The Human Right of Freedom of Expression in Investor-State Arbitration

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Investor-state dispute settlement (ISDS) by arbitration under bilateral investment treaties (BITs) frequently entails the application of international law extrinsic to the BIT itself, either as a principle of interpretation or by importation to the BIT of external rules as a matter of construction. Since the Second World War, a huge domain of law has been developed by international tribunals under human rights treaties. These treaties are international law instruments of equal status to any BIT. However, when claimants have brought ISDS claims relating to investments in television and radio broadcasting, human rights law, in particular the right of freedom of expression, has often been ignored or dismissed by arbitral tribunals. Yet a jurisprudence constante in human rights tribunals clearly provides that there is a presumption in favour of freedom to broadcast, a presumption potentially material to the merits of such disputes. The conventional protections provided to investors under BITs require tribunals to apply human rights law, with the result that the presumption of freedom to broadcast throws a burden on states to justify the withholding of necessary permissions. As political interference with free media, often foreign-owned, continues to be reported, the societal responsibility of tribunals to take such rights seriously becomes pressing.

Keywords: ISDS, investment treaty, arbitration, broadcasting licence, freedom of speech, freedom of expression, censorship, political interference

1 INVESTOR-STATE DISPUTE RESOLUTION AND MEDIA INVESTMENTS

In 2009, Reiner and Schreuer observed: 'Surprisingly, human rights are rarely invoked by investors in investment arbitrations'.[1] Although much commentary has been written since then about the relevance of human rights to investor-state dispute settlement (ISDS), especially in relation to the defences of host governments against investor claims, it remains that ISDS claimants seldom rely on, and tribunals still less purport to enforce, substantive rights arising under human rights treaties.[2] As Kriebaum states, '[t]he cases show that tribunals are hesitant to get

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1 Carla Reiner & Christophe Schreuer, *Human Rights and International Investment Arbitration*, in *Human Rights in International Investment Law and Arbitration* 88 (Oxford University Press 2009).

2 Ursula Kriebaum, *Chapter 6 Human Rights and International Investment Arbitration, the Oxford Handbook of International Arbitration* 150–152 (Oxford University Press 2020). On the contemporary tendency for

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involved in "stand-alone human rights issues"'.[3] It has been noted that: 'human rights as a multilevel legal system protecting substantive entitlements continue to play only a marginal role in ISDS arbitration'.[4]

Tribunals may have regard to decisions of human rights courts by way of guidance or inspiration, but almost never treat rights arising under human rights treaties as having normative force in their own right.[5] When investors seek in investment arbitrations to raise claims based in substantive human rights, tribunals tend to dismiss or ignore them; or treat them as moot, on the basis that the bilateral investment treaty (BIT) itself provides equivalent or superior protection.[6]

However, there are occasions when rights of a distinctively human character become relevant to investment disputes and arguably confer protection more extensive than that provided under the conventional provisions of BITs. Where the claim concerns investments in media businesses, the right to freedom of expression may be implicated. The question which this article seeks to answer is whether that right, where relevant, can or must be taken into consideration by an arbitral tribunal deciding an investor-state arbitration claim and, if so, in what circumstances. This is a question which is of more than academic interest: ISDS procedures enable international corporations not only to secure substantive remedies against states, but also directly to influence the development of public policy.

1.1 Media, regulation and politics

As broadcasting is a regulated industry, the state has potential influence over broadcasters. The infrastructural aspects of broadcasting are subject to regulation through technical rules, such as those relating to the allocation of spectrum and ownership.[7] The content of broadcasts may be subject to regulation as to public service requirements and decency, taste and balance.[8]

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new BITs to incorporate references to human rights as a defensive consideration, Eric De Brabandere, *2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform*, 36 ICSID Rev. (2021).

3 Kriebaum, *supra* n. 2, at 184.

4 Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11(1) AJWH 86 (2016).

5 As Alvarez observes, 'citations to ECHR law are most often made without any effort to suggest that this law is legally binding'. José E. Alvarez, *The Use (and Misuse) of European Human Rights Law by Investor-State Arbitrators – Chapter 2 – The Boundaries of Investment Arbitration, the Use (and Misuse) of European Human Rights Law by Investor-State Arbitrators* 112 (JurisNet, LLC 2018).

6 *Ibid*., at 41–81; Kriebaum, *supra* n. 2, at 157–163.

7 *See* e.g., OFCOM, *Statement: The Future of Media Plurality in the UK* (17 Nov. 2021), www.ofcom.org.uk/__data/assets/pdf_file/0019/228124/statement-future-of-media-plurality.pdf (accessed 9 Jan. 2023).

8 *See* e.g., OFCOM, *The OFCOM Broadcasting Code (with the Cross-Promotion Code and the On Demand Programme Service Rules)* (31 Dec. 2020), www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code (accessed 9 Jan. 2023).

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'Everyone shall have the right to freedom of expression'. Article 9 of the African Charter on Human and People's Rights, Article 13 of the American Convention on Human Rights and Article 10 of the European Convention on Human Rights (ECHR) provide similarly. It will be argued in section 2 that human rights dispute resolution bodies have interpreted these provisions as creating a presumption of entitlement to the grant of a broadcasting licence in favour of would-be broadcasters.

Because of the importance of television to the political process, broadcasters sometimes come into conflict with the political authorities. This has led to a number of claims before both ISDS arbitral tribunals and human rights bodies. The factual background to these cases is similar, but the legal treatment is different. Yet both processes are the result of bilateral or multiparty instruments binding under the principle of *pacta sunt servanda* in international law, that is to say, that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[9] There is no *cordon sanitaire* separating one category of a state's international obligations from another.[10]

The ISDS arbitrations in *European Media Ventures SA v. Czech Republic*,[11] *Lemire v. Ukraine*[12] and *Emmis International Holdings, BV v. Hungary*[13] all concerned the denial, or refusal to permit the transfer of, broadcasting licences by media regulators. In these cases and others, private broadcasters found themselves prevented from broadcasting by reason of the denial of licences. The outcome in each case was the result of a complex interaction between the terms of a BIT and the facts, often involving a detailed analysis of the behaviour of regulators. On the whole, broadcasters have struggled to establish ISDS claims relating to the refusal of licences.

Factually similar cases have arisen before human rights tribunals. In *Ivcher-Bronstein*, the government stripped a television channel owner of his citizenship, so that, as a non-citizen, he was prevented from owning the channel.[14] In *Granier*, the government refused to renew the licence of a long established private broadcaster, for blatantly political reasons.[15] In *Glas Nadezhda*, the regulator's refusal of a licence for a religious radio station was made without giving reasons, so denying

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9 Vienna Convention on the Law of Treaties (Vienna 23 May 1969), 1155 UNTS 331 (VCLT), Art. 26.

10 Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in *Human Rights in International Investment Law and Arbitration*, International Economic Law Series, 336 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds, Oxford University Press 2009).

11 *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability, 8 Jul. 2009.

12 *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010.

13 *Emmis International Holding, BV v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 Apr. 2014.

14 *Ivcher Bronstein v. Peru* (2001) Series C, No. 74 (IACtHR).

15 *Granier v. Venezuela (Merits)* (2015) Series C, No. 293 (IACtHR).

the applicant legal protection against arbitrary interference.[16] In these cases, as in many others, the claimants succeeded in their claims of human rights violation and were awarded damages.

Cases of this sort continue to occur. On 12 August 2021, the American company Discovery, Inc. notified the Polish Government of a request for arbitration under the United States-Poland BIT.[17] The grounds were the failure to renew the broadcasting licence of Discovery's Polish subsidiary, TVN24, and the passing of legislation to ban foreign ownership of media companies. On 27 December 2021, it was reported that the Polish President had declined to sign the law into effect.[18]

The litigation surrounding the Agonset television channel in Albania illustrates the parallel worlds of ISDS and human rights adjudication. In June 2015, the Italian businessman Francesco Becchetti and others requested arbitration against Albania in connection with what the tribunal ultimately found to be a sustained campaign of harassment by the Albanian government against a television channel, Agonset SH.P.K., in which Mr Becchetti and others had invested.[19] One of Agonset's complaints was that it had been excluded from applying for a broadcast licence. In July 2015, Agonset launched a claim before the European Court of Human Rights (ECtHR), alleging inter alia that this exclusion constituted a violation of its freedom of expression rights under Article 10 of the ECHR.[20] The tribunal in the ISDS proceedings was well aware that there were parallel proceedings before the ECtHR.[21] Nonetheless, no consideration was given in the final award to any treaty right of the company to freedom of expression, albeit the claimants had no difficulty in demonstrating an array of blatantly expropriatory conduct on other grounds.

The thesis of this article is that rights arising under human rights instruments are rights in international law; and that under certain conventional provisions of BITs, the arbitral tribunal in an ISDS case may be required to give effect to those rights. The article provides a synthesis of the jurisprudence of the main human rights dispute resolution bodies to identify the content of the right of freedom of expression and contributes a new analysis of the interaction between that right and

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16 *Glas Nadezhda Eood and Elenkov v. Bulgaria*, No. 14134/02, 2007, ECtHR.

