INTERNATIONAL CORPORATE OBLIGATIONS, HUMAN RIGHTS, AND THE *URBASER* STANDARD: BREAKING NEW GROUND?

Kevin Crow & Lina Lorenzoni Escobar*

* Both authors contributed equally to this work. Lina Lorenzoni Escobar, LL.M. (Heidelberg) is a Ph.D. Candidate at the Transnational Economic Law Research Centre (TELC) at the University of Halle-Wittenberg Law School. Kevin Crow, LL.M. (LSE) is a Lecturer, Researcher, and Ph.D. Candidate at TELC and a Research Associate at the Asia School of Business. The authors would like to thank Prof. Dr. Christian Tietje, LL.M. (Michigan) and Andrej Lang, LL.M. (NYU), for their support and valuable comments on this paper.

ABSTRACT

The December 2016 International Center for Settlement Disputes ("ICSID") Tribunal Award of Urbaser v. Argentina—the latest in the investor-state dispute settlement ("ISDS") arbitral saga spawned by the 2001 Argentine financial crisis—has caused quite a stir among international human rights lawyers who speculate that the decision may signal an 'inroad' to hold corporations liable for human rights violations under public international law. Accordingly, this article poses the question: What does Urbaser actually change about international arbitral practice? Through a hypothetical testing of the standards Urbaser sets forth (including an analysis of the mens rea standards Urbaser requires of international corporate actors), and after a thorough exploration of Urbaser's premises against the backdrop of debates on the subjectivity of corporations under international law, this article concludes that although Urbaser goes to certain theoretical lengths to impose international legal obligations on investors, the standards it sets forth fall short of changing the status quo for corporations under international law—at least for now. After situating Urbaser within current ISDS debates regarding the asymmetry of the international investment system and the growing relevance of CSR standards, as well as Ruggie's 'Protect, Respect, Remedy' framework for corporations under international law, and after emphasizing the nominal nature of much of Urbaser's language, the article concludes by commenting on how Urbaser may change and contribute to the debate regarding corporate human rights obligations under international law.

I. INTRODUCTION

The recent ICSID Tribunal award in *Urbaser v. Argentina* has caused quite a stir among international human rights lawyers who speculate that the award may signal an inroad to hold corporations liable for human rights violations under public international law.[1] Should international lawyers believe the hype? The authors of this article think it is best to proceed with caution. As this paper will demonstrate, while *Urbaser* goes to certain theoretical lengths to impose international legal obligations on foreign investors, the standards the case sets out fall short of changing the status quo for corporations under international law—at least in the short term.

The current international investment law ("IIL") regime faces widespread legitimacy concerns.[2] Issues arising from the vagueness and lack of

[1] *See*, *e.g.*, Sujoy Sur, *Urbaser v. Argentina: Analysing the Expanding Scope of Investment Arbitration in light of Human Rights Obligations*, EFILA BLOG (May 2, 2017), https://efilablog.org/2017/05/02/urbaser-v-argentina-analysing-the-expanding-scope-of-investment-arbitration-in-light-of-human-rights-obligations/ [http://perma.cc/F9FR-NZ6X].

[2] *See* David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on*

predictability in IIL standards have ushered the onset of what might be called a "crisis of legitimacy" for IIL.[3] Particularly in recent years, and especially since the Argentinian financial crisis,[4] arbitral awards have contributed to growing concerns regarding the balance and fairness of claims. A large part of the legitimacy debate centers upon the single directionality, or asymmetry, of claims that fall within the jurisdiction of arbitral tribunals.[5] This asymmetry is twofold: it manifests both procedurally and substantively. On the one hand, IIL provides a cause of action for investors against the host States to protect their investments. However, it does not provide the host States with a cause of action against investors and generally refutes attempts by States to bring counterclaims against investors.[6] On the other hand, IIL does not impose substantive obligations on investors, but does instead grant them rights.[7] Indeed, as the ICSID in *Spyridon Roussalis v. Romania* put it:

Legitimacy, 32 SUFFOLK TRANSNAT'L L. REV. 513, 515-16 (2009).

[3] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1584 (2005). The document that best describes the issues raised by this backlash is *Public Statement on the International Investment Regime*, OSGOODE HALL LAW SCH. (Aug. 31, 2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ [https://perma.cc/JU67-FATR], where pro-investor interpretations of investment treaties were critically questioned, and recommendations were made to withdraw or renegotiate investment treaties.

[4] For a general overview of the Argentine financial crisis and its relationship to IIL, *see* José E. Alaverz & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 379 (Karl P. Sauvant ed., 2009).

[5] *See, e.g.*, Anne K. Hoffman, *Counterclaims*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 505, 509 (Meg Kinnear et al. eds., 2016).

[6] This is a general rule, but (in rare circumstances) tribunals have found jurisdiction to hear counterclaims. *See, e.g.*, Saluka Invs. B.V. v. Czech, UNCITRAL, Decision on Jurisdiction, ¶ 83 (May 7, 2004), https://pcacases.com/web/sendAttach/879 [https://perma.cc/AVA3-CR8Q]; Goetz v. Burundi, ICSID Case No. ARB/01/2, Award, ¶ 281 (June 21, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2/DC2651_Fr.pdf; Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 854-69 (Oct. 5, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC2672_En.pdf; Ltd. Liab. Co. Amto v. Ukraine, SCC Case No. 080/2005, Final Award, § 118 (Mar. 26, 2008), http://cisarbitration.com/wp-content/uploads/2013/02/AMTO-LLC-v-Ukraine-SCC-Arbitration-No.-082005-Award-dated-26-March-2008.pdf [https://perma.cc/E6CD-X6CX]; RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 266 (Mar. 13, 2009), https://www.italaw.com/documents/RSMvGrenadaAward.pdf [https://perma.cc/YA3K-P3HU].

[7] Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 355 (2015).

> The Tribunal . . . considers that the . . . BIT [Bilateral Investment Treaty] limit[s] jurisdiction to claims brought by investors about obligations of the host State. The meaning of the 'dispute' is the issue of compliance by the State with the BIT. . . . *[T]he BIT imposes no obligations on investors, only on contracting States*.[8]

As a reaction to this asymmetry, calls for reform have prompted States to adopt new counterclaim clauses in investment treaties as a means to impose some obligations on investors, at least insofar as their commitment to the investment treaty at issue is concerned.[9] However, thus far, these attempts merely reflect the *Roussalis* standard, which essentially allows the investor to consent to counterclaims.[10] Even the (now likely defunct) Trans-Pacific Partnership ("TPP"), with paragraphs devoted to counterclaims in its investment chapter,[11] implemented a similar asymmetrical standard through some roundabout language in a footnote.[12] Also, the counterclaim language of the 2015 Model India BIT—which looked extremely promising for States—was eliminated in the 2016 version of that treaty.[13]

In December 2016, as the asymmetry debates raged on, along came *Urbaser*, a case in which an ICSID tribunal not only acknowledged the right of a host State to bring counterclaims not anticipated by the investor—thus implying a symmetrical nature to BITs—but also affirmed the existence of obligations for investors in an unprecedented fashion.[14] *Urbaser* grounded

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[8] Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 869-71 (Dec. 7, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C70/DC2431_En.pdf (emphasis added).

[9] *See, e.g.*, Government of India, *Model Text for the Indian Bilateral Investment Treaty*, art. 14.11, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [https://perma.cc/52CR-K47R]; *Trans-Pacific Partnership*, OFFICE OF U.S. TRADE REP., art. 9.19(2) & n.32, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf [https://perma.cc/Z9V8-S4AB] [hereinafter TPP].

[10] *See* Hoffman, *supra* note 5, at 508. *See also* Christian Tietje & Kevin Crow, *The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing?*, *in* MEGA-REGIONAL TRADE AGREEMENTS CETA, TTIP, AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC REGULATIONS 87 (Stefan Griller et al. eds., 2017).

[11] TPP, *supra* note 9, at art. 9.19(2).

[12] *Id.* n.32.

[13] *See* Andrew Cornford, *Revised Version of India's New Model Bilateral Investment Treaty*, INT'L DEV. ECON. ASSOCIATES (July 12, 2016), http://www.networkideas.org/featured-articles/2016/07/revised-version-of-indias-new-model-bilateral-investment-treaty/ [https://perma.cc/EN93-LXTP].

