What Does a Corporation Owe?: The Scope of Obligations in International Investment Counterclaims

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Abstract

The arbitral use of *jus cogens* and *erga omnes* to source obligations for private international actors from public international law are advancing on two fronts—jurisdiction and substance. This paper argues that, taken together, these concepts and these fronts are moving toward a 'presumption of applicability' in investor-state dispute settlement (ISDS) tribunals tasked with determining whether international law applies directly to investors. On the jurisdiction front, we chart the journey from a general bar on counterclaims in international investment law (IIL) to three recent standards permitting counterclaims and suggest ways in which the concepts of *jus cogens* and *erga omnes* might be understood differently in the contexts of each standard. On the substantive front, we further define the contours of *jus cogens* and *erga omnes* and how they are deployed in recent case law. We discuss how these concepts can be invoked, how the rights and obligations they produce are defined, to which actors they attach, and to whom or what those rights and obligations are owed.

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I. INTRODUCTION

Since the inception of the post-World War II international legal order, the question of whether and how international human rights and environmental obligations should attach to multinational corporations has been of concern to at least a minority of international lawyers.[1] International investment law (IIL) made contributions to this debate in the 1970s, but as the fires that fueled the New International Economic Order (NIEO) gave way to the interests of great power States in the 1980s and early 1990s, and notwithstanding UN Commission on International Trade Law (UNCITRAL) Working Group discussions on investor-state dispute settlement (ISDS) reform,[2] the potential of international law to catalyze corporate subjectivity has faded from prominent debate.[3] However, in recent years, with arbitral tribunals finding new allowances for State counterclaims against investors built into Article 46 of the International Center for the Settlement of Investment Disputes (ICSID) Convention, old possibilities have gained new life.[4] In this Article, we suggest that with the aid of two concepts from general international law (*jus cogens* and *erga omnes*), IIL is

1. *See*, *e.g.*, José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 1–2 (2011); John Ruggie (Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, paras. 1–3, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); Sabina Anne Espinoza, Should International Human Rights Law Be Extended to Apply to Multinational Corporations and Other Business Entities? 25 (Sept. 2014) (Ph.D. Dissertation, University College London) (on file with Business & Human Rights Resource Centre).

2. The latest efforts of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Investor-State Dispute Settlement Reform are available at https://uncitral.un.org/en/working_groups/3/investor-state (last visited Feb. 11, 2022).

3. There were other NIEO efforts, however. *See, e.g.*, G.A. Res. 1803 (XVII) (Dec. 14, 1962); G.A. Res. 3201 (S-VI) (May 1, 1974); G.A. Res. 3281 (XXIX) (Dec. 12, 1974); G.A. Res. 41/128 (Dec. 4, 1986). For further elaboration on this point see generally Kevin Crow, *Bandung's Fate*, *in* CONTINGENCY IN INTERNATIONAL LAW 443 (Ingo Venzke & Kevin Jon Heller eds., 2021) (discussing the rise and fall of NIEO efforts).

4. *See generally* Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216, 220–235 (2012) (discussing the development of State counterclaims against investors in ICSID and UNCITRAL arbitration proceedings).

treading a path towards the realization of direct corporate obligations to international law.

Indeed, in attempting to define the contours of how State-tailored obligations can be applied to investors, arbitral tribunals are increasingly drawing from (and in turn producing) a body of case law with the potential to dramatically influence not only the interpretation and application of international investment law in the years to come, but also the scope of the business and human rights debate. In this Article, we argue that the arbitral use of *jus cogens* and *erga omnes* on two fronts—jurisdiction and substance—are treading a path toward a presumption of applicability with peculiar parameters for investors. After providing a background on *jus cogens* and *erga omnes* in the context of ISDS (Part II), we delve into these fronts. On the jurisdiction front, we chart the journey from a general bar on counterclaims in IIL to three recent standards permitting counterclaims, and suggest ways in which the concepts of *jus cogens* and *erga omnes* might be understood differently in the contexts of each standard (Part III). On the substantive front, we further define the contours of *jus cogens* and *erga omnes* and how they are deployed in recent case law—we address questions regarding how they can be invoked, to which actors their rights attach, and to whom those rights are owed (Part IV). We conclude that judicial action in international investment arbitration is picking up where political will has left off, treading a path toward a presumption of applicability in international investment arbitration for investor obligations sourced from general international law (Part V).

II. BACKGROUND: *JUS COGENS*, *ERGA OMNES*, AND THE SIGNIFICANCE OF INTERNATIONAL INVESTMENT ARBITRATION

The law and politics surrounding international investment protection have drawn the interest of a wide range of legal and political actors over the past two decades. Indeed, while debates on systemic legal reform remain contentious, the UNCITRAL Working Group III's discussions on ISDS (2017 to present) reflect a broad consensus that, at the very least, reforms are needed.[5] There are other topics—such as the Member

5. *See generally* Int'l Bar Ass'n Arb. 40 Subcomm., *The Current State and Future of International Arbitration: Regional Perspectives* 10 (2015),

exploitation of the Dispute Settlement Understanding's judicial appointment system,[6] the International Monetary Fund's (IMF) policy for *Exceptional Access Lending* reform,[7] the absence of effective international legal regulation for corporate taxation or global value chains, or Argentina's 2020 sovereign debt default and ongoing efforts to restructure its 2016 deal with foreign hedge funds to absolve the multi-billion dollar debt it accrued some two decades earlier[8]—that highlight more foundational flaws in and fundamental challenges to the international economic system, but when it comes to international economic law, scholars and the general public alike concentrate to a large degree on the topic of ISDS.

Our intuition is that ISDS scrutiny arises partly because it lends itself easily to caricatures—i.e., protagonist States and antagonist investors. Caricatures can provide a narrative structure that fits the adversarial structure of international dispute settlement, procedurally speaking. And in turn, the narrative structure can give concrete form to the abstract contradictions that underpin much of the global economic

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https://cvdvn.files.wordpresw.com/2018/10/int-arbitration-report-2015.pdf (finding that award enforceability, legislative reform, and court support hindered the growth of international arbitration); Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013) (investigating the roots of investors appeals to "legitimate expectations" in investor-state disputes); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010) (criticizing investor-state arbitral tribunals for not considering how parties interpret their agreements); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005) (acknowledging the challenges of identifying investors' protections in investor-state disputes). *See also*, *supra* note 2.

6. *See*, *e.g.*, Terence P. Stewart, *WTO Dispute Setttlement* [sic] *Body Meeting of October 26, 2020 – No Movement on Appellate Body Impasse; U.S. Appeals Panel Report on Its Imposition of Tariffs on Chinese Goods*, WASH. INT'L TRADE ASS'N (Oct. 27, 2020), https://www.wita.org/blogs/wto-dispute-setttlement-meeting/.

7. INT'L MONETARY FUND, THE FUND'S LENDING FRAMEWORK AND SOVEREIGN DEBT–FURTHER CONSIDERATIONS 1–3 (Apr. 9, 2015), https://www.imf.org/external/np/pp/eng/2015/040915.pdf; *see also IMF Survey: IMF Reforms Policy for Exceptional Access Lending*, INT'L MONETARY FUND (Jan. 29, 2016), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sopol012916a.

8. Alexandra Stevenson & Jonathan Gilbert, *Argentina Reaches Deal With Four Hedge Funds Over Old Debt*, N.Y. TIMES: DEALBOOK, Mar. 1, 2016, at B4; Augustino Fontevecchia, *2001 to 2021: Argentina, A Ticking Time Bomb*, FORBES: MARKETS (Dec. 24, 2021), https://www.forbes.com/sites/afontevecchia/2021/12/24/2001-to-2021-argentina-a-ticking-time-bomb/.

system;[9] they provide a reference point from which to grasp broader dissonances between international law's ideals and its reality.