17 *Discovery, Inc. to Charge the Government of Poland with Violations to the US-Poland Bilateral Investment Treaty*, Discovery, Inc. News Release (12 Aug. 2021), https://ir.wbd.com/news-and-events/financial-news/financial-news-details/2021/Discovery-Inc.-to-Charge-the-Government-of-Poland-with-Violations-to-the-US-Poland-Bilateral-Investment-Treaty/default.aspx (accessed 10 Apr. 2022).

18 *Andrzej Duda: Polish President Vetoes Controversial Media Law*, BBC News (27 Dec. 2021), www.bbc.com/news/world-europe-59800040 (accessed 10 May 2022).

19 *Hydro Srl and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 Apr. 2019.

20 *Agonset SH.P.K v. Albania*, No. 33104/15, Decision, 10 May 2022 (Third Section C'tee), ECtHR.

21 *Hydro*, *supra* n. 19, para. 691.

the protections offered by BITs to investments in media businesses. The conclusion is that BITs do offer protection for freedom of expression, albeit in a fragmentary, even aleatory, fashion, depending on the treaty relations of the parties to the BIT, the applicable arbitral rules and the facts of the case.

1.2 Vindication of rights under international law

The obligations contained in BITs and plurilateral investment treaties, such as the Energy Charter Treaty (ECT), typically comprise a prohibition of expropriation of investments and of unreasonable and discriminatory measures, a requirement of fair and equitable treatment (FET) and (in many BITs) the obligation to accord treatment at least as beneficial as that required by international law.[22]

The possibility for an investor to bring a claim under a BIT depends on the scope of the consent given by the state in question and the content of the substantive terms of the BIT. As a treaty, the interpretation of a BIT is governed by the rules of customary international law or, for those countries which have acceded to it, the rules set forth in the Vienna Convention on the Law of Treaties (VCLT).[23]

Beyond the terms of the BIT, any external rules chosen by the parties to govern their dispute also play a part in the constitution of the ISDS framework. These rules may be contained in the Convention on the Settlement of Investment Disputes between States Nationals and of Other States 1965 (Washington Convention) and the concomitant Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID), or other rules accepted by the parties, such as the Arbitration Rules of the United Nations Commission On International Trade Law (UNCITRAL) or the rules of an arbitral institution such as the International Chamber of Commerce (ICC). Arbitral rules differ as to the determination of the applicable law, which could affect the application of human rights instruments in any given arbitration.[24]

In contrast, human rights treaties have created *sui generis* bodies to which individuals may present claims. Although such bodies award compensation, the enforcement provisions are weaker than those provided in arbitration. Thus, under the ECHR, enforcement is limited to diplomatic measures.[25] Similarly, under the

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[22] For example, *Energy Charter Treaty* (Lisbon 17 Dec. 1994), Art. 10(1).

[23] Subject to certain reservations, the VCLT is binding upon the 116 states which have become parties to it. James Crawford, *Brownlie's Principles of Public International Law* 353–354 (9th ed., Oxford University Press 2019). The VCLT is treated as codifying customary international law.

[24] On the interpretation of the Washington Convention in this regard, *see* Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375 (2003).

[25] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950) (ECHR), Art. 46.

ICCPR, African Charter and American Convention, states commit themselves to comply with rulings, but the only consequence of non-compliance is that the matter is reported to the political institutions of the treaty.[26]

1.3 Arbitrability of human rights

The binding force of an arbitration award lies not in the laws which purport to be applied by the tribunal, but in the recognition given by domestic and international law to an arbitral award as such. Parties may agree that the tribunal is to decide *ex aequo et bono*, with no regard to law at all; yet the resultant award is internationally binding because it is an arbitral award.[27]

The applicability of freedom of expression rights in investor-state arbitration depends on the construction of the BITs and of applicable arbitral rules. It will be argued that, where relevant and within the scope of the consent to arbitration, these rights should be taken into account in investor-state arbitrations in the media field. However, there are a number of issues of standing and admissibility which a claimant must negotiate, depending on the BIT and human rights regime under which the dispute arises.

It should be mentioned that for some commentators, human rights treaties embody a particularly Western conception or impinge unacceptably upon the sovereignty of states.[28] However, the societal legitimacy of human rights instruments is not a legal question, but a political and philosophical one. Taking a doctrinal approach, this article is concerned with the normative consequences of such texts, not their merits.

2 WHAT IS THE SUBSTANTIVE CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION?

The right of freedom of expression is recognized in international and regional human rights treaties and in Article 19 of the Universal Declaration of Human Rights (1948).[29] Human rights are not absolute and must be balanced against other

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[26] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. *See* Maria Fanou & Vassilis Tzevelekos, *The Shared Territory of the ECHR and International Investment Law*, in *Research Handbook on Human Rights and Investment* 101–102 (Edward Elgar Publishing 2018). *See also* American Convention on Human Rights, Art. 65; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* 28–30 (2nd ed., Cambridge University Press 2012); Optional Protocol to the International Covenant on Civil and Political Rights 1966, Art. 6.

[27] *See* Washington Convention, Art. 42(3); UNCITRAL Model Law on International Commercial Arbitration (2006), Art. 28(3).

[28] Crawford, *supra* n. 23, at 642–643.

[29] Universal Declaration of Human Rights 1948. The Universal Declaration is not a treaty: *ibid.*, at 612.

rights; and the rights accorded are not the same under every treaty. For example, the right to property is recognized under the First Protocol to the ECHR, but not under the ICCPR.[30] The EU Charter not only recognizes the right to property, but also the 'freedom to conduct a business'.[31] The balancing of these rights necessarily takes place within the bounds of the treaty in question and the panoply of rights created.[32]

Two of the principal human rights treaties refer specifically to media regulation. Article 13(3) of the American Convention elaborates the protection of expression by providing:

> [t]he right of expression may not be restricted by indirect methods or means, government or private controls over newsprint, radio broadcasting frequencies, or equipment used in dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

In 2000, the Inter-American Commission on Human Rights (IAComHR) adopted a Declaration of Principles on Freedom of Expression as 'a basic document for interpreting Article 13 of the American Convention on Human Rights'.[33] Principle 13 includes the following guidance:

> the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.

Article 10(1) of the ECHR, on the other hand, provides that the right 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. However, this has been interpreted to mean that licensing is not *per se* a violation, but must still comply with the conditions of public purpose, necessity and legality set out in Article 10(2).[34]

The most extensive jurisprudence on the right of freedom of expression is that of the ECtHR, the decisions of which have tracked the technical development of

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30 *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Paris 20 Mar. 1952).

31 Charter of Fundamental Rights of the European Union, 26 Oct. 2012, [2012] OJ C326/02, Arts 16, 17.

32 *See* e.g., *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL* (*SABAM*), Case C-70/10, EU:C:2011:771, 24 Nov. 2011.

33 IAComHR, *Press Release No. 16-00 108º Regular Sessions* (2000), www.cidh.org/Comunicados/English/2000/Press16-00.htm (accessed 10 Jun. 2022). IAComHR, *Background and Interpretation of the Declaration of Principles* (2000), para. 3, www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1 (accessed 10 Jun. 2022).

34 *Groppera Radio AG v. Switzerland*, No. 10890/84, 1990, ECtHR; *Informationsverein Lentia v. Austria*, No. 13914/88, 1993, ECtHR; *Demuth v. Switzerland*, No. 38743/97, 2002, ECtHR; *Centro Europa 7 SRL and Di Stefano v. Italy*, No. 38433/09, 2012, ECtHR; *NIT SRL v. Republic of Moldova*, No. 28470/12, 2022, ECtHR.

communications from analogue television[35] and the earliest beginnings of satellite broadcasting,[36] to the Internet of today.[37] A driver of this judicial activity has been the transition in Europe from largely domestic, state-owned, analogue television services to an international, commercially driven broadcasting environment.[38] In early cases, the Court treated the management of limited spectrum resources as an important justification for strict licensing.[39] As technological development has enlarged the available means of communication, however, the Court has recognized that 'justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available'.[40]

Article 10 ECHR provides as follows:

> *Freedom of expression*
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> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
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> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

First, the Court must determine whether the state has imposed a restriction on the freedom of the complainant to speak. If such interference is found, the Court must then examine whether the restriction was 'prescribed by law'. This has three aspects. The law must be adequately accessible; it must be sufficiently clear to enable the citizen to regulate his conduct, i.e., so as to protect legitimate expectations[41]; and it must provide safeguards against arbitrariness or other abuse.[42] Even if 'prescribed by law' textually, the Court will also scrutinize the implementation of the law in the given case for due process. Where the law does not provide sufficient guarantees against arbitrary decisions, for example by requiring the publication of reasons, the condition of legal prescription will not be satisfied.[43]

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35 *Groppera Radio AG*, *supra* n. 34.
36 *Autronic AG v. Switzerland*, No. 12726/87, 1990, ECtHR.
37 *Taganrog Lro and others v. Russia*, No. 32401/10 (et seq.), 2022, ECtHR.
38 This led to intense policy development through the 1980s, as set out in Council of Europe, *Explanatory Report to the European Convention on Transfrontier Television* (Council of Europe 1989).
39 *Groppera Radio AG*, *supra* n. 34.
40 *Informationsverein Lentia, supra* n. 34, para. 39.
41 *Centro Europa 7 SRL, supra* n. 34, paras 151–152.
42 *Handyside v. United Kingdom*, No. 5493/72, 1976, ECtHR; *Sunday Times v. United Kingdom (No. 1)*, No. 6538/74, 1979, ECtHR; *Glas Nadezhda Eood, supra* n. 16.
43 *Glas Nadezhda Eood, supra* n. 16, paras 49–52; *Meltex Ltd and Movsesyan v. Armenia*, No. 32283/0, 2008, ECtHR, paras 82–83.