[14] Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1150, 1209 (Dec. 8, 2016),

both acknowledgements in general international law.[15] The case focused on the interrelation between international human rights law and, specifically, the human right to water with the applicable BIT.[16]

While several ICSID tribunals in the past have dealt with human rights considerations in international investment disputes,[17] *Urbaser* makes bolder steps in attempting to define what requirements the human right to water imposes on host States and private actors when water services are privatized.[18] The case was immediately lauded as a victory for human rights,[19] a step toward greater international corporate responsibility,[20] and a counterweight to the past asymmetry of the system.[21]

But what standard does *Urbaser* actually set out and what type of corporate actions would be necessary in order to meet that standard? How does *Urbaser* ground corporate human rights obligations in international law, and what might it imply for future State counterclaims based on human rights? In exploring these questions, Part II of this paper summarizes the facts of *Urbaser* and situates it within the broader IIL context; Part III provides a synopsis on the human right to water in international law; Part IV then explores the question of whether *Urbaser* truly breaks new ground through its allowance of a State counterclaim based on the human right to water, specifically with respect to international corporate human rights obligations and corporate social responsibility ("CSR"); Part V then concludes with a

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf.

[15] *Id.* ¶¶ 1194, 1210.

[16] Agreement on the Reciprocal Promotion and Protection of Investments, Arg.-Spain, Oct. 3, 1991, 1699 U.N.T.S. 187.

[17] For an overview, *see* Owen McIntyre, *Emergence of the Human Right to Water in an Era of Globalization and Its Implications for International Investment Law*, GLOBALIZATION, INTERNATIONAL LAW, AND HUMAN RIGHTS 147, 164 (Jeffrey F. Addicott et al. eds., 2011); Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 433 (2013).

[18] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶¶ 1211-20.

[19] *See* Jarrod Hepburn, *Analysis: Arbitrators in Urbaser v. Argentina Water Dispute Deviate from prior Impreglio Award on Necessity and Damages*, INV. ARB. REP. (Jan. 12, 2017), https://www.iareporter.com/articles/analysis-arbitrators-in-urbaser-v-argentina-water-dispute-deviate-from-prior-impregilo-award-on-necessity-and-damages/ [https://perma.cc/ZT45-UNR5].

[20] *See* Edward Guntrip, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL: TALK! (Feb. 10, 2017), https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/ [https://perma.cc/S6XL-52AJ].

[21] *See* Elena Burova, *Jurisdiction of Investment Tribunals Over Host States' Counterclaims: Wind of Change?*, KLUWER ARB. BLOG (Mar. 6, 2017), http://kluwerarbitrationblog.com/2017/03/06/jurisdiction-of-investment-tribunals-over-host-states-counterclaims-wind-of-change/ [https://perma.cc/2Y3Y-AR5C].

discussion of the implications of *Urbaser* in theory and in practice.

II. BACKGROUND

When Argentina privatized drinking water and sewage services in the 1990s, a number of foreign companies invested in Argentinian water and sewage services.[22] After the Argentinian financial crisis between 1998 and 2001 prompted Argentina to freeze tariffs in a manner many companies considered equivalent to expropriation, many foreign companies in Argentina resorted to ISDS mechanisms provided for in applicable BITs.[23] *Urbaser* is the latest in a long line of controversial cases to join this saga.[24]

The claimants, Urbaser and CABB, were majority shareholders of Aguas del Gran Buenos Aires S.A. ("AGBA").[25] AGBA entered into a contract with the Province of Buenos Aires in December 1999.[26] The region awarded to AGBA had a population of about 1.7 million low-income inhabitants, of which only 35 percent had drinking water services and 13 percent had sewage services.[27] Argentina argued that one of the main purposes of the contract was the expansion of water and sewage coverage,[28] and indeed, the Argentinian government relied on the private sector for the technical and financial capacity to achieve expansion.[29] Claimants argued that Argentina's decision to freeze tariffs in 2002 negatively impacted the economic-financial equation that prompted AGBA's contract; they brought fair and equitable

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[22] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶¶ 41-42.

[23] *See* William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 200 (2008).

[24] *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, (May 12, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC504_En.pdf; BG Group Plc. v. Arg., UNCITRAL, Final Award, (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf [https://perma.cc/A7JU-24U3]; TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, (Dec. 19, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0874.pdf [https://perma.cc/8TYP-ZV2X]; SAUR Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/04/4, Award, (May 22, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3189.pdf [https://perma.cc/FZ6Y-TD89]. The Tribunal in fact recalls the cases that have derived from privatization of water and sewage services in several Argentine provinces. *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶¶ 46-51.

[25] *See id.* ¶ 62. Urbaser held 27.4122% of the capital stock and CABB held 20%.

[26] *Id.*

[27] *Id.* ¶ 57.

[28] *Id.* ¶ 69.

[29] *Id.* ¶ 55.

treatment ("FET"), discrimination, and expropriation claims on this basis.[30] On the other hand, Argentina argued that the contract faced difficulties due to AGBA's deficient management and, in particular, to its failure to perform obligations to invest in the expansion of services.[31]

Most significantly for our purposes here, Argentina filed a counterclaim alleging that Claimants' failure to invest violated Claimants' obligations under international law, specifically those based upon the human right to water.[32] Argentina argued that the contract gave rise to "*bona fide* expectations" that Claimants would invest.[33] Claimants' failure to invest not only violated "good faith and *pacta sunt servanda* [principles]," but also affected human rights.[34] While Claimants argued that human rights bind States, not private parties, Argentina countered that because the obligation during the concession was to guarantee access to water, and because both BIT parties were signatories to certain human rights treaties, the obligation of Claimants was "to comply with a fundamental human right."[35]

III. ARGENTINA'S PREMISE: THE HUMAN RIGHT TO WATER

The right to water and sanitation has its roots in international humanitarian law.[36] The 1949 Geneva Conventions III and IV underscore the obligation of detaining powers to provide water and soap for those detained, as well as sufficient drinking water.[37] The 1977 Additional Protocols I and II explicitly address drinking water and drinking water installations, linking these to hygiene.[38] The right to water migrated to international human rights law through interpretation of the 1966 International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR").[39] In particular, General Comment No. 15

[30] *Id.* ¶¶ 35, 75.

[31] *See id.* ¶¶ 199, 1156.

[32] *Id.* ¶ 36.

[33] *Id*. ¶ 1156.

[34] *Id*.

[35] *Id.* ¶ 1157.

[36] G.A. Res. 64/292, at 1-2, ¶ 1 (July 28, 2010).

[37] Geneva Convention Relative to the Treatment of Prisoners of War arts. 26, 29, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 85, 89, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[38] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 54(2-3), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5(1)(b), 14, June 8, 1977, 1125 U.N.T.S. 609.

[39] *See* Amanda Cahill, *'The Human Right to Water – A Right of Unique Status': The Legal Status and Normative Content of the Right to Water*, 9 THE INT'L J. OF HUM. RTS. 389,

of the Committee on Economic, Social and Cultural Rights ("Comment No. 15") deduces the right to water from ICESCR Article 11 (right to an adequate standard of living) and Article 12 (right to health).[40] Indeed, Comment No. 15 specifies that the Covenant entitles everyone to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[41]

In the years since the ICCPR and ICESCR, the right to water has begun to increasingly appear in international conventions.[42] Recently, the U.N. General Assembly ("UNGA") recognized "the right to safe and clean drinking water and sanitation as a human right"[43] and the U.N. Human Rights Council ("HRC") affirmed the inextricable relation of such right with the right to health, life, and human dignity.[44] The UNGA reaffirmed the *responsibility* of States to *promote* and *protect* human rights,[45] while the HRC reaffirmed the *primary responsibility* of States to *ensure full realization* of all human rights.[46] In addition, the HRC Resolution refers explicitly to non-State service providers.[47] States are encouraged to ensure that non-State service providers "fulfill their human rights responsibilities," among other things.[48] Thus, it appears that, from the perspective of U.N. bodies at least, the human right to water places some degree of responsibility on the part of non-State actors, specifically service providers; however, no clarifications are made as to what this responsibility entails.

390-91 (2005).

[40] U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 15*, ¶ 3, U.N. Doc. E/C. 12/2002/11 (Jan. 20, 2003).

[41] *Id.* ¶ 2.

[42] For an overview, *see International Timeline,* THE RTS. TO WATER AND SANITATION, http://www.righttowater.info/progress-so-far/international-timeline/ [https://perma.cc/ZE4L-S6UX].

[43] G.A. Res. 64/292, *supra* note 36, ¶ 1.

[44] Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9, ¶ 3 (Oct. 6, 2010).

[45] G.A. Res. 64/292, *supra* note 36, ¶ 2.

[46] H.R.C. Res. 15/9, *supra* note 44, ¶ 6.

[47] *Id.* ¶ 5.

[48] *Id.* ¶ 9. Point 9: "Recalls that States should ensure that non-State service providers: (a) fulfil their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them; (b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity; (c) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges; (d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms."