In many ways, the legal reality of the ISDS system has not kept up with the economic or political reality of multinational corporate power.[10] Despite ISDS reform efforts such as the incorporation of State-friendly clauses—e.g. clauses that provide greater specificity with respect to the right to regulate, indirect expropriation, full protection and security, umbrella clauses, or definitions of fair and equitable treatment, and clauses that enumerate specific exceptions to investment treaty provisions, *à la* GATT Article XX, or so-called "umbrella" clauses that serve as "catch-all" provisions[11]—the procedural design of the system itself has not changed significantly since the first generation of ICSID international investment agreements (IIAs) bloomed after the Second World War.[12] The crux of this stagnation is legal design rather than economic efficiency or any other majority-based ideal: the system is still comprised of agreements that commit two or more States to submit to the authority of arbitral decisions for claims brought by foreign investors, and since these are agreements between States and not agreements with any particular multinational corporation, States cannot use their provisions to initiate claims against investors. Hence the conventional approach remains the status quo: States cannot initiate claims against multinational corporations and often cannot make claims against them at all under IIL because the agreements in question oblige only States.

Although the procedural design of the system has not significantly changed since the 1960s, multinational corporations have. Until roughly the dawn of the Twentieth Century, the most significant multinationals were colonial

9. For a classic overview of some of these, see for example Fred Block, *Contradictions of Capitalism as a World System*, 5 INSURGENT SOCIOLOGIST 3 (1975) (detailing *inter alia* contradictions of "openness" and "free market access" coupled with special rights, privileges, and exceptions for the most powerful States within the structure of Bretton Woods Institutions).

10. *See* Christian Tietje & Kevin Crow, *The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing*?, *in* MEGA-REGIONAL TRADE AGREEMENTS: TTIP, CETA, TISA 87, 89 (Stefan Griller et al. eds., 2017).

11. *Id.* at 95–105.

12. *See generally* DIANE DESIERTO, *The ICESCR in State Public Policy-Making in the International Investment System*, *in* PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW 308–320 (2015) (detailing the three generations of IIAs and their relationship to public policy).

enterprises.[13] Immediately after the Second World War, there were few multinational corporations, and the vast majority of those that existed operated in only a few States.[14] Practices that are common amongst multinational corporations today—such as multi-State lobbying, jurisdictional cherry-picking, or selective subsidiary insolvency[15]—were not anticipated by the system's design,[16] and sovereignty concerns were later understood by the majority of the General Assembly to be secondary to the need for capital injection, particularly in newly decolonized States.[17] For these and many other reasons, the design of the international investment system collapsed the corporate person and the natural person into the single category of investor, creating by consent a right of Capital to sue States in a forum available to no other actor, domestic or international.[18] There were certainly some benefits to this arrangement,[19] but overall, international economic law's success in creating more wealth across States parallel to its failure to address distributive inequality amongst States (much less within them), along with the rise of modern multinationals in tandem with entrenched interests that hinder reform, have pushed international lawyers to seek greater accountability for corporations in old legal concepts.

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13. *See*, *e.g.*, ANDREAS TELEVANTOS, CAPITALISM BEFORE CORPORATIONS 2–3 (Oxford Univ. Press 2020). The title of Televantos' work refers to "modern corporations" and not colonial enterprises; our work recognizes differences in legal form but maintains that both modern corporations and colonial enterprises are corporations as defined by Barron's Law Dictionary, "an association of shareholders . . . created under law and regarded as an artificial person . . . 'having a legal entity entirely separate and distinct from the individuals who compose it . . . .'" *Corporation*, BARRON'S LAW DICTIONARY (6th ed. 2010).

14. For a detailed description of this, see KEVIN CROW, INTERNATIONAL CORPORATE PERSONHOOD 26–29 (2021).

15. *See generally id.* at 44–123 (describing the international legal rights that make up corporate personhood for today's multinational corporations).

16. *Id.* For a detailed description of how the investor-state system was designed to promote economic liberalism through investment, see generally KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES (2017).

17. *See* CROW, *supra* note 14, at 77–174; *see also* Crow, *supra* note 3, at 446–47.

18. CROW, *supra* note 14, at 101.

19. We refer here primarily to the fact that, under the Calvo doctrine dominant prior to the Postwar international legal system, foreign investors were legally weak in the sense that they had no recourse to 'rouge' or corrupt State practice (though defining those terms is tricky). For more on how investors, and not states, have recourse in the ISDS system, see Tietje & Crow, *supra* note 10, at 106.

In this article, we explore recent caselaw deploying the most prominent of these concepts: *jus cogens* and *erga omnes*. We also spell out the dilemma of treaty-made rather than judge-made law addressing corporate subjectivity to international law.

A. JUS COGENS

The origins of the romance between IIL and *jus cogens* or *erga omnes* obligations are to be found outside of IIL. The International Court of Justice's (ICJ) decision in *Barcelona Traction* was the first to reference *erga omnes* obligations as granting a standing effect for States to enforce community interests against other States.[20] Drawing a sharp distinction between States and corporations and the means to enforce their rights, *Barcelona Traction* roots *erga omnes* obligations in State enforcement of transnational tort litigation and builds linkages between domestic enforcement and international law, which is for the most part justified on the importance of infringed international norms.[21] In that vein, references to *jus cogens* as a source of *erga omnes* obligations abound. But the fundamental distinction between *jus cogens* and *erga omnes* seems to be as follows: *jus cogens* describes the recognition and assertion of norms in international law whereas *erga omnes* describes obligations "of protection," that is, obligations to protect *jus cogens* and other international legal norms.[22]

The notion of *jus cogens* is codified in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as a peremptory norm of general international law: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[23] Any treaty conflicting with such a norm at the time of its conclusion is void[24] and any *jus cogens* norm that emerges after a treaty comes into force, makes that treaty void and terminates it; this latter

20. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 1–4 (2005); *see* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

21. *See id.* ¶¶ 33-34.

22. *See, e.g.*, ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND 311 (3d ed. 2010).

23. May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 [hereinafter VCLT].

24. *Id.*

scenario is described as "*jus cogens superveniens*" and is also codified in the VCLT, at Article 64.

The VCLT is a point of arrival of a historical narrative where discussions on the origins of *jus cogens*, its "pedigree"[25] and the nature of its effects, have interwoven a thick cloak of doctrinal and jurisprudential insights. This cloak has unified a consensus around the existence of *jus cogens,* but has left the question of its embedding in international law open.[26] Indeed, the sources of *jus cogens* and the grounds for its hierarchical superiority are still a matter of vibrant discussion.[27]

One primary point of discussion is whether Article 53 of the VCLT sets forth criteria to establish "primary jus cogens obligations,"[28] or if it merely points towards an indirect delineation of *jus cogens*.[29] The International Law Commission's Special Rapporteur on the peremptory norms in international law, Mr. Dire Tladi, concluded in his Second Report that the existence of criteria for *jus cogens* are independent from its consequences.[30] According to Mr. Tladi, the VCLT sets forth two cumulative criteria to identify *jus cogens* norms: (1) whether it is a general international law norm, and (2) whether this norm is "accepted and recognized by the international community of States . . . from which no derogation is permitted."[31] The second criteria can only be modified by a subsequent *jus cogens* norm.[32]

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25. Jean d'Aspremont, *Jus Cogens as a Social Construct Without Pedigree*, 46 NETH. Y.B. INT'L L. 85, 89 (2015).