If the restriction was prescribed by law, the Court must then decide whether it had aims which were legitimate under Article 10(2) of the ECHR. If the aims were legitimate, the Court must then consider whether the restriction was 'necessary in a democratic society'. This question depends on 'the reality of the pressing social need'.[44] However, the state enjoys a 'margin of appreciation' in that determination.[45]

The ECtHR has consistently held that refusal of a broadcasting licence is an interference with freedom of expression.[46] The threshold is low. States have sought to argue that mere non-renewal of a time-limited licence is not such an interference, but the Court has rejected this.[47] Indirect interference with the opportunity of a person to broadcast, such as by delay in the allocation of spectrum,[48] a blanket ban on political advertising,[49] or denial of a security clearance[50] is also a restriction requiring justification. In no judgment has the ECtHR treated the refusal of a broadcasting licence to a person with standing as other than a prima facie infringement of the right to freedom of expression, requiring justification under strict scrutiny.[51] For this reason, Article 10 ECHR must be characterized as giving rise to a presumption in favour of the grant of broadcasting licences to objectively qualified applicants.

The categories of public interest in Article 10(2) are an exclusive list, at least if one applies the 'ordinary meaning' of the article, in accordance with Article 31(1) VCLT. Article 10(2) does not explicitly mention media plurality as a ground for interference with freedom of expression. However, in *Demuth* the ECtHR accepted that 'cultural and linguistic pluralism' was a legitimate ground for restricting freedom of speech in the context of broadcasting; and in *Informationsverein Lentia* it was accepted that the grant or refusal of a licence 'may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2'. By the time of its 2012 decision in *Centro*, the Court could assert that 'in such a sensitive

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44 *Hertel v. Switzerland*, No. 25181/94, 1998, ECtHR, paras 46–47.

45 *Handyside, supra* n. 42, para. 48. The expression 'pressing social need' has acquired the status of a formula, something not obviously intended by the decision.

46 *Autronic AG, supra* n. 36; *Grauso v. Poland*, No. 27388/95, 1997, EComHR; *Leveque v. France*, No. 35591/97, 1999, ECtHR; *Demuth, supra* n. 34; *Glas Nadezhda Eood, supra* n. 16; *Aydoğan and Dara Radyo Televizyon Yayincilik Anonim Şirketi v. Turquie*, No. 12261/06, 2018, ECtHR.

47 *Groppera Radio AG, supra* n. 34, para. 61.

48 *Centro Europa 7 SRL, supra* n. 34.

49 *Vgt Verein Gegen Tierfabriken v. Switzerland*, No. 24699/94, 2001, ECtHR.

50 *Aydoğan and Dara Radyo Televizyon Yayincilik Anonim Şirketi, supra* n. 46.

51 However, the claimant must be exercising the right of expression. In *Kalfagiannis and POSPERT v. Greece*, No. 74435/14, 2020, ECtHR, a former financial administrator at the national broadcaster and a trade union complained that their Art. 10 rights had been violated by the closure of the national broadcaster. As neither was engaged in expressive activities, they were held not to have standing to sue as 'victims' of a violation.

sector as the audiovisual media, in addition to its negative duty of non-interference the State *has a positive obligation* to put in place an appropriate legislative and administrative framework to guarantee effective pluralism' (emphasis added).[52]

In 2018, the Council of Europe adopted a recommendation on media ownership, including the following, which is fully supported by the jurisprudence of the ECtHR:

> 3.7. Any restrictions on the extent of foreign ownership of media should be implemented in a non-arbitrary manner and should take full account of States' obligations under international law and, in particular, the positive obligation to guarantee media pluralism.[53]

Most often, when regulators have failed to justify the refusal of a broadcast licence, it has been by reason of a lack of proportionality between the policy aim of the licensing regime and the decision taken. The Court held in *Informationsverein Lentia* that the Austrian State broadcasting monopoly was not 'necessary in a democratic society', holding that freedom of expression 'cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor'.[54] In *Aydogan* the Court, citing *Centro*, elaborated this principle, stating that:

> to ensure genuine pluralism in the audiovisual sector in a democratic society, provision must be made for effective access to the audiovisual market for several operators so as to ensure, in the content of the programs considered as a whole, a diversity which reflects as far as possible the variety of currents of opinion which cross the society to which these programs are addressed.[55]

The result is that the ECtHR claims a strong right to control the media policies of states subject to its jurisdiction, even where democratic states decide to give greater emphasis to the social control of broadcasting than to the promotion of media plurality.

Almost identical principles have been enunciated by the Inter-American Court of Human Rights (IACtHR). In 1985, Costa Rica requested an advisory opinion from the IACtHR on the compatibility with the Convention of national law prohibiting the exercise of the profession of journalist without a licence.[56] The

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52 *Centro Europa 7 SRL, supra* n. 34; *NIT SRL, supra* n. 34.

53 Council of Europe, *Recommendation CM/Rec(2018)1 of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership*.

54 *Informationsverein Lentia, supra* n. 34. Once cable television had been deregulated in Austria, the Court found itself able to hold that the refusal of a terrestrial broadcasting licence, although an interference, was proportionate to the objectives of the Austrian legislation, 'such as for instance guaranteeing the impartiality and objectivity of reporting and diversity of opinions through a national station': *Tele 1 Privatfernseh v. Austria*, No. 32240/96, 2001, ECtHR.

55 *Aydoğan and Dara Radyo Televizyon Yayincilik Anonim Şirketi, supra* n. 46, para. 41.

56 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, IACtHR Advisory Opinion [1985] OC-5/85.

IACtHR held that the right of free expression 'cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses'. Such control must satisfy four tests. First, the sanction must be based on previously established grounds for liability. Second, those grounds must be expressly and precisely defined in law. Third, the ends sought by the interference must be legitimate. Lastly, the state must show that those grounds of liability are 'necessary to ensure' the stated ends, namely respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals.[57]

For the IACtHR, the right of freedom of expression overrides practical considerations, such as access to material resources including spectrum or equipment:

> In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.[58]

In *Ivcher*, the complainant was the majority owner of a television channel critical of the Peruvian government. In addition to many acts of harassment, the government deprived Mr Ivcher of his Peruvian citizenship, with the result that, as a non-citizen, he was debarred by Peruvian media ownership law from owning a television channel in Peru.[59] The deprivation of his citizenship was palpably a device to prevent Ivcher from continuing to broadcast investigative journalism on the abusive conduct of the Peruvian military. The IACtHR found an indirect violation of the Article 13 right of freedom of expression.

In *Granier*, the Court dealt with a case of political motivation for the non-renewal of a broadcasting licence.[60] Marcel Granier was the President of and a minority shareholder in Radio Caracas Televisión (RCTV), a broadcaster operating in Venezuela since 1953. In 1987, its broadcasting licence was renewed until 2007, with a preferred position on expiry for a renewal of twenty years. In April 2002, a coup was attempted against then-President Chávez, which quickly failed. Once reinstated, Chávez and other officials adopted aggressive rhetoric against

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57 *Ibid*., paras 37–52.
58 *Ibid*., para. 31.
59 *Ivcher Bronstein v. Peru, supra* n. 14; *Ivcher Bronstein v. Peru (Admissibility)* IAComHR Report No. 20/98 (1998).
60 *Granier v. Venezuela (Admissibility)*, IAComHR Report No. 114/11 (2011); *Granier v. Venezuela (Merits)*, IAComHR Report No. 112/12 (2012). *See* Manuel Casas Martinez, Granier v. Venezuela *International Decisions*, 110(1) Am. J. Int'l L. 109-115 (2016).

RCTV, which they believed had supported the coup. In 2007, the government refused to renew the licence and the Supreme Court ordered that RCTV's equipment be transferred to the control of the regulator for use by a replacement channel. Other broadcasters which had maintained a more favourable treatment of the Chávez regime saw their licences renewed.