IV. INVESTOR RIGHTS, HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW

"There is a clear trend in the declarative practice of States towards extending responsibility for respecting human rights to private companies involved in the provision of private services."[49] *Urbaser* acknowledges and contributes to this trend. It approaches investment treaty law as part of the bigger picture of general international law, as will be illustrated in Section A below. In addition, *Urbaser* positively affirms investors' subjectivity within international law, which legally grounds investors' international human rights obligations in public rather than private law.[50] *Urbaser* thus explores the existence and nature of investors' human rights obligations under international human rights law, with mixed outcomes, as we will see in Section B below.

A. Urbaser and the Asymmetry of BITs

IIL developed on the premise that foreign investors do not have rights under customary international law.[51] In filling this void, international investment agreements ("IIAs") grant substantive and procedural rights to investors without typically imposing any obligations on them.[52] In IIAs, the host State does not have the same procedural standing as investors do primarily because the substantive rights contained in IIAs are not actionable by the State.[53] Moreover, the substantive standing of the State has a troubled history in international investment arbitration: investment provisions have sometimes been interpreted in a way that prioritizes economic interests over non-economic interests.[54] The State, however, has other obligations under

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[49] McIntyre, *supra* note 17, at 152.

[50] *See Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1195.

[51] *See* Franck, *supra* note 3, at 1536.

[52] *See Roussalis*, ICSID Case No. ARB/06/1, ¶¶ 869-71.

[53] *See* Franck, *supra* note 3, at 1529. Standards such as most favored nation, national treatment or compensation in case of expropriation, which are the basic content of most IIAs, protect the investor. It is difficult to imagine a scenario in which a host State could bring action based on standards of protection that cannot be violated by the investor.

[54] This has led to the framing of the right to regulate as opposed to the interpretive power accorded to arbitrators, an issue propelled especially by recent arbitral decisions. *See, e.g.*, Phillip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, (July 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf.; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, (May 12, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC504_En.pdf; BG Group Plc. v. Arg., UNCITRAL, Final Award, (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf

international law. The tension between the obligations cast in IIAs and general international law obligations of States has led to an ongoing backlash against IIL and, particularly, against international investment arbitration.[55]

While professional specialization in IIL should not lead arbitrators to overlook adjoining fields, such as principles and practices of general international law,[56] awards by arbitral tribunals under investment treaties have—at times—done so in the past.[57] Such shortsighted approaches have fueled the IIL asymmetry debate and even convinced counsel to argue cases based on such asymmetry.[58] This was exactly one of the litigation strategies adopted by Claimants in *Urbaser*.

In *Urbaser*, Claimants argued that the "uneven manner in which investor and host State[s] are treated is widely recognized."[59] BITs have an asymmetric nature that, on the one hand, prevent a State from invoking any rights based on such a treaty (even a counterclaim) and that, on the other hand, imply that investment treaties do not impose obligations on the investors.[60]

In Claimants' view, the Spain-Argentina BIT adopts this "classical" asymmetric BIT model.[61] The ICSID tribunal ("Tribunal"), however, found that no provision in the BIT allows an inference that the host State does not

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[https://perma.cc/A7JU-24U3]; TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, (Dec. 19, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0874.pdf [https://perma.cc/8TYP-ZV2X]; SAUR Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/04/4, Award, (May 22, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3189.pdf [https://perma.cc/FZ6Y-TD89].

[55] Franck, *supra* note 3, at 1523.

[56] U.N. Int'l Law Comm'n, Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 8, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006). Indeed, a limited jurisdiction ought not to imply a limitation of the scope of the law applicable in the interpretation and application of given treaty. *See id.* ¶ 45.

[57] For a discussion on specific examples of fragmentation in international investment law, *see* Anne Van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, 17 FINNISH Y.B. INT'L L. 91 (2006). For detailed examples of legal fragmentation in a variety of specialized areas of international law, *see* Andreas Fisher-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1004 (2004); DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (L.A.N.M. Barnhoorn & K.C. Wellens eds., 1995). *See also* Simon Roberts, *After Government – On Representing Law without the State*, 68 THE MOD. L. REV. 1, 2-3 (2005).

[58] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1131.

[59] *Id.*

[60] *Id.* ¶ 1120.

[61] *Id.* ¶ 1167.

have rights under it.[62] Indeed, the BIT refers to general principles of international law and general international law, all of which are extra BIT sources that can be applicable.[63] The BIT is not to be interpreted in isolation, but rather due consideration must be given to rules of international law external to the BIT's own rules.[64] As the Tribunal put it: "The BIT cannot be interpreted and applied in a vacuum . . . . The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights."[65]

This is the first explicit statement of this nature in investment arbitration. While this statement does not overcome the procedural asymmetry of IIL, it opens up possibilities for equalizing at least part of the substantive asymmetry of IIL by acknowledging other rights and duties of States under international law.

B. Urbaser and the Subjectivity of Corporations

Wading into a rather controversial and doctrinal issue of international law, the Tribunal stated that it was "reluctant" to take a principled position that private companies may never bear human rights duties.[66] While past tribunals considered that corporations are not subject to, and therefore do not have, a duty under international law, *Urbaser* found that this approach has "lost impact and relevance."[67] The Tribunal found that through the Spain-Argentina BIT's Most Favored Nation ("MFN") clause, investors are entitled to invoke rights resulting from international law.[68] "If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations."[69]

The Tribunal's reasoning is premised on the fact that under the BIT, the investor can bring claims and invoke *rights* grounded in international law, especially through the MFN clause.[70] Surely then, the investor could be held to *obligations* under international law.[71] The Tribunal also inferred the subjectivity of corporations through CSR: a "standard" of crucial importance

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[62] *Id.* ¶ 1183.
[63] *Id.* ¶ 1192.
[64] *Id.*
[65] *Id.* ¶ 1200.
[66] *Id.* ¶ 1193.
[67] *Id.* ¶ 1194.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

that is accepted by international law and in consideration of which transnational companies are no longer "immune" from international subjectivity.[72]

The existence of rights for transnational corporations is often invoked to ground the establishment of a full range of international subjectivity that includes obligations.[73] In this sense, the Tribunal aligns with many scholars that make this same argument.[74] However, international subjectivity remains a theoretical minefield[75] and the Tribunal's reasoning is dogmatically shaky.[76]

The starting point to analyze international subjectivity generally is the decision of the International Court of Justice ("ICJ") in the *Reparations to Injuries* case,[77] where the ICJ was careful to stress that subjects of law are not necessarily identical in their nature or in the extent of their rights.[78] Concluding that the U.N. was an international person, the ICJ found, "[it] is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same of those of a State."[79] The ICJ stated that the rights and duties of an organization depend on its purposes and functions.[80] At the same time, the ICJ's decision is devoid of actual criteria to delimit subjectivity.[81] For the purpose of establishing international duties for corporations or for investors in investor-state arbitration, international subjectivity might not even be an adequate category,

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[72] *Id.* ¶ 1195.

[73] *See id.* ¶ 1196.

[74] The *necessity* of the correlation between rights and duties, however, is dogmatically questionable, at least under the traditional theory of international subjectivity. Nowrot provides an extensive overview of the theory of subjectivity under international law and a critical approach to the conclusion that rights must be mirrored by duties. *See generally* Karston Nowrot, *„Wer Rechte hat, hat auch Pflichten"? Zum Zusammenhang zwischen völerrechtlichen Rechten und Pflichten transnationaler Unternehmen*, BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT Heft 7 (Christian Tietje ed., 2012).

[75] Koskenniemi uses the phrase "theoretical minefield" in reference to "mysteries" of customary law formation. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1947 (1990).

[76] *See generally* Nowrot, *supra* note 74.

[77] The U.N. was described by the ICJ as an organization "which occupies a position in certain respects in detachment from its Members." Reparation of Injuries Suffered in Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 175, 179 (Apr. 11).

[78] *Id*. at 178.

[79] *Id.* at 179.

[80] *Id.* at 180.

[81] *See* José E. Alvarez, *Are Corporations 'Subjects' of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 26 (2011) [hereinafter Alvarez, *Are Corporations 'Subjects' of International Law?*].

because of its difficult analogy with the State.[82] States are territorial-based regulators, whereas businesses are private, profit-seeking, and do not have territorial control or legal jurisdiction.[83] Taking the State as a reference for international law obligations of non-State actors (a "top down" approach) loses sight of the ways that corporations differ from States or natural persons.[84]

The Tribunal seems to be aware of these difficulties: it uses the category of international subjectivity, but the dogmatic weight of this language is not reflected in the analysis ultimately undertaken in *Urbaser*.[85] The Tribunal's considerations on subjectivity of corporations are premised on the rejection of principled positions and on the consideration that the subjectivity of investors cannot be rejected by "necessity."[86] The Tribunal did not offer criteria to delimit corporate international subjectivity. However, particularly when it was careful to establish the differences between the State and the corporation as a service provider, the Tribunal appeared to consider that the purposes and functions of the corporation frame the corporation's international subjectivity.[87] Insight on the context of a corporation's operations is reinforced by the Tribunal's consideration of CSR.[88]

CSR is characterized as a standard that requires contextualization and that trickles subjectivity to corporations.[89] If CSR is so important in creating or contributing towards subjectivity in international law for corporations, then *Urbaser* seems to look at subjectivity as participation,[90] at least to the extent that CSR has a private origin.[91] In this sense, while making use of traditional

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[82] Alvarez, however, takes efforts to point out that "skepticism about the 'personhood' of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly now they have both." *Id.* at 31.