26. *Id.* at 109 ("[T]he account of the debate on *jus cogens* that is provided in this chapter presents an image of contemporary international lawyers as being simultaneously hopeful and mystic.")

27. *Id.* at 89 (detailing *jus cogens* as a "central gospel[] of international law"); *see* William E. Conklin, *The Peremptory Norms of the International Community,* 23 EUR. J. OF INT'L L. 837, 840 (2012) ("More often than not, jurists are satisfied with a list of norms which are continually repeated as peremptory in international law rhetoric[.]").

28. ULF LINDERFALK, UNDERSTANDING *JUS COGENS* IN INTERNATIONAL LAW AND INTERNATIONAL LEGAL DISCOURSE 9, 26 (2020).

29. *Id.* at 9.

30. Dire Tladi (Special Rapporteur), *Second Rep. on Jus Cogens*, paras. 91–93, U.N. Doc. A/CN.4/706 (Mar. 16, 2017).

31. *Id*. paras. 91, 40, 63. In paragraph 40, Mr. Tladi explains that the first criterion consists of two steps, being a norm of general international law first, which is then accepted and recognized as one from which no derogation is accepted. In paragraph 63, he explains that recognition and acceptance is also a composite requirement that describes who must accept (the international community of states as a whole) and what must be recognized (no derogation)). *Id.*

32. *Id*. para. 37.

In this sense, non-derogation is not understood as a criterion for *jus cogens* status, but rather, as its primary consequence.[33] The role of non-State practice in shaping *jus cogens* is framed as "not irrelevant,"[34] but it is State acceptance and recognition that builds *opinio juris cogentis*.[35] In other words, norms can emerge from non-State sources, such as intergovernmental organizations like the UN, World Bank, or the IMF, and from non-governmental organizations such as Human Rights Watch or multinational corporations,[36] but it is broad State recognition that grafts legal authority onto those norms.

B. ERGA OMNES

Although the concept of *erga omnes* in international law's post-WWII incarnation first emerged in 1970 with the *Barcelona Traction* case at the ICJ,[37] positive obligations on non-State actors *erga omnes*—obligations endowed with legal validity independent of positive law—date back to at least Roman legal systems.[38] In those systems, the combined concepts of *erga omnes* and *actio popularis* created this possibility without need for positive law. First, *erga omnes* described the type of right or obligation that attached to all people in a given municipality.[39] For example, property rights and contract rights were distinct in that the former created obligations for all (*erga omnes*), whereas the latter created obligations only for the parties to a given

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33. *Id*. para. 73.

34. *Id*. para. 72.

35. *Id*. para. 84.

36. This characterization of multinational corporations as "non-governmental" actors simplifies, for the purposes of focused discussion, the role of State-owned enterprises in producing norms, the role of States in endowing corporations with legal form and legitimacy, the complex ownership structures of many multinationals that involve State equity, capitalization, or support, and the entangled nature of some multinational corporations with States and State interests, as is the case with firms such as Huawei.

37. *See* Belg. v. Spain, 1970 I.C.J. at 32.

38. *See, e.g.*, James Hsiung, Anarchy, Hierarchy and Actio Popularis: An International Governance Perspective 17–18 (Paper for delivery on the Panel on "Hegemony, Hierarchy and International Order" at the International Studies Association Annual Meeting) (Apr. 19, 2004), https://www.researchgate.net/publication/237823642_Anarchy_Hierarchy_and_Actio_Popularis_An_International_Governance_Perspective.

39. *See id* at 14–17.; *see also* Ignaz Seidl-Hohenveldern, *Actio Popularis im Völkerrecht?* [Actio Popularis in International Law?], 14 COMUNICAZIONI E STUDI 803, 805 (1975) (It.).

contract.[40]

Second, *actio popularis* described the right of a citizen to raise a claim on the grounds that some deed or practice harmed the public interest without need for positive law; if the claim was recognized as a right, it created obligations from all citizens toward all citizens.[41] This meant that a claimant did not need to be individually harmed in order to bring a claim; a claimant needed only to convince a court that the public was collectively and unjustifiably harmed.[42]

Shades of both Roman concepts are discernable in the present-day understanding of *erga omnes*; remembering the distinct elements that undergird this understanding might help to elucidate more clearly *erga omnes* in the present. Until very recently,[43] the ICJ's version of *erga omnes* accepted that a claimant could not sustain a claim that obligations *erga omnes* had been breached unless they could first show individual harm, i.e., jurisdiction.[44] Indeed, as the ICJ found in the 1966 *South West Africa Cases*,[45] the concept of *actio popularis* in the form of a community action for the vindication of a public interest was "not known to general international law."[46] However, the 2014 *Whaling in the Antarctic* and 2016 *South China Sea* cases appear to nuance the direct injury requirement if *erga omnes* is successfully invoked, allowing States not directly injured to seek redress for a breach.[47] But even now, in the wake such cases, it is not clear whether *erga omnes* claims can be sustained without

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40. *See, e.g.*, IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW 123–29 (2001).

41. *See, e.g.*, Egon Schwelb, *The Actio Popularis in International Law*, 2 ISR. Y.B. HUM. RTS. 46, 46 (1972); Seidl-Hohenveldern, *supra* note 39, at 804–05.

42. Seidl-Hohenveldern, *supra* note 39, at 805.

43. For a recent and comprehensive update on the uses of *actio popularis* in international law, see FARID AHMADOV, THE RIGHT OF *ACTIO POPULARIS* BEFORE INTERNATIONAL COURTS AND TRIBUNALS 1–12 (Malgosia Fitzmaurice & Sarah Singer eds., Queen Mary Stud. in Int'l L. Vol. 31 2018).

44. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 188 (Apr. 11).

45. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, ¶¶ 88–89 (July 18).

46. Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5 J. INT'L ECON. L. 287, 293 (2002).

47. For a detailed comparison of these cases and their impact on standing after successfully invoking obligations *erga omnes*, see generally Yoshifumi Tanaka, *Reflections on* Locus Standi *in Response to a Breach of Obligations* Erga Omnes Partes*: A Comparative Analysis of the* Whaling in the Antarctic *and* South China Sea *Cases*, 17 L. & PRACTICE INT'L CTS. & TRIBUNALS 527 (2018).

some showing individual harm, even if it is not the harmed party that lodges the complaint.

One way to separate the meat from the bone with such questions is to detach, if only in theory at first, from the idea that obligations *erga omnes* attach only to States. As we and others have shown in previous work, neither States nor intergovernmental organizations are the sole subjects of international law.[48] The primary question is not whether a corporate conglomerate or a contract network can interact with or even be subject to international law; we have seen that international law can attach to municipalities,[49] natural persons,[50] investors,[51] ethnic groups,[52] and perhaps even rebel

48. CROW, *supra* note 14, at 142; *see* Kevin Crow & Lina Lorenzoni-Escobar, *International Corporate Obligations, Human Rights, and the* Urbaser *Standard: Breaking New Ground?*, 36 B.U. INT'L L.J. 87, 98–100 (2018); *see*, *e.g.*, ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 60–73 (Jonathan Huston trans., 2016).

49. *E.g.*, LaGrand Case (Ger. V. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 80, 90–91 (Jun. 27) (holding that the Vienna Convention on Consular Relations granted rights to individuals, and that domestic and municipal laws could not limit the rights of the accused under the convention); Avena and Other Mexican Nationals (Mex. V. U.S.), Judgment, 2004 I.C.J. 12, ¶¶ 31–34 (Mar. 31) (granting Mexico's claim that municipal laws could not limit rights granted by the Vienna Convention).