Granier and a number of senior RCTV executives brought a complaint before the IAComHR, which, finding the claim well-founded, submitted the case to the IACtHR. The Court confirmed that Venezuela had violated the complainants' rights under Article 13 of the Convention, on the basis that the goal pursued by the government was illegitimate, holding: 'the facts of the instant case involved a misuse of power because the State used its lawful authority to try and align the communications outlet's editorial line with the government'.[61] As Casas Martinez argues, the government's failure to renew RCTV's licence was a 'deviation of power', in other words, a measure taken for an ulterior motive.[62] What is more, the right of freedom of expression 'is not exhausted with the theoretical recognition of the right to speak or write; rather, it inseparably includes the right to use any appropriate media for disseminating thought and delivering it to the largest number of people possible'.[63]

Arguably the IAComHR displayed a more analytical approach to the case, holding that it had to determine 'whether the differential treatment given by the Venezuelan State in not renewing RCTV's franchise was objective and reasonable'. The burden of proof fell on the state. The objective pursued should be 'a particularly important aim or a pressing social need'. The accused measure had to be 'be strictly required in order to achieve that aim' in the sense that no less harmful alternative existed.[64]

In *Maya Kaqchikel*, the Court held that Guatemala had violated the rights of expression and equal treatment of certain indigenous communities by allocating broadcasting licences through a simple, commercial auction, in which the complainants were too poor to participate.[65] By failing to enable the indigenous communities to operate their community radio channels, the government had violated their expression rights.

For the IACtHR, therefore, the obligation to foster media plurality gives rise to a presumption against restrictive licensing regulations and positively requires the

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61 *Granier v. Venezuela (Merits)* (IACtHR), *supra* n. 15, para. 197.
62 Casas Martinez, *supra* n. 60, at 111.
63 *Granier v. Venezuela (Merits)* (IAComHR), *supra* n. 60, para. 117.
64 *Ibid.*, para. 160. *See also Miguel Angel Millar Silva and others (Radio Estrella del Mar de Melinka) v. Chile*, IAComHR Report No. 48/16 (2016).
65 *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango and others v. Guatemala (Merits, Reparations and Costs)*, Series C No. 440, Judgment of 6 Oct. 2021, IACtHR.

means of broadcasting to be made available unless there is a legitimate and proportionate reason to the contrary.

Similarly, the United Nations Human Rights Committee regards media plurality as a value encoded in the ICCPR. It has commented that under Article 19 ICCPR:

> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations … Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services, should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters.[66]

The Article 19 right will be violated by media licensing requirements unless they are based on reasonable and objective criteria, among which equitable sharing of access and the preservation of media plurality are indispensable considerations.[67]

Although the rights of freedom of expression established by the international instruments subsist within their own treaty frameworks, there is remarkable unanimity as to the applicable framework for the protection of the human right of freedom of exception under international law. In summary:

- The refusal of a licence to broadcast is an interference with the right, requiring justification by the state concerned.
- In determining whether the interference is justified, a court must examine whether it was undertaken for a legitimate purpose, in the sense of a pressing social need, and whether the measure was clearly laid down by law so as to allow citizens to form reliable expectations as to their treatment.
- A lack of due process or transparency will defeat any justification. The allocation of licences for ulterior political reasons will offend against the principles of equality and plurality and so violate the rights of the victim.
- In the interests of media plurality, states are in principle under a positive obligation to provide the means of expression to those who seek them.

Whether the right of freedom of expression is justiciable in investor-state arbitration depends on the nature of the substantive protections granted to investors under BITs. These will be considered in the next section.

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[66] United Nations Human Rights Committee, *General Comment No. 34 – Article 19: Freedoms of Opinion and Expression* (2011), CCPR/C/GC/34, para. 39.

[67] United Nations Human Rights Committee, *Concluding Observations: Lebanon* (1997), CCPR/C/79/Add.78; UN Human Rights Committee, *Concluding Observations: Kyrgyzstan* (2000), CCPR/C/69/KGZ.

3 HOW MIGHT THE FRAMEWORK IN WHICH ISDS CLAIMS ARE DECIDED REQUIRE AN ARBITRAL TRIBUNAL TO TAKE INTO ACCOUNT INTERNATIONAL HUMAN RIGHTS OBLIGATIONS?

International human rights law may enter into arbitral decision-making at two levels. First, the substantive rules of human rights instruments, binding as international treaties, may feature as relevant factors in the interpretation of a given BIT or as a part of the factual matrix against which compliance must be adjudged. Second, BITs may incorporate human rights obligations by reference, as will be explained below.[68]

3.1 International law as tool of interpretation

According to Article 31(1) VCLT, a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. That context includes '[a]ny relevant rules of international law applicable in the relations between the parties' (Article 31(3)(c)). The International Law Commission (ILC) has observed:

> although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment – that is to say "other" international law. This is the principle of systemic integration to which article 31(3)(c) VCLT gives expression.[69]

As the ad hoc Committee observed in *Tulip*, the 'relevant rules of international law cover all sources of international law. The only requirements of Article 31(3)(c) are that the rules are relevant and that they are applicable as between the States parties to the treaty to be interpreted'.[70] However, interpretation cannot result in the importation of substantive obligations not found in the treaty text.[71]

Hirsch observes that '[e]xcept in the *Mondev* award in 2002, investment tribunals have declined to examine the specific provisions of international human rights law in investment disputes'. Their attitude 'is more reserved than the approach adopted by investment tribunals regarding international environmental law'.[72] The tribunal in *Mondev* tentatively recognized that decisions of the ECtHR

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[68] Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, XVII Finnish Y.B. Int'l L. 91–130 (2008).

[69] International Law Commission, *Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), UN Doc A/CN.4/L.682, para. 423.

[70] *Tulip v. Turkey (Decision on Annulment)*, Ad hoc Committee, ICSID Case No. ARB/11/28, 30 Dec. 2015, para. 87.

[71] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania (Award)*, ICSID Case No. ARB/11/24, 30 Mar. 2015, para. 276.

[72] Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), para. 106. And in *Mondev*, the tribunal in the event held the jurisprudence of the ECtHR to provide at most 'guidance by analogy' (para. 14).

might 'provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security"'.[73]

In *Biloune*, the tribunal construed its mandate as excluding the investor's personal human rights claim arising from his expulsion from the country, even though his deportation was central to the state's assault on the investment. The fact that the consent to arbitration was limited to claims by the investor 'in respect of' the investment was held to entail this conclusion.[74]

The only identified case in which an ISDS claimant has succeeded on the basis of a substantive right conferred by a human rights treaty is *Al-Warraq*, in which the tribunal held that the FET standard was violated by the denial to the claimant, a Saudi national, of basic rights of due process in criminal proceedings, as stipulated in Article 14 ICCPR.[75] However, the BIT in question, the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (1981), was not conventionally worded. Article 10 of that Agreement provided that the host state undertook:

> not to adopt or permit the adoption of any measure – itself or through one of its organs, institutions or local authorities – if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights.[76]

Applying the 'principle of systemic integration',[77] the tribunal noted that Indonesia had ratified the ICCPR. Due process in criminal cases was a 'basic right' contained in the ICCPR. Indonesia hence had an obligation in international law to provide due process to the claimant, an obligation it had failed to fulfil. In addition, the claimant was entitled to rely on his ICCPR rights in relation to his claim of a violation of the FET standard.

A weakness in the tribunal's reasoning is that it did not address the question whether Saudi Arabia, let alone all the signatories of the BIT, had adopted the ICCPR. As it happens, Saudi Arabia was not and is not a party to the ICCPR. The correctness of the decision must thus be regarded with caution.

Attempts have been made to raise human rights defensively. In *Azurix* and *Siemens*, in which the state sought to rely on human rights as an exculpatory factor,

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73 *Mondev v. United States (Final Award)*, ICSID Case No. ARB(AF)/99/2, 11 Oct. 2002.

74 *Biloune and Marine Drive Complex Ltd v. Ghana Investment Centre and Government of Ghana (Award on Jurisdiction and Liability)* [1989] 95 ILR 18425, para. 9. It is relevant to note that Biloune was not a party to the investment contract, but rather a third-party beneficiary of the arbitration clause.

75 *Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 12 Dec. 2014.

76 Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279, 280 (2005). The expression 'basic rights' is most uncommon in international investment agreements, which may limit the relevance of the decision.

77 *Al-Warraq, supra* n. 75, para. 203.

tribunals purported to find the claims inadequately argued.[78] In *Suez*, the tribunal fully addressed the same argument, holding that it was irrelevant:

> Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.[79]

In *Urbaser*, the state sought to raise a counterclaim based on a 'human right to water' under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[80] While holding that '[t]he BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights', the tribunal saw no basis for finding the claimant, as a private party, liable for violation of such a right.[81]

In *von Pezold*[82] and *Eco Oro*,[83] non-disputing parties were refused permission to make amicus curiae submissions on generalized issues of human rights, on the grounds, among others, that such submissions would be beyond the scope of the dispute.

There is hence a negligible history of success for human rights arguments in the ISDS jurisprudence. Yet the basic principle that states must comply with all their international obligations, mutually consistent or not, seems as applicable in ISDS adjudication as in any other forum applying international law.

3.2 Limited beneficiaries of human rights

There is a striking divergence between the ECHR and other human rights treaties as to their beneficiaries. Under Article 1 of the ECHR, states undertake to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the ECHR]'. Article 10 ECHR provides that 'everyone' has the right to freedom of expression. The ECtHR caselaw cited above demonstrates that corporations enjoy the right of freedom of expression.[84] Indeed, both the company and its staff may

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78 *Azurix Corp. v. Argentine Republic (Award)*, ICSID Case No. ARB/01/12, 14 Jul. 2006, para. 261; *Siemens AG v. Argentine Republic (Award)*, ICSID Case No. ARB/02/8, 6 Feb. 2007, para. 354.

