-state actors (Reinisch, 2005). These arguments were staunchly opposed by Rose, who contended that the language of the UDHR, despite calling them to respect human rights, does not indicate that private actors bear obligations under IHRL (Rose, 2016).

Inconsistency with the UNGP's approach of devolving the regulation of corporate conduct to the national realm, there have been progressive initiatives to strengthen corporate accountability for negative impacts on human rights through civil law litigation at the national level[8]. A recent development in this regard is the award rendered by The Hague District Court in *Milieudefensie et al. v. Royal Dutch Shell,* which found that the company owed a duty of care to Dutch citizens to prevent the environmental damage ensuing from carbon emissions based on the unwritten standard of care laid down in Section 162 of Dutch Civil Code. The court ordered Shell to reduce its CO2 emissions by a net 45% in 2030 and notably relied on the 'duty to respect" as embodied in the UNGP and its accompanying commentary (Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC, 2021, para. 4.4.17) to determine the content of the unwritten standard of care. Echoing the prevailing view in international jurisprudence and legal literature, the court however admitted that the provisions in international conventions such as the ICCPR and the European Convention on Human Rights (ECHR) only 'apply in relationships between states and citizens' (Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC, 2021, para. 4.4.9) and cannot be invoked directly against private actors.

Awards issued by investment tribunals examined in this article seem to follow the same path by acknowledging the state-centred character of IRHL obligations. Although Urbaser's tribunal was the only one to address at length and pronounce their carefully reasoned position that international law currently does not confer *human rights obligations directly on* non-State actors, nothing to the contrary can be inferred from the two other cases. Despite the alleged violations of both domestic law and IHRL, the tribunal in Copper Mesa declared the claimant's acts a material violation of Ecuadorian criminal law only (Copper Mesa v Ecuador, 2012, para. 6.100). Similarly, the tribunal in Burlington engaged in a detailed analysis of the investor's obligations grounded in domestic law, applying a strict liability regime that had been long established by Ecuadorian

[7] Article 30 of the UDHR stipulates that '"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Similar language can be found in Article 5(1) of the International Covenant on Civil and Political Rights (ICCPR) (adopted on 16 December 1966 and entered into force on 23 March 1976) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted on 16 December 1966 and entered into force on 3 January 1976).

[8] Examples include the judgment of the Supreme Court of Canada in Nevsun Resources Ltd. v. Araya where the Supreme Court of Canada held that Canadian corporations may be sued in tort for violations of IHRL that occur abroad, and the French law adopted in 2017 to establish a 'duty of care' for parent and subsidiary companies.

courts for certain activities, including oilfield operations (Burlington v Ecuador, 2017, para. 236).

In Urbaser, the tribunal found that Argentina's counterclaim conflated the concessionaire's obligation to provide water and sewage services under the contract with the obligation to fulfil the human right to water. It further noted that the human right to water, sourced from the UDHR and ICESCR, entails a 'duty to perform', and since it is grounded in international law, it binds only the state, not private actors (Urbaser v. Argentina, 2016, paras. 1206-1208). The tribunal, however, recognized investors' subjectivity in international law by relying on Article 30 UDHR and Article 5(1) ICESCR as previously posited by a few scholarly voices[9] and reasoned that there was also 'an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights' (Urbaser v. Argentina, 2016, paras. 1196-1199). Seemingly informed by this interpretation, the tribunal alluded to the fact that an obligation to abstain from violating human rights would automatically bind individuals and corporate entities had this been the case at issue (Urbaser v. Argentina, 2016, para. 1210) while leaving many questions unanswered[1] .

Prudential reasons also appear to have driven the tribunals' approaches when faced with allegations accusing investors of acting in breach of IHRL. These reasons tie in neatly with their state-centred outlook. It can be observed from Copper Mesa and Urbaser that in dissecting state's obligations, tribunals were inclined to examine whether there were any signs of acquiescence[1] to the investor misconduct on the part of the host state, which, if proven, would militate against finding the claim inadmissible or transferring liability from host state to investor in a counterclaim, if ever possible. It has been emphasized that the investor's acts and omissions are presumed to take place while the state has full knowledge of and control over the surrounding circumstances; thus, it is the state's responsibility to put in place and enforce a regulatory framework that is effective enough to ensure the investor's compliance (Urbaser v. Argentina, 2016, paras. 1213-1214; Copper Mesa v Ecuador, 2012, para. 5.63) essential for the fulfilment of the population's human rights. The tribunal's reasoning in Copper Mesa indicates that for the state to base its illegality defence to admissibility on the

[9] See Reinisch, 2005 and Weissbrodt and Kruger, 2005.