50. *See*, *e.g.,* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 14, 128–37 (Int'l, Trib. for the Former Yugoslavia Oct. 2, 1995) (finding that International Tribunal to have jurisdiction "to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits" and that "[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"); *see also* Ger. v. U.S., 2001 I.C.J. at 494, ¶ 77 (referring to the Vienna Convention on Consular Relations of April 24, 1963 and concluding "that Article 36, paragraph 1, creates individual rights").

51. Urbaser S.A. v. Republic of Arg., ICSID Case No. ARB/07/26, Award, ¶ 240 (Dec. 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf (holding that international human rights impose obligations on the investor).

52. *See*, *e.g.*, Joshua Castellino, *The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis*, 17 INT'L J. ON MINORITY & GRP. RTS. 393, 408–421 (2010) (analyzing and criticizing the current international legal regime that protects minority rights); *see also* Hurst Hannum, *The Concept and Definition of Minorities*, *in* UNIVERSAL MINORITY RIGHTS: A COMMENTARY ON THE JURISPRUDENCE OF INTERNATIONAL COURTS AND TREATY BODIES 49, 51–56 (Mark Weller ed., 2007) (referring to protection by adopting Minority Treaties at the end of World War I and monitoring by the League of Nations and the history of protecting different ethnic groups in "community").

groups.[53] Rather, the primary question is, under what circumstances can this occur? And under what circumstances are international obligations attached, rather than only rights?

In some conceptions of *erga omnes*, obligations need not attach to the commitments of any particular State, but rather, create a duty for all States to take coordinated action.[54] Since they are perceived as obligations owed by all toward all, the question becomes whether that means all States or all 'organs of society' or all legal personalities, natural and fictional. In this vein, the IIL case of *Aven v. Costa Rica* is particularly significant.[55] *Aven* suggests that, once an obligation can be said to be sourced from general international law (including norms recognized as *jus cogens*), it is an obligation *erga omnes*, and therefore, it can attach to corporations as well as States, regardless of accession to an international agreement.[56]

C. INTERNATIONAL INVESTMENT ARBITRATION'S ASYMMETRY DILEMMA

Legitimacy and power concerns brought on by the inherent vagueness of language as a medium and investment law as a field have ushered the onset of what might be called a "crisis of legitimacy" in international investment law.[57] Indeed, arbitral awards have contributed to growing concerns regarding the balance and fairness of claims in international investment law. A large part of the debate considers the single directionality, or "asymmetry," of claims that fall within the jurisdiction of arbitral tribunals.[58] Specifically, international investment law provides a cause of action for investors against states to protect

53. *See* Jessica A. Stanton, *Rebel Groups, International Humanitarian Law, and Civil War Outcomes in the Post Cold-War Era*, 74 INT'L ORG. 523 (2020) (arguing that rebel groups that do not target civilians in the face of government abuses are more likely to face favorable outcomes with international diplomatic support).

54. *See* Priya Urs, *Obligations* Erga Omnes *and the Question of Standing Before the International Court of Justice*, 34 LEIDEN J. INT'L L. 505 (2021) (discussing the collective duty of states to take responsibility for breaches of international obligations *erga omnes*, and its limitations).

55. Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4866/DS11491_En.pdf.

56. *Id*. ¶¶ 734–38.

57. *See* Franck, *supra* note 5, at 1582–84.

58. *See*, *e.g.*, Anne K. Hoffman, *Counterclaims*, *in* BUILDING INTERNATIONAL INVESTMENT LAW 505, 514 (Meg Kinnear et al. eds., 2016).

investments in a host state, but does not provide a cause of action for host states against investors, and generally refutes attempts by states to bring counterclaims against investors.[59]

This asymmetry presents a troubling dilemma. On the one hand, the interpretative power of arbitrators in international tribunals is immense and many of the provisions in the treaties that arbitrators interpret are vague by necessity.[60] Insofar as the terms of a given investment treaty embody a degree of ambiguity, arbitrators are concretely bound in their tools of interpretation by little more than the rules of the given tribunal and the basics of treaty interpretation in international law, as codified in the VCLT.[61] On the other hand, States require a degree of ambiguity to maintain regulatory freedom or policy space. Especially recent arbitral decisions have propelled protections on the State's Right to Regulate, specifically the framing of the Right to Regulate in opposition to the interpretive power accorded to arbitrators.[62] Indeed, States and regional organizations, including the United States and the European Union, have sought means through which to safeguard their regulatory power to pursue public policy objectives—a sometimes daunting challenge given that the international investment system's *raison d'être* is to protect and serve the interests of investors, not the citizens of any given State.[63]

Much of what the reforms in international investment agreements since 2004 try to achieve is greater protection for a

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59. Tietje & Crow, *supra* note 10, at 106. *But see*, *e.g.*, Saluka Invs. B.V. v. Czech Republic, Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶ 39, https://pcacases.com/web/sendAttach/879 (Perm. Ct. Arb. May 7, 2004) ("The language of Article 8 [of the bilateral investment treaty at issue], in referring to 'All disputes,' is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met.")

60. This argument is demonstrated *infra* Section II(B).

61. VCLT arts. 31, 32.

62. *See, e.g.*, Philip Morris Brands Sàrl, Philip Morris Products S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ ¶ 294–95 (July 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf; *see also* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 124 (May 12, 2005), 44 I.L.M. 1205; BG Gp. PLC v. Republic of Arg., Final Award , ¶¶ 95–103 (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf; TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶ 98 (Dec. 19, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0874.pdf.

63. AIKATERINI (CATHARINE) TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 19 (2014).

State that finds itself caught between a potential financial obligation to an investor and a public policy obligation to its citizens.[64] However, reforms that merely attempt to provide predictability through specificity fail to address the greater systemic problem that leads to this dilemma: namely, the fact that the international investment system imposes treaty-based obligations only on States, not on investors. Indeed, as the ICSID Tribunal in *Roussalis v. Romania* put it:

> The Tribunal . . . considers that the . . . BIT 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 . . . . *the BIT imposes no obligations on investors, only on contracting States*.[65]

Until the ICSID Tribunal's 2016 Award in *Urbaser v. Argentina*, the evolution of ICSID jurisdictional decisions since *Roussalis* displayed a limited universe of situations in which States can successfully bring counterclaims against investors after investors initiate proceedings against States.[66] The intervening Tribunals subscribed mostly to the *Roussalis* assertion that States have no opportunity to initiate claims against investors because the international investment system

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64. *See* U.N. Conference on Trade and Development, *Reform Package for the International Investment Regime*, U.N. Doc. TD/UNCTAD/TIR/2018, at 23, 43 (2018); *see also* U.N. Conference on Trade and Development, *Reform of the International Investment Agreement Regime: Phase 2*, ¶ 37, U.N. Doc. TD/B/C.II/MEM.4/14/Corr.1 (Oct. 9, 2017).