[83] Yousuf Aftab, *The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies*, 60 ROCKY MT. MIN. L. INST. 1, 9 (2014).

[84] Alvarez, *Are Corporations 'Subjects' of International Law?*, *supra* note 81, at 26.

[85] This reveals the gap between theory and practice that is made especially evident in the domain of subjectivity in international law. *See* Nowrot, *supra* note 74, at 25.

[86] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1194

[87] *Id.* at ¶ 1206-07.

[88] *Id*. at ¶ 1194.

[89] *Id*.

[90] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50-51 (Oxford Uni. Press, 1994).

[91] *See* Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 2 TRANSNAT'L LEGAL THEORY, 221, 224-25 (2010) [hereinafter Mares, *Global Corporate Social Responsibility*]. CSR standards are labelled as private, underscoring their common thread which is to be an alternative to government regulation. However, the word private does not

language which conceptualizes international law made by subjects, it seems that the Tribunal—by linking CSR to subjectivity—is actually referring to participants.

Regardless of the theoretical shortcomings, which are representative of the state of flux of international law in this regard, *Urbaser* ultimately affirms subjectivity for corporations. To this end, the Tribunal explored the existence of human rights obligations for corporations under international law through traditional human rights treaties.[92] Through its reference to CSR, the Tribunal left the door open to considerations of how CSR molds human rights obligations of corporations.[93]

1. Human Rights Treaties: The Urbaser Standard for Corporate Obligations

What, then, does *Urbaser* actually change about the obligations of a foreign investor to a host State under classical BIT interpretation when it comes to human rights? Turning to the question of corporate international subjectivity, the *Urbaser* Tribunal found that the 1948 Universal Declaration of Human Rights ("UDHR") "may also address multinational companies" insofar as the enjoyment of individual rights implies that no other entities may disregard them.[94] After reviewing the ICESCR and the International Labor Organization ("ILO") Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, the Tribunal found that: "[T]he human right for everyone's dignity and [the right to] adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."[95]

Turning to the specific question of whether the investor's actions violated the human right to water, the Tribunal found that "[t]he human right to water entails an *obligation of compliance* on the part of the State, but it does not contain an *obligation for performance* on part of any company providing the contractually required service."[96] Moreover, for "an obligation to perform to be applicable to a particular investor, a contract . . . relationship . . . is required."[97] Indeed, "the investor's obligation to perform has its source in

entail that CSR is necessarily corporate-led. CSR initiatives span from industry self-regulatory initiatives to multi-stakeholder initiatives.

[92] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1195-204.

[93] *Id.* ¶ 1195.

[94] *Id.* ¶ 1196.

[95] *Id.* ¶ 1199.

[96] *Id.* ¶ 1208 (emphasis added). In particular, the Tribunal finds that the investor's obligations with regard to water in the present case were based on the concession, not on the BIT or on international law. *Id.*

[97] *Id.* ¶ 1210.

domestic law; it does not find its legal ground in general international law."[98]

Having established this, the Tribunal stressed that the compliance obligation did not preclude an abstention obligation: "The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights, would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties."[99] This differs only slightly from the initial standard by differentiating the individual *mens rea* component (an aim or intention) for violations of *jus cogens*. That is, an investor has an obligation to abstain from *jus cogens* violations that obstruct human rights regardless of whether the investor engages in such activity with the *intention* of obstructing human rights.

The Tribunal thus indicates that foreign investors could carry obligations to host States based on public international law, such as the UDHR and the other treaties comprising the international bill of rights.[100] But such treaties inform only the treatment of individuals under the law, not necessarily corporate persons;[101] as discussed above, the question of how to define corporate personhood under international law is far from settled.[102] In interpreting the treatment of corporate investors under the *Urbaser* standard, international criminal law ("ICL") may provide some guidance.[103] Under both statutory and judge-made ICL, the leaders of States and military

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] The Universal Declaration of Human Rights assigns rights to "individuals" and to "human beings" and obligations to States in ensuring those rights are protected. "All human beings are born free and equal in dignity and rights . . . ." G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948) [hereinafter UDHR]; Article 2: "Everyone is entitled to all rights and freedoms set forth in this Declaration . . . ." However, there is some debate, especially from followers of John Ruggie, about whether the UDHR's preamble also imposes obligations on corporations as "organs of society." *See* UDHR, preamble: "The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

[102] Alvarez, *Are Corporations 'Subjects' of International Law?*, *supra* note 81, at 34-35.

[103] ICL deals with specific tragic circumstances and with criminal culpability rather than monetary liability, so obviously, the customary principles that emerge from ICL cannot be directly transferred to the practice of IIL. However, the concept of *mens rea* in ICL is helpful in determining what type of action might be necessary to determine corporate "intent" under international law.

organizations can be held jointly liable as a joint criminal enterprise ("JCE").[104] JCE was originally a judge-made doctrine that emerged in modern ICL from the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Prosecutor v. Tadic*,[105] but has since been codified in the Rome Statute of the International Criminal Court ("Rome Statute").[106]

The JCE doctrine is controversial because, under one of its formulations, JCE III, it eliminates the individual *mens rea* element typically required to assign criminal culpability;[107] it seeks instead to determine the JCE's common purpose and, subject to certain conditions, projects that purpose onto each participant in the enterprise.[108] In this sense, a JCE carries international legal personhood in the same way an investor might, insofar as an investing enterprise might be treated as an individual for *mens rea* purposes. In contrast to JCE, however, in the event of a corporate entity's involvement with an armed conflict, it has been unclear whether those treaties or rules of custom that enable ICL to apply to private actors, such as the Genocide Convention, and to political entities, through JCE, could also apply to corporate entities.[109] The *Urbaser* decision moves towards an answer, at least for those corporate entities that have willfully bound themselves under BITs.

Urbaser found that legal instruments traditionally governing State obligations, like BITs and the Geneva Conventions, may also address multinational companies.[110] The standards it sets forth describe a spectrum of three standards for potential investor liability based in public international law. At one end of the spectrum, *Urbaser* accords both investors and States an obligation not to engage in activity *aimed* at destroying human rights,[111] and at the other end, an obligation not to act in ways that are prohibited by

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[104] *See* Giulia Bigi, *Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnic Case*, *in* 14 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 51-83 (Armin Von Bogdandy & Rudiger Wolfrum eds., 2010).

[105] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

[106] Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

[107] *See, e.g.*, Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 160-61 (2007).

[108] *Id.* at 165.

[109] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, 78 U.N.T.S 277. *See also* José E. Alvarez, *Beware: Boundary Crossings – A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 J. WORLD INVEST. & TRADE 171-288 (2016).

[110] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[111] *Id.*

peremptory norms.[112] In the middle, however, lies a potential inroad for CSR obligations under international law. In the following analysis of the three standards on the spectrum, two distinct sources emerge from which a Tribunal may find justiciable performance obligations for corporations: through treaties or general principles of international law.

i. *Urbaser's First Standard: An Obligation Not to Aim at Destroying Human Rights*

The first standard reflects the JCE *mens rea* requirement under ICL—an *intent* to destroy—which amounts to a highly improbable standard for investor liability under IIL.[113] After analyzing covenants, the Tribunal concluded that investors and States have an obligation *not to* engage in activity *aimed at* destroying human rights.[114] According to the Tribunal, this standard complements positive rights (dignity, housing, etc.) without actually according them.[115]

This initial standard appears nominal since the type of action required to meet the standard is unclear and the mental state required for the action is debatably unprovable.[116] Indeed, for a successful counterclaim under this standard, Argentina would need to demonstrate that the claimants actively aimed to destroy Argentina's ability to provide clean water and sanitation.[117] There is no international legal standard by which to demonstrate the aim of a corporate entity, but the Tribunal could, in theory, have borrowed from ICL's JCE doctrines.[118] The general goal of a JCE, initially spawned by the

[112] *Id.* ¶ 1215.

[113] Ambos, *supra* note 107, at 165.

[114] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1199.

[115] *Id.* ¶ 1194.