[1] For criticisms of the award over the subjectivity of corporate entities in international law see Edward *Guntrip*, "*Urbaser v Argentina*: The *Origins* of a *Host State Human Rights Counterclaim in* ICSID Arbitration?" (10 February 2017), online: EJIL Talk! Blog <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>; Kevin Crow and Lina Escobar, 'International Corporate Obligations, Human Rights and the Urbaser Standard: Breaking New Ground?' (2018) 36 BU Int'l LJ 1 at 103 – 111; Kube, 2019, at 168.

[1] This argument draws on Llamzon's analysis of the implications of 'acquiescence' in the context of corruption in international investment law, suggesting that 'a finding of acquiescence or waiver implied by conduct may lead a tribunal to rule that the host state's corruption-based defenses are to be considered abandoned'. Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014), at 270 -273.

claimant's human rights breaches, it must demonstrate, at minimum, that it had taken post-breach measures to control and investigate those acts within its jurisdiction rather than bring them up for the first time after the commencement of the arbitration (*Copper Mesa v Ecuador*, 2012, para. 5.64).

In Urbaser, the tribunal also observed that it would have been more prudent if the state had set up clear policies of high priority that better apprise the investors of the link between their obligations under their contract and the realization of the state's obligations towards its people (*Urbaser v. Argentina*, 2016, para. 1204). The failure of renegotiations in Urbaser, was mostly attributed to their desired policy to transfer back water concessions to public hands (*Urbaser v. Argentina*, 2016, paras. 826, 1214) rather than to take the best course of action to reach the human rights objective intended, was sufficient for the tribunal to deduce that this human right could not be classified as a 'governmental primary focus' (*Urbaser v. Argentina*, 2016, para. 1219).

Another pressing issue that could stand in the way of seeking damages for investor's violations against local populations is the nature of human rights as *inherently individual* interests. The tribunal in Urbaser rightly questioned how mitigation of state liability could deliver justice to those specific individual victims who had been injured. It calls attention to the fact that there is no grounding in international law that could entitle those affected individuals to raise a claim against a private party and demand reparation for harm (*Urbaser v. Argentina*, 2016, para. 1220), a matter that is even more pertinent to Copper Mesa which involved acts of violence against local communities. This connotes that human rights breaches in ISDS proceedings may only have a bearing on state liability, and claiming damages would only be envisaged in case of collective harm, e.g. environmental damage.

CONCLUSION

Faced with the painstakingly slow and hampered at times, reform process of the ISDS regime, it would be prudent for host states to capitalize on the means at hand to counter the asymmetrical nature of this regime. This article aims to contribute to this debate and argues that host states ought to vigilantly consider how and when to raise their defences against a defiant investor. Save for the nebulous distinction made by Urbaser's tribunal, investor-state tribunals are generally supportive of the orthodox view that states are the primary bearers of IHRL obligations *and that no international instruments* currently *impose direct* legal *responsibilities* on corporations. If successfully pleaded, both the post-establishment illegality and contributory fault merely reduce the liability of the state[1] by way of set-off against what

[1] It is unlikely for the state to avoid liability in its entirety in cases where there is post-establishment misconduct on the part of the investor because measures taken in response to such conduct, and that presumably amount to deprivation of investment, are often found to be disproportionate to the gravity of the investor's wrongdoing.

the state owes the investor based on the primary claim. This carries no benefit to the victims who are directly harmed by the breaches. It follows that in case no finding of liability was made against the state, then the only opportunity to denounce and retaliate against corporations for their involvement in human rights violations in an international forum will have been forfeited. Assuming that the host state is able to navigate the preceding jurisdictional hurdles successfully, lodging counterclaims based on domestic laws against investors who perpetrate human rights violations seemingly stands the best chance to obtain damages for attendant harm and can mitigate to some extent the asymmetry in investment arbitration since a state can, in the same proceedings, enforce social and environmental obligations against an investor.

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