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

66. *See, e.g.*, Goetz v. Republique de Burundi, Affaire CIRDI No. ARB/01/2 [ICSID Case No. ARB/01/2], Sentence [Award], ¶ 267 (June 21, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2/DC2651_Fr.pdf; Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 283 (Oct. 5, 2012); *see also* Saluka Invs. B.V. v. Czech Republic, Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶¶ 80–81, https://pcacases.com/web/sendAttach/879 (Perm. Ct. Arb. May 7, 2004) (exemplifying the same principle in an older decision); Ltd. Liab. Co. AMTO v. Ukr., SCC Case No. 080/2005, Final Award, § 118 (Stockholm Chamber Com. Mar. 26, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0030.pdf (exemplifying the same principle in an older decision); RSM Production Co. v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 504 (Mar. 13, 2009), https://www.italaw.com/sites/default/files/case-documents/italaw10246.pdf (exemplifying the same principle in an older decision).

imposes no positive obligations on investors *vis à vis* States.[67] Thus, limitations on counterclaims and the absence of a right to bring claims for States presented reformers with a glaring dilemma: should international investment law increase the legal power of investors or should it treat them as equal partners with obligations attached to each international right? In the past, foreign investors have been characterized as "legally weak" because States have domestic legal options to pursue claims that are unavailable to foreign investors, which creates risk particularly in politically unstable States.[68] But if States lack the ability to either initiate or utilize the system to mitigate damages in arbitral awards, they are forfeiting sovereignty and—at least in some instances—the interests of their citizens to the interests of foreign investors.

III. JURISDICTION: HOW ARTICLE 46'S "SCOPE OF CONSENT" DETERMINES THE SCOPE OF POSSIBLE CORPORATE OBLIGATIONS

With reform discussions slow and often gridlocked,[69] the dissonance between the legal and economic realities of multinational corporations has only grown.[70] Perhaps in response to this dissonance, we suggest that arbitral tribunals are inching toward a presumption of investor subjectivity to international law. The substance of this subjectivity is sourced from *jus cogens* and *erga omnes* obligations; its jurisdiction is often sourced from the ICSID Convention.

Since 2011, we suggest that arbitrators have produced a

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67. Roussalis, ICSID Case No. ARB/06/1, at ¶¶ 869–71; *see also supra* note 66 and accompanying text.

68. *See* Catherine Yannaca-Small & Lahra Liberti, Organisation for Economic Cooperation and Development [OECD], *International Investment Law: Understanding Concepts and Tracking Innovations*, at 40–41 (Mar. 17, 2008), https://www.oecd.org/investment/internationalinvestmentagreements/internationalinvestmentlawunderstandingconceptsandtrackinginnovations.htm.

69. Note, for example, the progress of the United Nations Commission on International Trade Law. *See* Working Group III: Investor-State Dispute Settlement Reform, U.N. COMM'N INT'L TRADE L. [UNCITRL], https://uncitral.un.org/en/working_groups/3/investor-state (last visited Feb. 11, 2022).

70. *See, e.g.*, Thomas Treece, *Changes in the International Tax System Proposed by the Biden Administration*, FLA. BAR J., May/June 2021, at 30 (showing an analogous dissonance in a tax reform context, but still reflecting the issue).

"pallet of interpretations," differing from a largely arm's-length past, when it comes to the question of whether to use Article 46 of the ICSID Convention to broaden or narrow the scope of what kinds of claims can attach to jurisdiction under a bilateral investment treaty (BIT) or IIA. Noting parallels between increasing criticisms and shifting interpretations over time, we suggest that arbitral interpretations of Article 46's "scope of consent" have fluctuated in correlation with societal pressure and hence, political will. Whereas traditionally, the jurisdictional understanding of "scope of consent" in many ICSID cases can be seen as a scapegoat—e.g. questions about whether X affects Y are beyond the 'scope' of the present inquiry—since *Roussalis*, the same Article is increasingly used to grant jurisdiction to the consideration of human rights and environmental counterclaims, and to allow for ancillary claims that resemble class action claims. In the subsections that follow, we explore the varying justifications used to broaden or narrow the 'scope of consent' for jurisdiction and question the extent to which Article 46 facilitates precedential cherry-picking for political ends.

Three different approaches emerge from ICSID case law, and each have relevance beyond counterclaims. While *Roussalis* has emerged consistently to spread the scope of counterclaims beyond explicit consent in the IIA, *Goetz* is primarily used to justify other types of ancillary claims. And while an Award has yet to be issued citing the *Gavazzi* interpretation of Article 46, it may provide a tool for arbitrators seeking to encourage victims of investor misconduct to locate reparations that do not depend on the intermediary of the State (*See infra* Section 2(a).). The implications for each approach, however, vary depending upon a Tribunal's understanding of the source of investor obligations. Where Tribunals are faced with the question of whether and how to apply international law to non-State parties, *jus cogens* obligations implicate non-applicability whereas *erga omnes* obligations seem to attach to investors (*See infra* Section 2(b).).

A. ARTICLE 46: THE PALLET OF INTERPRETATIONS

Article 46 of the ICSID Convention, which is supplemented by Rule 40 of the ICSID Arbitration Rules, identifies the three conditions for filing counterclaims in ICSID arbitration. Counterclaims must (1) arise directly out of the subject matter of the dispute; (2) be within the scope of the consent of the

parties; and (3) otherwise be within the jurisdiction of the center.[71] Of these, the "otherwise within the jurisdiction of the center" requirement harnesses the most expansive potential; it means that the counterclaim must meet other requirements than consent under Article 25 of the Convention.[72] The first draft of the Convention (then Article 49)[73] only provided the "arising directly" requirement and the "otherwise within the jurisdiction of the center" requirement, in a similar manner to paragraph 1 of Article 63 of the 1946 Rules of the International Court of Justice (now Article 80 of the 1978 Rules, amended in 2001).[74] The fact that this requirement of consent was singled out from other jurisdictional requirements and provided as a separate condition in the final text of the Convention suggests the emphasis that the drafters wanted to place on this element.[75]

The crucial point in determining the presence or absence of consent to jurisdiction over counterclaims is whether or not the host State's offer to arbitration extends to counterclaims. However, as detailed below, this offer need not be explicit. In fact, Rule 40 of the Arbitration Rules formulates a sort of "negative" understanding of the State's offer: if the parties do not agree that counterclaims *are not* permissible, then they *are*

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71. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 46, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]; ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS 40 (Apr. 2006) [hereinafter ICSID ARB. RULES].

72. Pierre Lalive & Laura Halonen, *On the Availability of Counterclaims in Investment Treaty Arbitration*, *in* CZECH Y.B. INT'L L., 141, 144 (2011).

73. ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Volume I)* 204–06 (1970) [hereinafter History of the ICSID Convention].

74. Rules of Court, adopted Apr. 14, 1978 and entered into force July 1, 1978, in I.C.J. Acts & Docs, Art. 80, https://docentes.fd.unl.pt/docentes_docs/ma/sis_MA_31678.pdf (requiring a counterclaim come within the jurisdiction of the Court and be directly connected to the subject matter of the claim of the other party for the court to entertain a counterclaim). A reference to Article 63 of the Rules of Court is found in the preparatory documents of the ICSID Convention. ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Volume II)* 422 (1968); *see also* Goetz v. Republique de Burundi, Affaire CIRDI No. ARB/01/2 [ICSID Case No. ARB/01/2], Sentence [Award], ¶ 273 (June 21, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2/DC2651_Fr.pdf (stating that a counterclaim may be brought only if it relates to the subject matter and falls within the jurisdiction of the Court).

75. *See* ICSID, *supra* note 74, at 422.

permissible if they fall within the scope of consent. Indeed, Rule 41 of the Arbitration Rules grants arbiters the authority to consider whether ancillary cases fall within the scope of consent *proprio motu* at any time during proceedings. Nevertheless, a tension arises between Article 46 of the Convention and Rules 40 and 41 of the Arbitration Rules regarding how specific an investment agreement must be to bring a claim within the scope of consent. Exactly how specific does the text need to be? Does it need to explicitly allow for counterclaims, and if not, does it at least need to anticipate applicable law? What are the implications if the source of the applicable obligation is *jus cogens*? What if the source of the obligation arises *erga omnes*? In determining the "scope of consent," three different approaches emerge from ICSID case law, and each have relevance beyond counterclaims.