[116] *See, e.g.*, ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 127, 128 (Edward Elgar Publishing 2012). Domestically, most jurisdictions hold that corporations are incapable of committing crimes because they are incapable of authorizing them; it is only the individuals within them that can foster the *mens rea* necessary to incur criminal culpability. However, on the international stage, lawyers would be remiss to ignore JCE's similarity to the corporate legal person. It is worth noting also that JCE III in particular places great weight on what would appear to be the *mens rea* of the enterprise; through the structure of the enterprise, it lowers the *mens rea* standard necessary to prove individual culpability.

[117] *See Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[118] Here, JCE is described as 'doctrines' rather than 'doctrine' because the evolution of JCE has produced three similar but separate doctrines, each with slightly different *mens rea* requirements. Jose Alvarez has cautioned generally about transposing such concepts of public law to the international investment arena, even as a way to generally inform arbitral interpretation, because the circumstances and stakeholders in the various branches of international law tend to differ so vastly. *See* Alvarez, *Are Corporations 'Subjects' of International Law?*, *supra* note 81, at 171-228 (2016).

Nuremberg Tribunals, was to bypass the justifications of sovereign immunity or superior responsibility when it came to assigning responsibility to individuals for the commission of mass atrocities.[119]

In parsing out a corporate *mens rea* standard for an IIL case, JCE's utility does not lie in transposing the *mens rea* element from a corporation to an individual. Rather, a JCE, and in particular a JCE III, is useful because it employs a standard by which to determine the mental state of a legal person—an enterprise in JCE but a corporation for our purposes here—without attaching any requirement for individual *mens rea*.[120] The corporate standard then, first articulated by the ICTY, is that the legal person have a common plan or purpose, which is demonstrated through the results of the legal person's actions.[121]

In *Urbaser*, and in ICSID cases generally, the results of a legal person's actions are highly unlikely to reach the level of criminality required for organizational liability under ICL.[122] The only crimes under the Rome Statute that require a demonstration of the intent or aim of an enterprise to incur liability are genocide[123] and crimes against humanity consisting of "inhumane acts . . . intentionally causing great suffering."[124] Therefore, unless a denial of water and sewage rights could be construed as an "intent to destroy, in whole or in part" the Argentinian people, or as an inhumane act

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[119] For a brief history of JCE's evolution, *see* Bigi, *supra* note 104, at 51-83.

[120] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42, Oct. 14, 1966, 575 U.N.T.S. 159; Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The authors recognize that the equation of an 'enterprise' in JCE to a 'corporation' under general international law is problematic, at least because of the different avenues through which corporations and JCEs are formed. Nevertheless, JCE is the only such tool in international law available to determine *mens rea*, and as such, could be considered by an ICSID Tribunal's interpretation of "aimed." This is because the ICSID Convention requires that the terms of treaties litigated under its rules be interpreted according to Article 31 of the VCLT, which stipulates that "any relevant rules of international law applicable in the relations between the parties" should be taken into account when interpreting treaty language. *Id.* art. 31(3)(c). And as an element of public international law to which virtually all the world's states are party, the ICJ Statute can inform the sources arbitrators use; specifically, Article 38(1) of that statute stipulates that "international custom" and "general principles of law" can be considered, among other sources. *See id.* art. 38(1).

[121] The Rome Statute requires that the "aim" of each individual to further the criminal purpose of the enterprise, but the standard remains results-based for demonstrating "common plan." *See* Rome Statute, *supra* note 106, at art. 28. The intent behind individual participation in the enterprise—the most controversial element of JCE III—is not at issue here.

[122] *See generally Urbaser S.A.*, ICSID Case No. ARB/07/26.

[123] Rome Statute, *supra* note 106, at art. 6.

[124] *Id.* art. 7.

intended to cause "great suffering," *Urbaser*'s standard would not be met.[125] Even considering the lower standard of proof for civil as opposed to criminal cases, preponderance of the evidence rather than beyond a reasonable doubt,[126] the fact that most crimes against humanity require a mental state of only knowledge for a JCE—rather than a demonstration of intent or aim—highlights the absurdity of *Urbaser*'s counterclaim standard.[127]

ii. *Urbaser's Second Standard: An Obligation to Perform*

Turning to the middle standard on the *Urbaser* spectrum, the Tribunal veers away from the "aimed at" extreme in asking whether other parts of international law, and specifically water and sanitation, impose positive obligations on investors.[128] After surveying multiple sources, the Tribunal found that both investors and States do have an obligation to comply with *some* performances required by public international law.[129] However, the required performances significantly differ. While States have a positive performance obligation to provide access to water and sanitation services, there is no basis in international law that would accord the same positive performance obligation on investors, at least with respect to the human right to water.[130] Rather, the investors can only be obligated to provide water and sewage on the basis of private contractual law; however, they must fulfill those contractual obligations in a way that does not violate general international law, which would be the only justiciable question before an arbitral tribunal.[131] The Tribunal did not exclude that a justiciable international obligation could exist, but such an obligation must arise from either another treaty or a general principle of international law.[132] The Tribunal found neither in this case.

The reasoning in *Urbaser* drew a sharp distinction between an investor's

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[125] *Id*. art. 6-7.

[126] *Id.* art. 66.

[127] *Id.* art. 6, 30.

[128] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[129] *Id*.

[130] *Id*.

[131] "Although the conduct of corporations under these treaties is regulated by an international instrument, the international legal obligation under the treaty rests with the State, which needs to adopt national measures to regulate the activity of the corporations on the domestic legal level. Corporate responsibility under these treaties is thus purely domestic rather than international." Eric De Brabandere, *Non-State Actors and Human Rights, Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System, in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 268, 275 (Jean D'Aspremont ed., 2011).

[132] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1207.

contractual obligations and general international law, and appeared to reject private law theories about IIL.[133] At the same time, the distinction could be read as elevating private investors to the level of States in international economic law.[134] Curiously, *Urbaser* also appeared to create horizontal obligations, although limited, between investors as foreign individuals and citizens of a host State—a perplexing and paradoxical position from the perspective of traditional human rights law.[135] On the one hand, unless it can be gleaned from the prohibition on aggression enshrined in the Geneva Conventions,[136] there is no negative obligation on States not to actively engage in activity aimed at obstructing the activity of other States in protecting the human rights of citizens. On the other hand, individuals have neither positive nor negative obligations under the Covenants;[137] the Covenants impose positive obligations only upon States.[138] However, according to *Urbaser*, the Covenants now impose negative obligations on investors as well.[139] This convoluted web of liabilities between individuals and States, international law and individuals, and international law and private law constitutes the second *Urbaser* standard: the middle ground.

iii. *Urbaser's Third Standard: An Obligation to Abstain*

In the third and final standard comprising the *Urbaser* spectrum, the Tribunal states that investors have an obligation to abstain from activity prohibited under general international law,[140] which includes international criminal law, international human rights law, and the law of armed conflict.

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[133] *Id*. ¶ 1206.

[134] The Tribunal's finding implies that the investor is bound by treaties that typically govern only State action toward individuals, which suggests that investors carry greater obligations than individuals. However, the finding does not place investors under the same standard as States under international law, as is clear in the first 'negative' standard. Thus, investors appear to be placed in an undefined zone with greater responsibilities than individuals but lesser responsibilities than States. *See Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1207-10.

[135] CSR nuances this to the extent that horizontal relationships are created beyond the binary dichotomies of binding or non-binding law. As we will see in Section IV.B.2, *infra*, after the United Nations Guiding Principles, it is universally accepted that companies hold responsibilities—a category that is distinct but not necessarily below the category of obligations—vis-à-vis the society in which they operate. These responsibilities are thus horizontal. S*ee Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1159.

[136] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287.

[137] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[138] *Id*. at ¶ 1208, 1210.

[139] *Id.* at ¶ 1210.

[140] *Id*.

This standard notably renders intent irrelevant in such cases.[141] It would appear that "activity prohibited under general international law" refers to activity that would violate *jus cogens* rights, as there is no explicit reference to specific prohibited activity.[142] While there is much debate on the point at which a norm becomes a peremptory norm (or *jus cogens*),[143] activities prohibited by *jus cogens* generally do not include those that would violate the ICESCR as a primary aim.[144] Indeed, the Tribunal is quick to state that this standard "is not a matter for concern in the instant case."[145]

Nevertheless, a footnote in *Urbaser* may provide some insight into situations in which the *jus cogens* standard might amount to a matter for concern.[146] The footnote essentially states that because no prohibited activity under general international law is at stake, Argentina's reliance in its counterclaim on the 1980 U.S. Second Circuit case of *Filártiga v. Peña-Irala* was unconvincing.[147] The Tribunal does not detail exactly how Argentina relied upon that case, and none of the submissions of the parties have been made available to the public.[148] However, one might presume that, because *Filártiga* involved a civil claim heard and upheld in the U.S. for wrongful death by a torture committed in Paraguay, the *Urbaser* Tribunal found the *Filártiga* norm on torture insufficiently applied when it came to a discontinuance of water and sewage services.[149] The footnote implies that it is the lack of a violation of *jus cogens* alone that renders *Filártiga* unconvincing when applied to the facts in *Urbaser*.[150] Thus, it further implies that the converse is presumably true: if there is a violation of *jus cogens*, the *Filártiga* reasoning would be convincing. In *Filártiga*, the Second Circuit found that a violation of "the law of nations"—based upon the U.N. Charter, the UDHR, other international instruments, and customary international law—could stand in U.S. courts under the Alien Tort Statute, even though the parties did not explicitly agree to grant the U.S. such jurisdiction.[151] It

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[141] *Id*.