79 *Suez, Barcelona and Vivendi v. Argentina (Decision on Liability)*, ICSID Case No. ARB/03/19, 30 Jul. 2010, para. 262.

80 United Nations High Commissioner for Refugees, *General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)*, E/C.12/2002/11, 20 Jan. 2003.

81 *Urbaser v. Argentina (Award)*, ICSID Case No. ARB/07/26, 8 Dec. 2016, para. 1200.

82 *Von Pezold, Bernhard and others v. Republic of Zimbabwe (Procedural Order No. 2)*, ICSID Case No. ARB/10/15, 26 Jun. 2012, para. 60.

83 *Eco Oro Minerals v. Colombia (Procedural Order No. 6 Decision on Non-Disputing Parties' Application)*, ICSID Case No. ARB/16/41, 18 Feb. 2019, para. 28.

84 Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* 3 (Oxford University Press 2006).

simultaneously be beneficiaries.[85] Other human rights treaties apply only to physical persons.

However, even under treaties which accord rights only to physical persons, where the complainant investor expresses himself through a corporation he has standing to complain about actions taken against the corporation in so far as they impinge upon his rights of expression.[86] Thus in *Granier*, the IAComHR rejected the claims of certain staff of the station who had not been shown to be participating in the expressive activities of the company.[87] Such complainants resemble indirect investors under ISDS law. As Dolzer et al. observe, 'adverse action by the host State, in violation of treaty standards affecting the company's position, gives rise to rights [in] the company's shareholders and controllers'.[88]

The tribunal in *Biloune* observed that while the consent to arbitration 'in respect of' the foreign investment excluded any consideration of Biloune's human rights claims *as such*, 'the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration'.[89] In some fact situations, therefore, it may be arguable that treaty protection was violated in respect of the investment by reason of breach of the expression rights of employees. It is, after all, clear that physical interference with a claimant's employees may be a violation of the FET standard.[90]

3.3 A TYPOLOGY OF INVESTOR PROTECTIONS

The protections offered to investors by BITs, breach of which will entitle the investor to request arbitration, are largely uniform in the more than 2,200 BITs currently in force.[91] The conventional protections comprise the following:

(1) fair and equitable treatment ('FET standard')[92];
(2) full protection and security ('FPS standard')[93];

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85 *Glas Nadezhda Eood, supra* n. 16, para. 40.

86 *Belfort Istúriz and others regarding Venezuela (Provisional Measures Orders)*, 15 Apr. 2010, IACtHR, para. 20, https://corteidh.or.cr/docs/medidas/belford_se_01.pdf (accessed 18 Sep. 2022).

87 *Granier v. Venezuela (Merits), supra* n. 60, paras 127–132.

88 Rudolph Dolzer, Ursula Kriebaum & Christoph Schreuer, *Principles of International Investment Law* (3d ed., Oxford University Press 2022) 120. The text refers to 'rights *by* the company's shareholders', possibly a translation error.

89 *Biloune and Marine Drive Complex Ltd, supra* n. 74, para. 61.

90 *Desert Line v. Yemen (Award)*, ICSID Case No. ARB/05/17, 6 Feb. 2008, paras 193–194.

91 According to the Investment Policy Hub of the United Nations Conference on Trade and Development (UNCTAD), there are currently in force 2,219 BITs, https://investmentpolicy.unctad.org/international-investment-agreements (accessed 18 Sep. 2022).

92 For example, 'Investment shall at all times be accorded fair and equitable treatment', United States-Czech and Slovak Federal Republic BIT 1992, Art. II(2)(a), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/994/download (accessed 18 Sep. 2022).

93 For example, 'Investment … shall enjoy full protection and security', *ibid.*, Art. II(2)(a).

(3) no impairment of investments by arbitrary or discriminatory measures ('Arbitrary Measures standard')[94];
(4) no expropriation, except in the public interest, on a non-discriminatory basis, under due process of law and with adequate compensation[95];
(5) compliance with obligations entered into by the state with the investor[96];
(6) treatment no less favourable than that required by international law.[97]

In addition, states will undertake to give national treatment to foreign investors and to grant the most favourable level of protection contained in any other agreement with another state ('most favoured nation' or MFN).

The conventional protections fall into three groups. First, there are provisions in various formulations prohibiting unfair or arbitrary treatment of investments (items (1) to (3) above, 'unfair treatment provisions'). Second, there is the prohibition on expropriation without compliance with certain conditions (item (4) above, 'no-expropriation provision'). Third, there are provisions which incorporate obligations incurred outside the BIT, whether under contract or international law (items (5) and (6) above, 'imported obligations provisions'). Human rights obligations affect the application of these provisions in different ways.

3.3[a] *Unfair Treatment Provisions*

Although FET, Arbitrary Measures and FPS are strictly separate obligations, they overlap in many practical situations.[98] At the margin, there have been cases in which an investor's staff have been subjected to physical danger, which more naturally falls under the FPS standard, but those rare instances do not affect the argument in relation to the denial of freedom to broadcast.[99] For present purposes it is sufficient to consider the FET standard.

3.3[a][i] Interpreting the FET Standard

BITs show variations in formulation of the FET standard. Most BITs simply use words such as 'Investments of nationals or companies of each Contracting Party

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94 *Ibid.*, Art. II(2)(B).
95 *Ibid.*, Art. III(1).
96 *Ibid.*, Art. II(2)(C) ('Umbrella Clause').
97 *Ibid.*, Art. II(2)(A).
98 *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador (Award)*, ICSID Case No. ARB/04/19, 18 Aug. 2008, para. 377; *Ronald S Lauder v. Czech Republic*, Final Award, 3 Sep. 2001, UNCITRAL, paras 212, 214.
99 *Desert Line, supra* n. 90, paras 213–215.

shall at all times be accorded fair and equitable treatment'.[100] Where there is no reference to international law, the evaluation of compliance with the FET standard is essentially a question of fact.

As Dr Mann observed in 1981:

> The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal … will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.[101]

Wythes asserts: 'On a plain reading of any given FET clause, it becomes immediately clear that the words are characterized by a high degree of ambiguity'.[102] Yet one can only disagree: the *words* are perfectly clear. Even young children understand what 'fair' means. What is difficult is to decide what is or is not fair in any given circumstances.

As the tribunal in *Micula I* stated:

> Whether a state has treated an investor's investments unfairly and inequitably defies abstract analysis or definitions, and can only be assessed when looking at the totality of the state's conduct.[103]

Other BITs refer without elaboration to 'fair and equitable treatment in accordance with the principles of international law'.[104]

In *Toto*, the Italy-Lebanon BIT provided that '[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law'.[105] The claimant sought to pray in aid both the ECHR and ICCPR jurisprudence in support of his claim that that the FET standard had been violated. The claimant argued that his right to a fair trial had been violated on account of unreasonable delay. The tribunal rejected the attempt to rely on the ECHR, on the grounds that Lebanon was not a party to the Convention. However, Lebanon had acceded to the ICCPR, which recognized the right to a fair trial. Accordingly, the tribunal accepted that the claimant's rights under the ICCPR were to be taken into account in evaluating his claim of a

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[100] UK Model Bilateral Investment Treaty 2008, Art. 2(2).

[101] F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52(1) Brit. Y.B. Int'l L. 241–254 at 244 (1982).

[102] Annika Wythes, *Investor-State Arbitrations: Can the Fair and Equitable Treatment Clause Consider International Human Rights Obligations?*, 23 LJIL 241 at 254 (2010).

[103] *Micula v. Romania I (Award)*, ICSID Case No. ARB/05/20, 11 Dec. 2013, para. 517.

[104] For example, France Model Bilateral Investment Treaty 2006, Art. 4, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download (accessed 18 Sep. 0202).

[105] Italy-Lebanon BIT 1997, Art. 7(2), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1688/download (accessed 18 Sep. 2022).

violation of the FET standard. Notably, Lebanon had *not* ratified the Optional Protocol to the ICCPR, which entitles individuals to maintain claims directly against a state party. Nonetheless, the ICCPR was relevant law in applying the BIT. However, the claim failed on the evidence.[106]

According to the judgment of the Paris Court of Appeal in *Aboukhalil*, this wording entitles the arbitral tribunal to take human rights treaties into account even when the respondent state is not party to them 'in order to assess the content of the fair and equitable treatment standard in the light of the principles of international law, or even the case law of the European Court of Human Rights'.[107] This seems debatable. Before giving effect to treaty obligations, it is surely appropriate to consider, as did the tribunal in *Toto*, whether they are binding on the state in question.[108] However, at least where the parties to the BIT are both bound, the reference to international law must be given *effet utile* by taking those rights into account in the assessment of fairness.[109] This is most straightforwardly conceptualized by understanding the investor's human rights as a juridical *fact* relevant to the evaluation of his treatment.