1. The *Roussalis* Approach

The oldest and most common approach to determining whether a counterclaim falls within Article 46's scope of consent is the one adopted by the majority in *Roussalis v. Romania*.[76] Prior to *Roussalis*, the prevailing view was that, by filing a claim to arbitration, an investor accepts the "offer as set out in that treaty, nothing more and nothing less."[77] Beginning with *Roussalis*, ICSID Tribunals approach consent as the first question in determining whether a Tribunal has jurisdiction to hear a counterclaim.[78] Thus, according to *Roussalis*, a Tribunal should only hear claims to which both parties acceded under the terms of the IIA, but the IIA does not need to specifically allow

76. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 861–65 (Dec. 7, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C70/DC2431_En.pdf.

77. HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION 135 (2013).

78. *See Roussalis*, Award at ¶ 863. *See also* Inmaris Perestroika Sailing Maritime Servs. GmbH v. Ukr., ICSID Case No. ARB/08/8, Award, ¶ 432 (Mar. 1, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C320/DC3296_En.pdf; *Goetz*, Award at ¶ 278; Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 408 (Oct. 4, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf; Vestey Gp. Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/06/4, Award, ¶ 333 (Apr. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf; Urbaser S.A. v. Republic of Arg., ICSID Case No. ARB/07/26, Award, ¶ 1147 (Dec. 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf.

for counterclaims.[79] Both *Urbaser* and *Aven* cited *Roussalis* in their allowance of counterclaims.[80]

2. The *Goetz* Approach

In the dissent to *Roussalis*, Professor Michael Reisman advanced an alternative view regarding the "scope of consent" that would broaden the range of a Tribunal's jurisdiction to anything that touches or concerns the initial claim.[81] According to Reisman, when a host state and investor consent to ICSID jurisdiction, that consent automatically applies to ancillary claims, including counterclaims.[82] Indeed, in Reisman's view, consent to ancillary claims is "*ipso facto* imported into any ICSID arbitration . . . ."[83] This view was adopted by the Tribunal in *Goetz v. Burundi II*, but debatably "capped."[84] While *Goetz* agreed that Tribunals automatically have jurisdiction to hear ancillary claims, the Tribunal noted that the language of the applicable IIA was broad enough to include the counterclaim advanced by the Respondent.[85] According to the *Goetz* approach, while consent to counterclaims or parallel claims need not be explicitly found in the text, a determination of what can qualify as an ancillary claim should begin with a careful analysis of the applicable IIA.[86] Whereas *Roussalis*'s point of departure is a presumption against counterclaims unless they can be read into the text, *Goetz* starts from the opposing presumption; that is, the majority opinion in *Goetz* understands Article 46 as prescribing a presumption for counterclaims unless the text is either explicit in excluding them or the exclusion can be construed from other

79. *Roussalis*, Award at ¶ 759 ("[T]here is no ICSID precedent requiring an explicit *authorization* in the BIT as a precondition for asserting a counterclaim.").

80. *Urbaser S.A.*, Award at ¶ 1121; Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 741 (Sept. 18, 2018), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4866/DS11491_En.pdf.

81. Roussalis v. Romania, ICSID Case No. ARB/06/1, Declaration by W. Michael Reisman (Dec. 7, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C70/DC2432_En.pdf.

82. *Id.*

83. *Id.*

84. *Goetz*, ICSID Case No. ARB/01/2, Award ¶¶ 279–85.

85. *Id.* ¶¶ 273, 277–78.

86. *Id.* ¶¶ 278–80 (explaining that by accepting the concluded treaty, parties also accept that incidental counterclaims can be settled by the court under Article 46 of the ICSID Convention and Rule 40 of the Arbitration Rules).

documents between the parties.[87] The narrower (dissenting) view is that, while *Goetz* indicated that consent to ancillary claims need not be explicit in the text of a given IIA, consent must nevertheless be "manifest and unequivocal"—consent itself as well as the scope of consent—through "various interrelated documents,"[88] presumably international and domestic commitments of the parties.[89] Either way, this widens the scope of permissible counterclaims significantly beyond the *Roussalis* approach.

3. The *Gavazzi* Approach

If *Goetz* is an evening dusk expanding the pupil of Article 46's "scope of consent," *Gavazzi v. Romania* is a flash of lightning that shrinks the pupil to a pinpoint. In *Gavazzi*, the dispute resolution clause of the relevant IIA provided that "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party . . . shall be settled . . . amicably[,]"[90] and, when it fails, "the investor in question may submit the dispute" to investor–state arbitration.[91] That IIA (Italy-Romania) did not include a reference to the possibility of initiating counterclaims.

Rather than begin with the question of whether the counterclaim lodged fell within the parties' "scope of consent" as *Roussalis*, *Goetz*, and their progeny had done, *Gavazzi* questioned whether the IIA "entitle[s] the Respondent to advance in the present proceedings a . . . counterclaim."[92] *Gavazzi* answered this question in the negative for two reasons.

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87. *See, e.g.*, Tomoko Ishikawa, Marco Gavazzi and Stefano Gavazzi v Romania*: A New Approach to Determining Jurisdiction in ICSID Arbitration?*, 32 ICSID REV. 721, 723–24 (2017).

88. Ambiente Ufficio S.P.A. v. Arg. Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 82 (May 2, 2013) (dissenting opinion by Bernárdez, S.T.) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C340/DC3452_En.pdf.

89. *See generally id.* at ¶¶ 25–38, 106–57.

90. Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 51 n.165 (Apr. 21, 2015) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888_En.pdf.

91. *Id.* at 45, n.127.

92. *Id.* ¶ 159.

First, the IIA made no explicit reference to counterclaims.[93] And second, while the IIA stated that investors could bring claims, it did not state that States could do so.[94] The only mention of "scope of consent" arose when the opinion stated that even if "such [a] counterclaim would be possible under the BIT",[95] it wouldn't have been admissible anyway, because the alleged counterclaim met none of the three conditions under Article 46.[96] Although ICSID Article 46 and ICSID Rule 40 clearly indicate that jurisdiction could arise so long as parties to a dispute did not agree to forbid counterclaims, and although the applicable IIA's Preamble suggested openness to ancillary claims,[97] *Gavazzi* required an explicit, positive statement to grant jurisdiction. According to the *Gavazzi* approach, "Where there is no jurisdiction provided by the wording of the [IIA] in relation to the counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the [IIA]."[98] No further analysis of "scope" or "consent" is necessary.

In sum, the *Roussalis* approach considers counterclaims within the 'scope of consent' determined, even inexplicitly, by the terms of the IIA; the *Goetz* approach considers ancillary claims *de facto* within the 'scope of consent' unless clearly contradicted by the IIA; and the *Gavazzi* approach requires that an IIA explicitly provide for counterclaims.