[142] *Id.*

[143] VCLT, *supra* note 120, at art. 53.

[144] *See, e.g*., Predrag Zenović*, Human Rights Enforcement via Peremptory Norms – A Challenge to State Sovereignty*, RIGA GRADUATE SCH. OF L. 36-37 (2012), http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf [https://perma.cc/TZ4F-KV2X].

[145] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[146] *Id.* n.446.

[147] Filártiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980).

[148] *See generally Urbaser S.A.*, ICSID Case No. ARB/07/26.

[149] *Filartiga,* 630 F.2d at 876; *Urbaser S.A.*, ICSID Case No. ARB/07/26, n.446.

[150] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210, n.446.

[151] *Filártiga*, 630 F.2d at 880, 887.

proceeded to find torture to be a clear violation of the law of nations.[152]

While *Filártiga* involved a dispute between individuals, *Urbaser* opens a similar window through which states may be able to hold foreign individuals liable for financial damage caused by the investor's violations of *jus cogens*,[153] and indeed, tribunals have found *jus cogens* a justiciable standard to impose liability in the past.[154] Under the *jus cogens* prong of the *Urbaser* spectrum, no showing of intent is necessary for such liability.[155] Under this standard, an investor could be held liable for providing a State with chemicals produced without the intent of violating the Geneva Conventions,[156] but that end up debatably violating the Conventions nonetheless, as was the case with Monsanto, Dow Chemical Company, and seven other manufacturers producing Agent Orange during the Vietnam War.[157] A similar situation could have occurred, hypothetically, during Nazi Germany, had Degesch been foreign-owned.[158]

However, a simple thought experiment reveals that this standard too is essentially nominal. In order to incur liability, a BIT between the investor's home State and the host state would need to be in force, and some investment on the part of the manufacturers would need to be present in the host State. Additionally, some expropriation, unfair treatment, or other term of the BIT would need to be violated by the actions of the host state, and the

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[152] *See id.* at 880.

[153] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210.

[154] Sabahi discusses Turkish arbitration cases in which the State successfully alleged damage to its international reputation as a result of the "jurisdictionally baseless claim asserted in bad faith." *See, e.g.*, BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 143 (2011); PSEG Global, Inc., v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 246, (Jan. 19, 2007), https://www.italaw.com/documents/PSEGGlobal-Turkey-Award.pdf [https://perma.cc/QKJ8-86TC].

[155] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶¶ 1207, 1210. Paragraph 1210 notably omits the "aimed" language set out in paragraph 1207. The standard makes no mention of intention. *See id.*

[156] *E.g.*, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (1925).

[157] *See, e.g.*, *Agent Orange: Background on Monsanto's Involvement*, MONSANTO http://www.monsanto.com/newsviews/pages/agent-orange-background-monsanto-involvement.aspx [https://perma.cc/9HBS-SY9R] (detailing involvement with the government-sanctioned manufacture of Agent Orange during the Vietnam War).

[158] Degesch was the private company responsible for producing the chemicals that were used to kill German prisoners, primarily of Jewish decent, in the gas chambers in Auschwitz and other locations. *See German Firm Is Cited as Top Producer of Death Camp Gas*, L.A. TIMES (Dec. 4, 1998), http://articles.latimes.com/print/1998/dec/04/news/mn-50587 [https://perma.cc/SBP5-K83E].

manufacturers would need to initiate a claim against the State with the full knowledge that one of the standards in the *Urbaser* spectrum could be applied. Such a situation places counterclaims for States squarely back within the ultimate discretion of the investor, as was the case long before *Urbaser*.[159]

Therefore, for the reasons above, all three standards set out on the *Urbaser* spectrum do not appear to change much, if anything, about the actual arbitral practice of IIL. On one end of the spectrum, States must demonstrate that investors actively aimed to destroy human rights in order to succeed on a counterclaim. On the other end, in the rare event that an investor tortures, uses chemical weapons, or violates some other *jus cogens* norm under international law, the investor still carries discretion over whether to bring a claim in the first place—an arrangement tantamount to the nominal counterclaim clauses in the 2015 Model India BIT,[160] the Investment Chapter of the TPP,[161] and the investor consent standard set out in *Roussalis v. Romania*.[162]

However, in the middle of the spectrum lies a vague standard regarding positive obligations on the part of the State to fulfill human rights and a negative obligation on investors to fulfill their private contractual obligations, rooted only in domestic law, in a way that does not interfere with the States' positive obligations.[163] This standard does not exclude the possibility that investors could have positive performance obligations rooted in international law.[164] Accordingly, because the spectrum of standards the Tribunal set out for a successful State counterclaim against an investor is either stringent or vague, international lawyers should be cautious to believe the human rights hype surrounding *Urbaser*. Nevertheless, the case opens a window for IIL tribunals to enforce extra IIL treaty obligations upon States through IIL suits.

2. Corporate Social Responsibility: Operationalizing the Obligation to Perform?

The middle ground standard identified above highlights the difficulty of framing corporate human rights obligations within traditional international law. Indeed, at present, the legal basis for human rights obligations of private actors remains vague.[165] However, by focusing on the category of traditional

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[159] *See generally* Tietje & Crow, *supra* note 10.

[160] *Model Text for the Indian Bilateral Investment Treaty*, *supra* note 9, at ch. 4.

[161] TPP, *supra* note 9, at ch. 9.

[162] *Roussalis*, ICSID Case No. ARB/06/1, ¶¶ 865-66.

[163] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1210. *See* discussion *supra* Section IV.B.1.ii.

[164] *Id.*

[165] Andreas Heinemann, *Business Enterprises in Public International Law: The case for an International Code on Corporate Responsibility*, *in* FROM BILATERALISM TO COMMUNITY

binding obligations, the Tribunal overlooked the possibilities offered by CSR and the horizontal performance responsibilities it places on corporations.[166] This reveals the theoretical difficulties of navigating the diffused governance embodied by CSR and its intersection with international law. While it is of extreme interest that the Tribunal considered CSR in its analysis, the Tribunal left the potential implications of CSR for the case untouched.[167]

i. *Urbaser and the CSR Standard*

The Tribunal refers to CSR as a "standard" of crucial importance that is accepted by international law.[168] The Tribunal concludes that in light of CSR, "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law."[169] Both the premise and the conclusion are bold. Defining CSR as a standard raises the question of whether "standard" is an adequate word to describe the heterogeneity of initiatives that inhabit the CSR landscape, which is beyond the scope of this contribution.[170] Moreover, stating that this standard is "accepted" by international law raises the question of what acceptance in international law entails.[171] It seems to be that in this case acceptance entails inescapability of subjectivity, even in the case of a soft standard such as CSR.[172]

INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA, 718, 719 (Ulrich Fastenrath et al. eds., 2011).

[166] By using the language of "responsibility" for corporate human rights duties, Ruggie clearly took issue with single-minded proponents of either corporate voluntarism or legalistic solutions. *See* Radu Mares, *Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels*, 23 IND. J. GLOBAL LEGAL STUD. 171, 173 (2016).

[167] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶¶ 1161, 1195.

[168] *Id.* ¶ 1195.

[169] *Id*.

[170] In general, CSR can be defined as a response to an expectation that corporations will address a triple bottom line in their operations, which thus includes social and environmental issues in addition to financial ones. *See* Mares, *Global Corporate Social Responsibility*, *supra* note 91, at 224. Business and human rights literature shows an increasing refinement of this expectation in the sense that it is "hardening" either through increased standardization of CSR content or through complementarities with hard law. *See* Aftab, *supra* note 83, at 3.

[171] Aftab, *supra* note 83, at 8.

[172] The example of CSR "standard" that the Tribunal refers to are the United Nations Guiding Principles, a document which is precisely characterized and premised on not being binding in the formal sense. At any rate, CSR is characterized by its "soft" nature, either because it is principles-based or because, even if providing for detailed provisions, it is voluntary. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. HUMAN RTS. OFF. OF THE HIGH COMMISSIONER 13 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/57S4-7ZGL].