In a third formulation, Article II.2(a) of the United States-Argentina BIT provides: 'Investment shall at all times be accorded fair and equitable treatment … and shall in no case be accorded treatment *less than* required by international law' (emphasis added). The tribunal in *Azurix* recognized that this wording created a floor, not a ceiling to the investor's protection.[110] The tribunal assumed, however, that the reference to 'international law' meant 'customary international law' – no other international law having been asserted. However, this is not necessarily a correct assumption. If parties wish to apply customary international law alone, it is easily stated, as in Article 1.6 of the United States-Mexico-Canada Agreement (USMCA).

In principle, 'international law' surely means the totality of obligations in international law binding upon the parties to the treaty. Salacuse observes: 'one might argue that the plain meaning of the term "international law" is that it

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[106] *Toto Costruzioni v. Lebanon (Decision on Jurisdiction)*, ICSID Case No ARB/07/12, 11 Sep. 2009, paras 158–168.

[107] *Aboukhalil v. Senegal*, Judgment of Paris Court of Appeal (Redacted, 2021), Cour d'Appel de Paris No. RG 19/21625, para. 162 (translated).

[108] Article 34 VCLT; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 13.

[109] *Rawat v. Mauritius (Award on Jurisdiction)*, Case No. 2016-20, 6 Apr. 2018, Permanent Court of Arbitration, para. 182.

[110] Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment 1994, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download (accessed 18 Sep. 2022). *See Azurix Corp., supra* n. 78, para. 361. United States-Poland BIT (21 Mar. 1990), Art. II(6), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5339/download (accessed 18 Sep. 2022) uses identical language.

includes international law from all sources including treaties'.[111] He notes the scepticism of Newcombe and Paradell, who believe that 'the better view is that where states have intended to guarantee treatment in accordance with other general treaty obligations they have done so expressly'.[112] Yet that position deprives the words of effect, as customary law applies whether referred to or not.

Prior to the binding clarification issued by the North American Free Trade Agreement (NAFTA) Free Trade Commission in 2001, US BITs typically included a provision that in respect of investments the states parties should 'in no case accord treatment less favorable than that required by international law'.[113] In *Pope & Talbot*, the investor argued (in the context of the FET standard under Article 1105 NAFTA) that 'international law' meant 'all the sources of international law found in Article 38 of Statute of the International Court of Justice', including both customary international law and the treaty obligations of the state.[114] The tribunal rejected Canada's submission that the reference to 'international law' imported customary international law as a ceiling of protection under the FET standard. Before the arbitration had reached a conclusion, the NAFTA Free Trade Commission imposed an agreed interpretation under the treaty to the effect that 'international law' meant 'customary international law'.[115] That intervention, defining the meaning of 'international law' *ex post*, rendered moot any discussion of the meaning of 'international law' in the context of the case, as the FET standard would be more generous to the claimant than customary international law. However, outside the NAFTA and USMCA context, it seems difficult to argue that 'international law' excludes extrinsic treaty obligations, where relevant.

The Statute of the International Court of Justice provides powerful context under Article 31(3)(c) VCLT supporting a literal interpretation.[116] Article 38(1) of the Statute provides that the Court shall apply as international law, inter alia, 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.

This interpretation is sustained in relation to ICSID arbitrations by the fact that the Washington Treaty provides as a default rule that '[i]n the absence of

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111 Jeswald W. Salacuse, *The Law of Investment Treaties* 326 (3d ed., Oxford University Press 2021).

112 Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 254 (Kluwer Law International 2009).

113 For example, US Model BIT, Art. II(3)(a) (1998 – superseded), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2868/download (accessed 18 Sep. 2022).

114 *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, 10 Apr. 2001, UNCITRAL, para. 107.

115 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (2001). *See* Campbell McLachlan, Laurence Shore et al., *International Investment Arbitration: Substantive Principles* (2d ed., Oxford University Press 2017), para. 7.07.

116 Salacuse, *supra* n. 111, at 326.

agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute … and such rules of international law as may be applicable'.[117] The Report of the Executive Directors explains that:

> The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.[118]

In the ICSID arbitration *Duke*, the (separate) arbitration agreement designated the applicable law as 'the laws of the [respondent state] and the applicable principles of International Law'. The tribunal held that 'international law' included the terms of the BIT itself.[119] In other words, the 'international law' in question was not limited to customary international law:

3.3[a][ii] Human Rights as a Fact Relevant to Fairness

In *SD Myers*, the tribunal observed that the determination whether a breach of the FET standard has taken place must 'take into account any specific rules of international law that are applicable to the case'.[120] It went on to observe:

> In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied 'fair and equitable treatment', but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of [the FET standard].[121]

The limitation that the rule be 'specifically designed to protect investors' cannot be understood as a condition of relevance. If an investor is protected by an extrinsic rule of international law binding on the respondent state and the right is relevant to the dispute, it is difficult to see on what grounds it could be excluded from consideration.

Similar considerations apply to the violation by the state of its own law. In *Lemire*, where the claimant's allegation was that the manner in which radio licences had been awarded was in contravention of the statutory procedure, the tribunal stated:

> Although not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard, in the

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117 Washington Convention, Art. 42(1).
118 ICSID, *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965), para. 40.
119 *Duke Energy Electroquil Partners and Electroquil SA*, *supra* n. 98, para. 196.
120 *SD Myers, Inc. v. Government of Canada*, Partial Award, UNCITRAL, para. 263.
121 *Ibid.*, para. 264.

> Tribunal's view a blatant disregard of applicable tender rules, distorting fair competition among tender participants, does.[122]

As Crawford notes:

> Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.[123]

3.3[a][iii] Legitimate Expectations

Leaving aside the normative effect of treaties in interpreting the FET standard, an important factor identified in the jurisprudence is that 'it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'.[124] This consideration can arise irrespective of the specific formulation of the FET standard.

Such expectations may arise from the domestic law of the state.[125] While an investor is not entitled to assume that legislation will never be altered to his detriment, he is entitled to fair and consistent treatment: '[u]nder a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature'.[126] As Knoll-Tudor observes, '[t]he stability requirement is a prominent characteristic of the FET standard'.[127] Equally, the investor is entitled to the fair application of the legislation to him.[128]

Obligations arising under international law are facts potentially relevant to the investor's expectations, like the substantive provisions of the BIT itself. Where, therefore, the parties to a BIT are bound by the same human rights treaty, a broadcaster must be entitled to assume that those human rights specifically relevant to his investment will be substantially respected. It should surely go without saying that, of all the laws affecting the investor, those guaranteeing his human rights would not be violated.

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[122] *Lemire, supra* n. 12, para. 385. *See also GAMI v. Mexico*, Final Award, 15 Nov. 2004, UNCITRAL, para. 91.

[123] James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries – 2001* 89 (Cambridge University Press 2002).

[124] *Waste Management v. Mexico II (Award)*, ICSID Case No. ARB(AF)/00/3, 30 Apr. 2004, para. 98.

[125] *Micula v. Romania I*, *supra* n. 103.

[126] *El Paso v. Argentina (Award)*, ICSID Case No. ARB/03/15, 31 Oct. 2011, para. 372.

[127] Knoll-Tudor, *supra* n. 10, at 329.

[128] *GAMI, supra* n. 122, para. 94.

3.3[b] *No-Expropriation Provision*

A typical BIT provision on expropriation is contained in Article 12 of the Netherlands Model BIT (2019):

> Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investors of the other Contracting Party of their investments, unless the following conditions are complied with:
> (a) the measure is taken in the public interest;
> (b) the measure is taken under due process of law;
> (c) the measure is taken in a non-discriminatory manner; and
> (d) the measure is taken against prompt, adequate and effective compensation.

Hence four conditions justify an expropriation, namely, pursuit of the public interest, due process of law, non-discrimination and adequate compensation.

As the tribunal observed in *European Media Ventures*, the 'essence of expropriation is the taking of property by the State'.[129] An *indirect* taking occurs through 'covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State'.[130] In Salacuse's formulation, indirect takings are 'situations in which host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them'.[131]

The refusal to grant licences or other permissions has featured in a number of expropriation cases. In *Metalclad*, the expropriation consisted in the unjustified denial of a construction permit for a waste disposal business.[132] In *Tecmed*, an expropriation was found as a result of the refusal of a licence to operate a landfill site.[133]

In *CME Czech Republic BV v. Czech Republic* (*CME*), the investor had entered into arrangements, approved by the Media Council, under which it would invest in a television production company, in partnership with a local partner which would hold the broadcasting licence. The local partner was contractually obligated to work exclusively with the investee company. However, the regulator later colluded with the local partner so as to enable the latter to break its relationship with the investee company and obtain television services from another provider, so

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[129] *European Media Ventures, supra* n. 11, para. 47.
[130] *Metalclad Corp. v. United Mexican States (Award)*, ICSID Case No. ARB(AF)/97/1, 30 Aug. 2000.
[131] Salacuse, *supra* n. 111, at 395.
[132] Metalclad Corp., *supra* n. 130.
[133] *Técnicas Medioambientales Tecmed, SA v. United Mexican States (Award)*, ICSID Case No. ARB (AF)/00/2, 29 May 2003.

destroying the investee's business. The tribunal held that the regulator's 'actions and inactions … cannot be characterized as normal broadcasting regulator's regulations in compliance with and in execution of the law'. By destroying the legal basis of the company's business, it had carried out an indirect expropriation. The regulator's improper conduct took its actions outside any latitude granted to general regulatory actions undertaken under 'police powers'.[134]

If an expropriation has taken place, its justification requires the respondent state to satisfy the four exculpatory conditions. The human rights of the investor might enter into the assessment whether the accused measure was taken 'in the public interest', in the sense that the denial of a broadcasting licence to an applicant presumptively undermines the plurality of the media, a value insisted upon by the human rights jurisprudence. The effect of this consideration could be expected to be somewhat weak, since plurality will seldom depend on the participation of a particular broadcaster. More significant, however, is the potential effect of the investor's freedom of expression right on the prior question whether there has been an indirect expropriation.

In *EuropeanMedia Ventures*, a Luxembourg investor (EMV) had agreed to finance the expansion of a private television channel in the Czech Republic, TV3. EMV acquired TV3 through a Czech subsidiary. The broadcasting licence was owned by Mr A, who agreed to transfer the licence to KTV, a company set up for the purpose in Luxembourg, with a view to transferring the shares in KTV to EMV. It was a condition of the licence that it would be used only for the purpose of TV3's broadcasting. However, the plan to transfer both channel and licence into the control of the investor EMV ran into difficulty. The national regulator, which had the authority to authorize the licence transfer, declined to do so, on the express grounds that it wished to give priority to Czech operators. In breach of his contract with EMV, Mr A then applied to transfer the licence to another Czech company, RTVG, which he controlled. Over EMV's protest, the regulator approved the transfer, putting the licence beyond the contractual control of EMV and leaving them with a potentially worthless claim in damages against Mr A. Unable to broadcast, TV3 went out of business. EMV brought an arbitration claim against the Czech Government under the Belgium-Luxembourg-Czech Republic BIT, asserting that the regulator had expropriated its investment. Allegations of bad faith on the part of the regulator were part of the claim.

The tribunal held that there had been no expropriation. It was Mr A's breach of contract which deprived EMV of the value of its investment, not the actions of the regulator. The tribunal observed:

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[134] *CME Czech Republic BV v. Czech Republic* (CME), Partial Award, 13 Sep. 2001, UNCITRAL, para. 603. For 'police powers', *see* Dolzer, Kriebaum & Schreuer, *supra* n. 88, at 174–180.

> Contrary to the way the Claimant has sometimes expressed its case, the Claimant had no right vis-à-vis the world at large to the Licence, nor did it have any such right to acquire the Licence.[135]

If the obligations of the Czech Republic towards Luxembourg companies under the ECHR were admitted to the reasoning, this starting point would become highly debatable. EMV had acquired a Czech company, TV3, which was already broadcasting in a small way. As a result of the decision of the regulator to refuse the transfer of the licence, on the explicit basis that it wished to discriminate in favour of Czech investors, the company went out of business. This was clearly an interference with TV3's Article 10 ECHR right. EMV's investment, TV3, was a company with the presumptive right to a broadcasting licence. The refusal of the transfer deprived it of the possibility of trading, rendering EMV's interest worthless. This would seem to fall within the definition of an indirect taking. Notably, in both *Lauder v. Czech Republic* and *European Media Ventures*, the tribunals thought it an argument against the allegation of indirect expropriation that the investment, as they saw it, was unaffected by the state's denial of a broadcasting licence:

> The Claimant's legal interest in TV3 was not altered by [the state's] measures, what it owned (directly or indirectly) before those measures, it still owned after they had been taken.[136]

The proof of indirect expropriation therefore depends on the conceptualization of the asset concerned. Because the tribunals in *European Media Ventures* and *Lauder* did not understand the investment to include a presumptive right to a licence under the ECHR, the denial of the licence could not be treated as causing any damage to the investment; and if there was no damage, necessarily there was no expropriation. However, accept that the investment enjoyed that right and the wrongful denial of a licence can easily be understood as 'interference … in the use of [Claimant's] property or with the enjoyment of its benefits'.[137]

Evidently, it is not sufficient merely to assert the presumption in favour of permission to broadcast. EMV would have had to show that TV3's ECHR rights had in fact been violated, but the burden of showing justification for the interference would, according to the ECtHR's jurisprudence, have lain upon the state.

A media investment in a state which has accepted obligations under one of the principal human rights treaties is the equivalent of an asset with an option attached. That option, the right to hold a government to account if a licence is refused, is a thing of value. The outcome of these cases might or might not have been different

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135 *European Media Ventures, supra* n. 11, para. 80.
136 *Ibid.*, para. 89.
137 *Ronald S Lauder, supra* n. 98, para. 201.

had the free expression rights of the investee companies been taken into account, but the analysis would arguably have focused on the exculpatory justifications for the state's action, not the threshold question whether there was an act of expropriation.

3.3[c] *Imported Obligations Provisions*

Some BIT formulations incorporate international law obligations by reference. It will be recalled that, as a private party, an investor has no standing to enforce his human rights outside the structures specifically created for that purpose under human rights treaties. However, a BIT may provide a bridge from the international to the personal level through a provision such as Article 3(5) of the 1992 BIT between the Netherlands and the Czech and Slovak Federal Republic:

> If … obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

The tribunal in *CME*, somewhat summarily, upheld a claim under this provision on the basis of a violation of customary international law.[138] Human rights obligations were not pleaded. However, the above wording, contemplating obligations 'existing at present or established hereafter', must extend to treaty obligations of any type.

In *Roussalis*, an identical provision in the Greece-Romania BIT (1997) was analysed. The investor sought to rely on Article 1 of the First Additional Protocol to the ECHR (right to property) as conferring 'treatment more favourable' than that provided under the BIT. The tribunal accepted the potential relevance of the investor's human rights, but found the issue moot on the basis that the BIT offered a 'higher and more specific level of protection'.[139]

Henin argues against the idea that such clauses should be taken at face value.[140] Attacking the tribunal's willingness to consider Roussalis' human rights claim, she contends:

> The text itself does not refer to the additional rights of investors (as natural or legal persons), who are the only potential bearers of human rights. Instead, it refers to 'investments'. 'Investments' may be entitled to protection, but they simply cannot be the bearers of human rights in the way natural or legal persons can.[141]

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138 *CME v. Czech Republic, supra* n. 134.
139 *Spyridon Roussalis v. Romania (Award)*, ICSID Case No. ARB/06/1, 7 Dec. 2011, para. 312.
140 Paula F. Henin, *The Jurisdiction of Investment Treaty Tribunals over Investors' Human Rights Claims: The Case Against Roussalis v. Romania*, 51 Colum. J. Transnat'l L. 224 (2012).
141 *Ibid.*, at 256.

This assertion is unpersuasive. Investments can be bearers of human rights, as the jurisprudence of the ECtHR amply demonstrates. Whether they have human rights in a particular case depends on the treaty concerned. As discussed above, natural persons standing behind such corporations, like investors under ISDS jurisprudence, may in some cases pursue human rights claims for wrongs ostensibly done to the corporation, just as investors, even if separated by intermediate corporations of an essentially instrumental character, can pursue claims under BITs.[142]

Where the parties' agreement does not explicitly determine the applicable law, the issue may be resolved by the parties' agreement as to the institutional rules selected to govern the arbitration. These may or may not designate international law as applicable.

In a common formulation for BITs, the investor may be entitled to select between different institutional schemes, typically the Washington Convention and ICSID Arbitration Rules, the ICSID Additional Facility Rules[143] or ad hoc arbitration under the UNCITRAL Arbitration Rules.[144] For BITs which specify the Washington Convention as the governing regime, where applicable to the states concerned, Article 42(1) provides that, in the absence of agreement, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. This 'simply means that the relevant rules of international law are to be applied'.[145] For arbitrations under UNCITRAL Arbitration Rules, however, Article 28(1) of those rules directs arbitrators to 'decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'. Article 28(2) provides that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. Hence, where the parties have not selected the law directly, these provisions delegate the task to the tribunal.

Without entering into the ramifications of applicable law theory, it is evident that where a substantive provision of the BIT incorporates a rule of international law by reference, the arbitral tribunal must ascertain and apply it, whatever law governs the proceedings generally. With regard to more general matters of interpretation and the legal context of the relations between investor and state, the default rule under the Washington Convention, as mentioned above, requires the tribunal to decide whether a rule of law, e.g., one arising under a human rights

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142 Dolzer, Kriebaum & Schreuer, *supra* n. 88, at 114–121; *Schreuer's Commentary on the ICSID Convention* 195 (Stephan W. Schill ed., Cambridge University Press 2022). *See also Hydro, supra* n. 19, para. 533.

143 ICSID Additional Facility Rules 2006.

144 United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules 2021.

145 Schill, *supra* n. 142, at 881.

treaty or customary international law, is 'applicable'. Similarly, under the UNCITRAL Model Law the tribunal must, in the absence of party choice, 'apply the law determined by the conflict of laws rules which it considers applicable'.[146] In ICSID and non-ICSID cases alike, this is a judicial exercise, not a matter of free discretion. It would otherwise be determining the case *ex aequo et bono*, which is permissible only if explicitly agreed by the parties.