By bringing CSR into the picture to support subjectivity of corporations, the Tribunal also acknowledged that CSR can contextualize a corporation's activities as they relate to human rights, and that CSR can even determine whether these activities are attached to international law.[173] Thus, in theory, the Tribunal could have used CSR to—in the Tribunal's language—attach Claimant's activities to international law.

ii. *The Untouched Potential of the CSR Standard in Urbaser*

The failure to find an obligation to perform on the part of the investor is the natural consequence of human rights law being tailored to bestow obligations on States, which makes efforts to extend such obligations to non-State actors feel like a procrustean task.[174] Indeed, there is no easy answer to the human rights obligations of corporations. On a general level, there is no single type of corporation and there is no presumption of equality among them; rather, this is a fiction that States apply.[175] On the level of water and sanitation provision services specifically, there is no single contractual relationship for all scenarios and the involvement of the private sector will differ depending on the form of privatization employed.[176] All of these variables impact the nature and extent of State obligations and corporate relationships with human rights.

Nevertheless, *Urbaser* was not faced with the task of accommodating all these variables, but rather with the possibility of exploring the existence of a performance obligation on investors in light of the specific case.[177] While a state-centric human rights regime cannot logically apply to business as is, it is possible to build frameworks that link concrete business operations to the substance of the rights[178] through a functional, rather than formal, approach.[179] CSR enables building such linkages; it manages human rights contingencies of specific business operations,[180] and in this sense, it has a functional approach to human rights. Indeed, this is exactly how the Tribunal sees CSR.

The Tribunal considered that CSR, on its own, is insufficient to obligate corporations to harmonize internal policies with human rights law and that

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[173] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1195.

[174] *Id.*

[175] Larry Cata Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect, and Remedy and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. 69, 72-73 (2012).

[176] McIntyre, *supra* note 17, at 149.

[177] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1206.

[178] Aftab, *supra* note 83, at 7-8.

[179] Backer, *supra* note 175, at 167.

[180] *Id.* at 96.

the focus must therefore be on "contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual."[181] However, the Tribunal failed to follow up on this statement, and thus the enabling venue offered by CSR was one that *Urbaser* did not explore.[182] This begs the question of whether the Tribunal could have attached human rights obligations to Claimants through their CSR policies.

iii. *The CSR Standard in Practice: An Exercise of Performance Obligations Through CSR in Urbaser*

In *Urbaser*, Claimants consisted of two companies, Urbaser and CABB, which together were majority shareholders of AGBA, the concessionaire. AGBA has no active website or information retrievable online, which indicates that the status of the company is currently in the process of liquidation.[183] Based on the information available online, it is difficult to assess CSR commitments AGBA could have made at the time. However, Urbaser and CABB do have running websites where their CSR commitments can be traced.[184] The overview of the CSR commitments of Urbaser and CABB here will be limited to the case of *Urbaser*.[185]

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[181] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1195.

[182] *Id.*

[183] *Datos Comerciales de Aguas del Gran Buenos Aires S A (en Liquidacion),* BUSCAR DE CUIT, http://buscar-cuit.com/?q=30-70605947-0&view=resultados [https://perma.cc/3DLS-XM85]; *Aguas del Gran Buenos Aires S A (en Liquidacion)*, CUIT ONLINE, https://www.cuitonline.com/detalle/30706059470/aguas-del-gran-buenos-aires-s-a-(en-liquidacion).html [https://perma.cc/BK3A-L5DF].

[184] It must be clarified that the analysis is solely based on information that is retrievable online from the companies' websites. It has not been cross referenced and contacts with the companies have not been sought for the purposes of this contribution. The information available on the websites is taken as is for the sake of argumentation, and is not intended to be an assessment or judgment on the solidity of the companies' CSR policies or on the companies' good faith when implementing them.

[185] CABB joined the U.N. Global Compact in 2012 and, as far as can be gathered from the website, has published CSR reports since 2013, given that its CSR report of 2014 is referred to as the second one in the Global Reporting Initiative Report Check certificate that is uploaded on the company's website. The 2014 CSR Report is also available at *Segunda Memoria de Responsibilidad Social Corporativa,* CONSORCIO DE AGUAS, http://www.consorciodeaguas.com/Web/Transparencia/PDF/INSTITUCIONAL/CAS/mrsc.pdf. [https://perma.cc/4VHD-XGA7]. CABB also has a published environmental policy from 2008, *Politica Ambiental*, CONSORCIO DE AGUAS (Oct. 23, 2008), http://www.consorciodeaguas.com/Web/GestionAmbiental/PDF/Politica/Ingurumen_Politika.pdf [https://perma.cc/BFF4-F54Q], and an Ethic Code adopted in 2014, *Código Ético y de Conducta del Consorcio de Aguas de Bilbao-Bizkaia*, CONSORCIO DE AGUAS, http://www.consorciodeaguas.com/Web/Transparencia/PDF/INSTITUCIONAL/CAS/Codigo_etico.pdf [https://perma.cc/4353-WGM8].

Urbaser belonged to ACS Group, a Spanish corporation, until December 2016.[186] Urbaser's website contains a link to CSR, which refers to the corporate social responsibility of its prior parent company, ACS Group.[187] Thus, it is presumable that Urbaser's CSR policies were those of ACS Group in the past,[188] and ACS Group provides plenty of information on its CSR approach.[189] While ACS Group's CSR commitments have evolved over time, two elements of that commitment trace back to the time of the facts of the case.

The first element is that ACS Group joined the U.N. Global Compact in 2002.[190] Principle 1 of the Compact states that businesses should "support and respect the protection of internationally proclaimed human rights."[191] There seems to be a consensus regarding the fact that the human right to water has been proclaimed internationally.[192] The question then becomes whether the U.N. Global Compact can play a role in realizing it.[193]

The second element is ACS Group's CSR Report of 2006, which states

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[186] ACS Group sold Urbaser to Firion Investments S.L.U, as communicated by ACS Group in its press release of the December 7, 2016. *See* Press Release, Actividades de Construcción y Servicios, ACS Realiza la Venta de Urbaser (Dec. 7, 2016).

[187] *See Información general*, URBASER, http://www.urbaser.es/seccion-1/Informacion-General [https://perma.cc/4YRM-T5X4].

[188] Again, this is a rebuttable presumption that is based solely on the information that has been found online. *Id.*

[189] Indeed, ACS Group has a multi-layered CSR policy that consists of several components: a CSR strategy with a commitment statement in favor of CSR and the explanation of how CSR values are shared among the several companies that conform the group, policies that are referred to as "related" to CSR (including a February 2016 CSR policy and a July 2016 Human Rights Policy), CSR reports (all published from 2006 onwards), and finally a mention of the initiatives the company adheres to and the prizes it has been awarded. *Estrategia de RSC*, ACS GROUP (Sept. 15, 2017), http://www.grupoacs.com/responsabilidad-corporativa/estrategia-de-rsc/ [https://perma.cc/YLG7-BTXB].

[190] *See Premios, reconocimientos y adhesions*, ACS GROUP (Sept. 24, 2017), http://www.grupoacs.com/responsabilidad-corporativa/premios-reconocimientos-y-adhesiones/ [https://perma.cc/2NAR-KHGD]. The U.N. Global Compact is not a code of conduct but rather a forum where private companies engage in collective learning through dialogue on how to achieve the Compact's ten principles. The principles are not binding; however, Compact companies have a duty to submit an annual communication on progress. *See* Heinemann, *supra* note 165, at 722; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order,* 40 STAN. J. INT'L L. 283, 308 (2004).

[191] *The Ten Principles of the UN Global Compact,* U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/75YQ-ZKQ7].

[192] *See* discussion *infra* Part III.

[193] Given the voluntary nature of the U.N. Global Compact, commentators are in some instances skeptical. *See, e.g.*, Melina Williams*, Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 489 (2007).

that adherence to the U.N. Global Compact commits the Group to integrate the principles of the Compact to the Group's strategies and operations,[194] so that the Group's actions will at all times be in line with the U.N. Global Compact.[195] The 2006 CSR Report also states that the operations of ACS Group are based on the provisions contained in the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises ("OECD Guidelines") and that the Group has committed to adopting actions to integrate the guidelines to its operations.[196] The version of the OECD Guidelines applicable at the time of the facts is the text from 2000.[197] One might presume that the ACS Group was aware of the OECD Guidelines before reporting adherence to them in its 2006 CSR Report. If this is the case, the 2000 OECD Guidelines already offered insights into a company's duty in light of human rights.[198] In particular, the 2000 OECD Guidelines acknowledge that business activities can have social and environmental implications, which can be managed through self-regulatory practices and management systems.[199]

Throughout the years 1999 and 2006, when the facts of *Urbaser* developed, ACS Group had assumed a commitment to CSR by reference to the U.N. Global Compact and the OCED Guidelines.[200] This commitment translated into integration of the principles of the aforementioned instruments, which include human rights, into the company's operations.[201] CSR is flexible on how this integration can take place and, in this regard, falls back on the voluntary undertakings of each corporation.[202] It is true that with

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[194] *Informe de Responsabilidad Corporativa*, ACS GROUP 314, http://www.grupoacs.com/ficheros_editor/File/03_accionistas_inversores/03_informe_anual/2006/08_acs___ia06___03_resp_corporativa.pdf [https://perma.cc/2GL6-D2ZM].