While therefore tribunals have leeway in deciding which laws are applicable, the nature of their enquiry is an objective one. Where a human rights treaty applies to the dispute as a matter of law, the tribunal, complying with its duty to act judicially, must apply it.[147]

3.4 Beneficiaries of protection

A difference between claims based on human rights treaties and those founded in investment treaties is the importance in the latter of nationality. The paradigm of diplomatic protection is that the state seeks reparation for a wrong done to it in the person of its national.[148] Hence, the circumstances in which a state may pursue diplomatic protection in favour of a person who enjoys dual nationality are qualified. Article 7 of the ILC Draft Articles on Diplomatic Protection provides:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Under customary international law, where there is no predominant nationality, no state of the individual's nationality may pursue diplomatic protection against another.[149] Consistently with this principle, it is a condition of standing under the Washington Treaty that the claimant not be a national of the respondent state.[150] Therefore, where the investor pursues ICSID arbitration, this strict rule of diversity will apply. However, as a *lex specialis*, a BIT may specify the nationality conditions to which investor claims are subject, and in non-ICSID cases the BIT may permit claims by dual nationals.[151] It is a matter of the interpretation of the

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146 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (2006), Art. 28(2).

147 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (2009), para. 5.67.

148 *Case regarding Mavrommatis Palestine Concessions (Objection to the Jurisdiction of the Court)*, Series A – No. 2, 30 Aug. 1924, Permanent Court of Arbitration.

149 *Mergé Case*, Decision No. 55 (1955) XIV Italy-United States Conciliation Commission 236-48.

150 Washington Convention, Art. 25(2).

151 International Law Commission (ILC), *Draft Articles on Diplomatic Protection*, Art. 17. *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Decision on Jurisdiction, 15 Dec. 2014 [Spanish], Permanent Court of Arbitration, paras 167–174. *Rawat, supra* n. 109.

BIT in question whether the nationality condition includes or excludes dual nationals.

Under human rights treaties, on the other hand, states confer rights on the world at large. Under the ECHR, states agree to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the ECHR]'.[152] The African Charter accords rights to 'every individual'.[153] Parties to the American Convention grant rights to 'all persons subject to their jurisdiction'.[154] Where a state has accepted the compulsory jurisdiction of a human rights court in respect of individual claims, such as the African Court of Human Rights (ACtHR), the IACtHR or ECtHR (prior to 1998, when all ECHR members accepted this jurisdiction), the claimant's nationality is irrelevant.[155]

The question that arises in ISDS claims is whether the state of the investor, in right of which the investor claims, is entitled to invoke treaty-based human rights in its favour.[156] If both states are bound by the treaty to accord certain rights to all persons within their jurisdictions, evidently that obligation must protect an investor who is a national of the capital-exporting state. However, if the respondent state is a party to the relevant treaty but the investor's state is not, it must depend on the terms of the BIT whether the investor is entitled to pray in aid the rights accorded by that treaty to all persons *vis à vis* the respondent state.

Thus, where the relevant obligation under the BIT is defined by reference to 'international law', the reference must surely be to international law as between the parties to the BIT. It is difficult to imagine that the capital-importing state would agree to accord to nationals of the other state rights which the other state declines to recognize. In other words, the two states on either side of the dispute must both be bound by the human rights obligation concerned.[157] That does not mean, however, that procedural limitations affecting the jurisdiction of any human rights instance under the human rights instrument are also imported into the BIT. Subject to one point, therefore, it seems that treaty obligations which the state

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[152] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950) (ECHR), Art. 1.

[153] African Charter on Human and Peoples' Rights (Banjul, 27 Jun. 1981), Art. 2, OAU Doc. CAB/LEG/67/3 rev. 5 (1982) 21 ILM 58.

[154] American Convention on Human Rights, Art. 1.

[155] Ursula Kriebaum, '*Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*', *Human Rights in International Investment Law and Arbitration* 222 (Oxford University Press 2009).

[156] Evidently it is only on human rights treaties that the claim of violation of freedom of expression can be founded, customary international law offering no such protection.

[157] *Toto Costruzioni, supra* n. 106, paras 158–168. This said, it is arguable that by entering into a multilateral human rights treaty which benefits all persons within the jurisdiction, irrespective of nationality, a state confers that right on all persons: Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Christina Binder et al. eds, Oxford 2009).

of the investor's nationality is not entitled to assert against the host state will be irrelevant.

A qualification to that conclusion lies in the operation of MFN clauses. The application of such clauses is inconsistent, but 'it is widely accepted that investors may rely on MFN clauses to claim a better substantive treatment accorded by a host state to investors of third States'.[158] Where a claimant investor of a state which is not party to a human rights treaty is nonetheless entitled under the BIT to the benefit of treatment accorded by the respondent state to investors of other states pursuant to such treaty, the MFN clause could enable that claimant to claim the benefit of the same protection.

MFN clauses are subject to the *eiusdem generis* rule, namely that the benefit of the clause 'will accrue only within the subject-matter covered by the basic treaty'.[159] It would seem that the comparison is to be undertaken in broad terms. In *Maffezini*, it was sufficient that the basic treaty and the more-favourable treaty both dealt with the protection of foreign investments.[160] Although the issue of the applicability of MFN clauses is complex, investors of non-ECHR states who are beneficiaries of a BIT with an ECHR member are in principle entitled in that state to the same human rights treatment of their investments as investors of ECHR members.

4 CONCLUSION

This article has argued that international human rights treaties provide that those who wish to undertake media activities have a presumptive right to be granted necessary licences by national authorities. Where disputes arise between a foreign investor and a host state, the investor may be entitled to rely upon freedom of expression rights in arguing his claim under a BIT.

Where states accept an obligation without qualification to comply with 'international law', that must usually be taken to mean that they will observe their treaty obligations, as relevant to a dispute falling within the terms of the parties' consent to arbitration. Where human rights treaties apply as between the

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158 Dolzer, Kriebaum & Schreuer, *supra* n. 88, at 269–271.

159 *Ibid.*, at 265. *See also* United Nations, *Draft Articles on Most-Favoured-Nation Clauses* (United Nations 1978), Art. 10.

160 *Maffezini v. Spain (Decision on Jurisdiction)*, ICSID Case No. ARB/97/7, 25 Jan. 2000, para. 56; *Suez, Barcelona and Interagua v. Argentina (Decision on Jurisdiction)*, ICSID Case No. ARB/03/17, 16 May 2006, paras 55–57; *Siemens AG v. Argentine Republic (Decision on Jurisdiction)*, ICSID Case No. ARB/02/8, 3 Aug. 2004, para. 92. However, there may be a growing trend to condition the applicability of MFN clauses to evidenced cases of *actual* preferential treatment of third-country investors: *see* Borzu Sabahi, Noah Rubins & Don Wallace Jr., *Investor-State Arbitration* 569–571 (2d ed., Oxford University Press 2019). This seems unsound, as the state of law created by the human rights treaty confers an immediate benefit on the investors to which it applies as soon as it comes into force.

parties to a BIT, they fall within the general category of international law and must be applied by the arbitral tribunal where relevant to the issues arising under substantive protections of the BIT. The MFN mechanism may extend such protection to nationals of unbound states.

However, only under the ECHR do expression rights extend directly to corporations. Where the Convention applies, a media company's Article 10 rights may support claims under various investor protections conventionally arising under BITs. It would seem that the ICCPR, African Charter and American Convention will not normally assist the corporate investor, although interference with the expression rights of employees may support, in particular, a corporation's FET claim, either as a rule of international law imported into the BIT by reference or as a fact which is relevant to the fairness of the treatment given to the investment.

The BIT may, of course, limit extrinsic sources of law to customary international law, in which case such treaties are irrelevant.[161] Other countries are following the lead of the United States in attempting to confine the interpretation of the FET standard to the four corners of the BIT.[162]

The 2021 request for arbitration by Discovery against Poland indicates that the issues raised in this article remain of interest.[163] It remains to be seen whether the reluctance of ISDS arbitrators to venture into the field of human rights will persist, despite their clear relevance to media disputes.

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[161] United States-Mexico-Canada Agreement 2018 (USMCA), Art. 14.6(1).

[162] Belgium-Luxembourg Economic Union Model BIT 2019, Art. 4(6); Netherlands Model Bilateral Investment Agreement 2019, Art. 9(6), excluding the relevance of other treaties.

[163] Trinidad Alonso, *On Why Corporations Should Care About Investment Treaty Protection Now More Than Ever,* Kluwer Arbitration Blog (24 Mar. 2019). With the dismantling of intra-EU BITs in the wake of the *Achmea* judgment (*Slovak Republic v. Achmea BV,* C-284/16, 6 Mar. 2018, ECLI:EU:C:2018:158), such non-EU investors might consider placing subsidiaries in non-EU ECHR members, having first checked as to the existence of a BIT, so as to secure the protection of their investments. For Poland, the choice is: Montenegro, North Macedonia, Norway, Serbia, Switzerland, Turkey, Ukraine.