[195] *Id*. at 247.

[196] *Id*. at 314.

[197] *2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative Table of Changes Made to the 2000 Text*, ORG. FOR ECON. COOPERATION & DEV. 5, http://www.oecd.org/corporate/mne/49744860.pdf [https://perma.cc/L2YQ-2QGL].

[198] The General Policies of the 2000 OECD Guidelines for Multinational Enterprises encourage companies to respect the human rights of those affected by their activities (at the time, the human rights that are consistent with the host government's international obligations and commitments). Respect for human rights is encouraged not only in dealings with employees but also in dealings with those affected by the company's activities. *See id*. at 33.

[199] *See id*. at 48.

[200] ACS GROUP, *supra* note 194, at 314.

[201] *Id.*

[202] The dichotomy between voluntarism and hard law however is nuanced and complex. *See* Yousuf Aftab & Ursula Wynhoven, *The Virtue of Voluntarism: Human Rights, Corporate Responsibility, and UN Global Compact*, *in* CORPORATE SOCIAL RESPONSIBILITY?, HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY 232, 233 (Charlotte Walker-Said & John D. Kelly, eds., 2015). *See also* Radu Mares, *Business and Human Rights*

the U.N. Guiding Principles on Business and Human Rights, CSR has become more precise, even assuming the contours of a legal science.[203] However, this does not mean that the margin of flexibility offered by CSR before the U.N. Guiding Principles left companies clueless on what measures could be adopted. Surely, ACS Group must have been aware of tools such as self-regulating mechanisms, management systems, and impact assessments.

ACS Group had already assumed the commitment to respect human rights through its CSR policy.[204] This commitment is not nominal under a serious CSR policy.[205] Rather, it translates into specific measures taken at the corporate level to address the relationship between the corporation's activities and human rights. These measures are performance duties that naturally follow from a CSR commitment. In practice, they often consisted of corporate codes of conduct, impact assessments, and integration of human rights considerations into the company's management systems.[206] Because the submissions of the parties are not public, we cannot know whether Urbaser mentioned its CSR policy. One can speculate it did not since it would not have favored its asymmetry claims.

It is difficult to know what conclusions the Tribunal would have drawn from consideration of Urbaser's CSR policy. On the one hand, the Tribunal stated that for a corporate obligation to perform, exist, and be relevant in the framework of a BIT, it must be part of either a treaty or a general principle of international law.[207] On the other hand, the Tribunal acknowledges the potential of CSR to contextualize a company's activities and to determine whether such activities attach international law obligations to the company.[208] In Urbaser's case, its CSR commitment implied integrating such rights to its operations.[209] It is the integration of human rights into the company's operations that attaches these operations to international law—an attachment that was voluntarily taken upon by ACS Group.

After Ruggie: Foundations, the Art of Simplification, and the Imperative of Cumulative Progress, *in* THE UN GUIDING PRINCIPLES ON HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 1, 30 (Radu Mares, ed., 2012).

[203] Aftab, *supra* note 83, at 8.

[204] ACS GROUP, *supra* note 194, at 314.

[205] *Id.*

[206] The operationalization of CSR has changed significantly after the introduction of Ruggie's "protect, respect, remedy" framework, in the sense that businesses are offered a clearer blueprint of how to articulate their human rights commitments. The U.N. Guiding Principles translate a business' responsibility to respect human rights in a policy commitment, a due diligence process and a remediation process. The core of the system is the due diligence process. For an overview, *see* Aftab, *supra* note 83, at 7, 14.

[207] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1207.

[208] *Id.* ¶ 1195.

[209] *Id.*

In this sense, the integration of human rights into a company's operations provides perhaps the missing link to international law that could have made a corporate obligation to perform human rights justiciable. Indeed, the voluntary undertaking of human rights through a CSR policy can bring international human rights obligations to the company level, where company performance—albeit functional—can be assessed.

V. CONCLUSION

Urbaser rejects the contractual theories of IIL by taking a position that acknowledges the subjectivity of foreign investors under international law, at least under the applicable BIT. This acknowledgement leads to at least one groundbreaking result: investors can now be considered duty bearers under international law, which includes human rights. The question is whether this breakthrough speaks to the practicing lawyer as opposed to the theoretician, and ultimately, to the stakeholders involved in investment arbitration. What practical implications does *Urbaser* have?

First, it is notable that the Tribunal was able to entertain the issue of human rights to the extent it did because of ACS Group's counterclaim. As noted above, counterclaims are an exception in investment arbitration and tend to have limited footing in investment agreements. Nevertheless, *Urbaser* may set a precedent for tribunals to give human rights more space in investment arbitration, regardless of whether counterclaims are admitted or not. Tribunals have traditionally been hesitant to approach human rights-based arguments because of jurisdictional limitations.[210] But *Urbaser* sees a manifested link between the claim and the counterclaim: they are based on the same investment or lack thereof, in relation to the same concession. This would be sufficient, says the Tribunal, to adopt jurisdiction, but it also adds: "The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only."[211] One can expect this broadened interpretation of what constitutes a connection to the investment to enable more human rights-based defenses in the future.

In practice, however, *Urbaser* does not bring forward a theory for corporate human rights obligations under international law. *Urbaser* sets forth three standards, two of which are nominal. The third one—the possibility of a performance obligation—was found to be inapplicable in the case, and it is difficult to imagine a case in which it would be applicable given the present state of human rights law. Indeed, no international law corporate obligation to perform human rights exists under international human rights

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[210] For on overview of human rights in investment arbitration, *see* Karamanian, *supra* note 17, at 426-27, 431.

[211] *Urbaser S.A.*, ICSID Case No. ARB/07/26, ¶ 1151.

law,[212] and this is what *Urbaser* confirms. Without understating the importance of acknowledging the potential for such obligations in international law, which *Urbaser* does, this would mean that *Urbaser* merely acknowledges the status quo. However, the CSR standard has direct implications for the human rights obligations of corporations, implications that the Tribunal did not take into consideration. The possibility of performance obligations for investors through CSR should not go unnoticed since it sets the stage for the most immediate and practical implications of *Urbaser*.

CSR, seen as a corporate operationalization of human rights, opens a scenario of risk for investors in investment arbitration that is real. In commenting on *Urbaser*, Naomi Briercliffe from Allen & Overy rightly noted that human rights counterclaims "may expose investors to financial liability."[213] The uncertainty surrounding the nature of the obligations that might be justiciable and the future developments the CSR standard might have in international law puts investors in the uneasy position of being—if not formally bound—socially expected to comply with a set of standards whose contours are the object of progressive development. This might have the paradoxical result of discouraging CSR practice in transnational investment or causing companies to frame it in terms so broad that it delimits the scenarios of attachment of a given CSR policy to human rights.

The uncertain risk generated by possible corporate human rights obligations might also lead to a situation where the corporate sector actually advocates for a CSR treaty, so as to have guidance on what exactly is expected and thus to limit the legal risk. The latter is a strenuous challenge to the extent that any hard obligations under CSR would have to be preceded by a debate on the nature of a company's personality under international law and consequently on the structure of the obligations to be bestowed.

Urbaser acknowledges the debate on asymmetry, which has been the core of the backlash against the IIL. To a certain extent, *Urbaser* brings this debate to its maturation, taking a definite position on IIL being part of the general international law and on investors being duty bearers. In doing so, *Urbaser* touches upon issues that are far from settled and that are paradigmatic of attempts to describe current international life using traditional international law language and categories.[214] The status of transnational corporations and the implications of this status for human rights are questions that will

[212] *Id.* ¶ 1206.

[213] Naomi Briercliffe & Allen & Overy LLP, *Holding investors to account for human rights violations through counterclaims in investment treaty arbitration*, JD SUPRA (Jan. 31, 2017), http://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/ [https://perma.cc/U2RU-N64Q].

[214] The HRC's finding of unspecified human rights responsibilities of service providers, *see infra* Part III, is another expression of this difficulty.

continue to engage legal scholars for years to come. While *Urbaser* contributes to this debate, it provides no definite answers. Nevertheless, it leaves the door open for more holistic approaches to investment law in international investment arbitration.