B. IMPLICATIONS FOR STATE AND INVESTOR OBLIGATIONS

Until *Roussalis* came down in 2011, counterclaims against investors virtually always failed to pass muster at the jurisdiction phase which effectively barred all counterclaims apart from exceptional circumstances under which an investor consented to a counterclaim *ex post facto* in the IIA.[99] In the years leading up to the *Roussalis* decision, ISDS came under increasing scrutiny, especially after the 2003 Argentine financial crisis had prompted a flurry of almost 60 high-stakes

93. *Id.* ¶¶ 152–58.
94. *Id.*
95. *Id.* ¶ 160.
96. *Id.*
97. *Id.* ¶ 151.
98. *Id.* ¶ 154.
99. *See* Ana Vohryzek-Griest, *State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure*, 15 REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 83, 86 (2009).

arbitration claims.[100] Since 2009, when the Obama administration revealed its intention to pursue a Trans-Pacific Partnership Agreement (TPP) which would include 12 States circling the Pacific Ocean and would include Chapters on ISDS and international intellectual property enforcement similar to U.S. free trade agreements with Latin American parties, ISDS has remained under scrutiny.[101] Buoyed by the first spat of high dollar awards and settlements in 2010, public interest in ISDS swelled, outrage over the asymmetrical nature of investor and state rights ballooned, and efforts toward reform commenced.[102] Perhaps as a reaction to this political backdrop, leaked drafts of the TPP's Investment Chapter as well as the first draft of the US-India BIT revealed clauses that specifically accorded States the right to bring counterclaims (though the TPP version essentially nullified itself through some tricky language in a footnote).[103] By the time U.S. President Donald Trump terminated the initial version of the TPP through an Executive Order during his first week in office in 2017,[104] the asymmetrical nature of BITs and ISDS reform had become a common topic of discussion for international lawyers and for the public at large.[105]

While *Roussalis* did not ultimately allow the counterclaim Romania brought, it finally addressed terms in Article 46 of the ICSID Convention that seemed, on their face, to allow counterclaims so long as certain conditions were met.[106] By specifying that counterclaims against investors could be brought if they involved State obligations, *Roussalis* opened the door to

100. Ezequiel Vetulli & Emmanuel Kaufman, *Is Argentina Looking for Reconciliation with ISDS?*, WALTERS KLUWER: KLUWER ARB. BLOG (Oct. 13, 2016), http://arbitrationblog.kluwerarbitration.com/2016/10/13/is-argentina-looking-for-reconciliation-with-isds/.

101. *See, e.g.*, JOSÉ AYLWIN, *The TPPA and Indigenous Peoples: Lessons from Latin America*, *in* NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT 70, 70, 74 (Jane Kensley ed., 2010).

102. For a detailed analysis of the asymmetry of rights and obligations in the ISDS, see Tietje & Crow, *supra* note 10, at 106–07.

103. *Id*. at 107–08.

104. *See* Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/.

105. *See* Tiejte & Crow, *supra* note 102, at 106–07.

106. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 861–65 (Dec. 7, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C70/DC2431_En.pdf.

what we argue has become a presumption of international law's applicability to investors. Not *Roussalis* itself, but rather the use of *Roussalis,* has set this trend in motion, whereby international obligations to investors are rooted in violations of *jus cogens* norms or *erga omnes* interests.[107] Indeed, on the wings of *Roussalis*, Article 46 has enabled the argument that, because State obligations to their citizens could be considered, and because investors could have obligations to States that connect to a State's ability to fulfill its obligations to citizens, investor obligations can be found in international law.

The first (non-explicit and ultimately unsuccessful) breakthrough toward using ISDS to accord obligations rooted in international law to multinationals arrived in late 2016 when the *Urbaser* Tribunal used *Roussalis* to find jurisdiction over Argentina's counterclaim that the investor bringing the claim had deprived its citizens of the human right to water—a right the State was obliged to fulfill.[108] Although the ultimate reasoning of *Urbaser* was convoluted (as we have discussed elsewhere),[109] and although the Tribunal ultimately found that the investor had no positive obligations under the applicable international law, *Urbaser* moved the needle on investor obligations by taking seriously ICSID Convention Article 46's reference to "scope of consent" rather than using an absence of explicit consent to bypass the counterclaims that could have otherwise been found to "arise directly out of the subject matter of the dispute."[110]

Similarly, the *Aven* Tribunal used *Roussalis* to bring the potential for investor liabilities not explicitly mentioned in the IIA within the scope of the investor's consent. With *Roussalis* as guiding persuasive precedent, *Aven*'s reasoning in granting the State's right to counterclaim to States seems so obvious that the novelty of the interpretation is striking: because the IIA in question defined claimants as investors, because the IIA invoked the ICSID Convention as authoritative in governing procedure for disputes, and because the only possible respondents were States, the mere fact that the ICSID Convention considers counterclaims renders party consent axiomatic.[111] This

107. *See infra* Part IV.

108. *Urbaser S.A.*, Award at ¶¶ 1117–55.

109. Crow & Lorenzoni-Escobar, *supra* note 48, at 98.

110. *Urbaser S.A.*, Award ¶¶ 1135–55.

111. Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶¶ 728–47 (Sept. 18, 2018), http://icsidfiles.worldbank.org/icsid/

reasoning appears to flip the "consent" requirement on its head: consent to counterclaims is always present unless parties agree beforehand that counterclaims are not anticipated by the agreement or that counterclaims require explicit consent. Thus, *Aven*'s reliance on *Rousalis* suggests an understanding of Article 46 that is closer to the *Goetz* approach than the *Roussalis* approach.

Goetz has been used to widen the scope of admissible counterclaims against claimants. It is often cited in those disputes that respondents claim to be veiled "class action" suits – e.g. investors in government bonds in the *Ambiente Officio v. Argentina* decision on jurisdiction,[112] *Alemanni v. Argentina*,[113] and *Deutsche Bank v. Sri Lanka*.[114] The *Goetz* citation also shows up in non-ICSID cases with similar subject matter, such as *Oxus Gold v. Uzbekistan*.[115] Meanwhile, while *Gavazzi* has not been cited as definitive authority on "scope" as of publication, it has been cited as authoritative in cases in which counsel for investors appear to be attempting to evoke arbitral mistrust in "losing" States, such as *Lao Holdings v. Lao*.[116] The submissions before these tribunals seem to press political reasons why the Tribunals should rely on *Gavazzi*, specifically, they suggest that arbitrators should mistrust the counterclaiming State; they suggest that if the State were to receive a large payout, the State

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ICSIDBLOBS/OnlineAwards/C4866/DS11491_En.pdf.

112. Ambiente Ufficio S.P.A v. Arg. Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 95–96, 157–63 (Feb. 8, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C340/DC2992_En.pdf.

113. Alemanni v. Arg. Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility ¶ 136 (Nov. 17, 2014).

114. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Dissenting Opinion of Makhdoom Ali Khan, ¶ 81 n.77 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1273.pdf.

115. Oxus Gold v. Republic of Uzb., Final Award, ¶ 908 (ad hoc, Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf.

116. Lao Holdings N.V. v. Gov't of Lao People's Democratic Republic, ICSID Case No ARB(AF)/12/6, Decision on the Merits of the Claimants' Second Material Breach Application, ¶ 103 n.82 (Dec. 15, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2462/DS10815_En.pdf; Bridgestone Licensing Services, Inc. and Bridgestone America, Inc. v. Republic of Panama, ICSID Case No ARB/16/34, Claimants' Response to Panama's Expedited Objections Pursuant to Article 10.20.5 of the US-Panama Trade Promotion Agreement, ¶ 125 n. 146 (July 24, 2017), http://icsidfiles.worldbank.org/icsid/icsidblobs/onlineawards/C5946/DC10956_en.pdf.

would likely not disperse those funds to the public.[117] In light of these political claims, *Gavazzi* provides a precedent that can cloak the political goal of counterclaim exclusion in "reason" in much the same way, say, U.S. Supreme Court Justice Antonin Scalia used originalism to derive "operative" and "prefatory" clauses from the U.S. Constitution's Second Amendment.[118] Arguments that press Tribunals to narrowly limit state counterclaims have simmered in the background of ISDS for decades. As Richard Bilder wrote back in 1980:

> [D]eveloping nations can make their appeals to equity and justice more persuasive by ensuring that redistribution to poorer people actually occurs. As many observers have suggested, there is little equity in any arrangements which transfer income from many less-than-wealthy consumers in developed nations to the very few wealthy people who control resources in developing nations.[119]

The possibility of invoking *Gavazzi* in cases like *Lao Holdings v. Lao* and *Bridgestone v. Panama* harness specters of Bilder's observations. Neither Laos nor Panama have strong international reputations for State ambivalence toward citizens in financial matters. As Tomoko Ishikawa puts it:

> [E]ven when counterclaims are available to the defendant state in investment arbitration, in the current framework of international law, there is no mechanism to ensure that the state would use counterclaims as a way to fulfill its duty of protection against actions by

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117. *See, e.g.*, Yasmine Lahlou et al., *The Rise of Environmental Counterclaims in Mining Arbitration*, GLOB. ARB. REV. (June 18, 2019) https://globalarbitrationreview.com/chapter/1194145/the-rise-of-environmental-counterclaims-in-mining-arbitration; *see generally* Lao Holdings N.V. v. Gov't of Lao People's Democratic Republic, ICSID Case No ARB(AF)/12/6, Award (Aug. 6, 2019) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2462/DS12613_En.pdf (rejecting government counterclaims in case where claimant's investment involved lots of corruption).

118. District of Columbia v. Heller, 554 U.S. 570, 577 (2008); Kristin A. Goss & Matthew J. Lacombe, *Do Courts Change Politics? Heller and the Limits of Policy Feedback Effects*, 68 EMORY L.J. 881, 883 (2020) ("[T]he ruling endorsed a perspective on guns and citizenship that legal scholars (including some liberals) and pro-gun advocates had been developing for many years.").

119. Richard R. Bilder, *International Law and Natural Resources Policies*, 20 NAT. RES. J. 451, 478 (1980).

> private entities. For example, there is no guarantee that the state actually would effect payment in satisfaction of the victims' claims. There is also the possibility that the state would decide not to raise counterclaims even when there is no effective judicial venue available to the victims, or that the state would limit the victims' claims by compromising the case.[120]

Despite the persistence of problems associated with domestic redistribution, many of which have been exacerbated since the Bretton Woods Conference, redistribution is not a major theme for international economic lawyers generally and certainly is not prominent within ISDS reform discussions.[121]

It is often assumed that the job of international economic law is to increase the size of the pie; and that it is the job of States to ensure that its pieces are equitably distributed.[122] On the one hand, the assumption that international law's job does not concern distribution may perpetuate inequality. On the other hand, justifications for non-payment to a State that appeal to some notion that a State will not "do the right thing" if it receives payment carry paternalistic (if not condescending) undertones.[123] Thus, we suggest that the forms of reasoning used and the principles relied upon tell us more about the priorities of the law than the "right outcome." In cases where the investor's liability is established, the rights of the victims are arguably better secured in investment arbitrations than in domestic courts because the former has a much stronger international enforcement mechanism.[124] However, if the payout from the

120. Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AJIL UNBOUND 33, 36 (2018).

121. *See id*. at 35 (describing the deficiency of domestic dispute resolution for protecting investor interests, andasserting that the "right" counterclaimant addressing individual harm caused by investors is the State in which the individual was harmed). Ishikawa's argument here is representative of the majority view, which either fails to consider or simply ignores the question of whether States that receive monetary awards through Counterclaims actually distribute those awards, directly or indirectly, to the individuals harmed within the State, or for that matter, to the State's general public or within the State's public interest.

122. *See, e.g.*, Ingo Venzke, International Law and the Spectre of Inequality, Inaugural Lecture No. 607, University of Amsterdam (May 16 2019), *in* UNIV. AMSTERDAM INAUGURAL LECTURE SERIES 609, at 7, https://pure.uva.nl/ws/files/38035248/Venzke_International_Law_and_the_Spectre_of_Inequality_2019.pdf.

123. *See, e.g.*, CROW, *supra* note 14, at 31–32.

124. Ishikawa, *supra* note 120, at 36.

investor is the priority over what happens to the payout after it is dispersed, *Gavazzi*'s appeal is greatly diminished.

All of these standards and their contexts inform us as to the law's priorities; what is and what is not a "reason" can flow from subtly different principles that create different rules and obligations for corporations. The three standards above find reasons for State or investor obligations alternately *erga omnes* and *jus cogens*, which are types of obligatory norms generally understood to related to the protection of international law's "fundamental principles."[125] If *erga omnes* obligations are understood as flowing from all to all, we suggest here that it should be more explicitly referenced as an obligation flowing from some appeal to humanity rather than from normative State practice.[126]

Thus, in those cases where attorneys could appeal to the *Gavazzi* interpretation of Article 46, an understanding of investor obligations rooted in the concept of *erga omnes* could resolve the tension an arbitrator might feel when considering both investor liability and State responsibility. That is, if liability flows from *erga omnes* obligations to peoples rather than States, the tribunal would be justified in asking whether the State will disperse payouts in a manner that serves its citizens. Conversely, in those cases seeking to broaden the scope of potential parties and claims that can join a given case, *jus cogens* can provide more concrete liability standards based in State practice and with reference to customary international law.[127] We argue this because, as we will discuss below,[128] *jus cogens* has been addressed by judicial bodies and by the International Law Commission, giving a fairly undisputed picture of what norms have a peremptory status. Of course, the construction of "State practice" and "custom" are wrought with their own biases and problems of ambiguity,[129] which we are sympathetic to but

125. For a more detailed overview of these two concepts, see *supra* Part II.

126. *See generally* TRINDADE, *supra* note 22 (surveying international law with a *leitmotif* of the fulfillment of general human needs and aspirations).

127. *See, e.g.*, Christian Tomuschat, *The Security Council and* Jus Cogens, *in* THE PRESENT AND FUTURE OF JUS COGENS 19 (Enzo Cannizzaro ed., 2015); ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW – JUS COGENS: A GENERAL INVENTORY 106–07 (2015).

128. *See infra* Part V.

129. *See, e.g.*, Harmen van der Wilt, *State Practice as Element of Customary International Law: A White Knight in International Criminal Law?*, 19 INT'L CRIM. L. REV. 1, 16 (2019); *see also* Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*,

must nevertheless set aside for now. There are also difficulties in transferring State liability standards to investors or corporations in Court, as the obligation of an investor still must be linked to—perhaps even made dependent upon—interference with a State's obligation.[130] Similarly, violation of *jus cogens* must attach to an investor through a State.[131] These are complex issues that deserve further discussion in another paper. Here, we wish to simply emphasize the greater array of legal tools. Because of its judicial development, *jus cogens* can provide in complex multiparty arbitration a means to expand the scope of what can legally stick to a claimant in a counterclaim.

In sum, where *erga omnes* obligations have the benefit of justifying inquiries into the distributive responsibilities of States that receive payouts from investors due to counterclaims, *jus cogens* as a normative basis has potential to provide a greater array of settled standards and general principles. However, the relatively settled body of *jus cogens* obligations typically concern States and not corporations—to transfer a *jus cogens* obligation from a State to a corporation requires a fairly exceptional set of circumstances. In this way, although *erga omnes* is less developed in judicial settings, it has greater potential to develop effective standards of corporate liability to international law because it is connected to issues that are closer to the conduct of corporations than States. An impressive arsenal of standards and principles obligating corporate actors could also emerge from a positive decision to embrace international obligations rooted in peoples rather than States. This is an orientation toward international law that former-ICJ Judge Trinidade and many TWAIL scholars have embraced and it is one that *erga omnes* has the potential to facilitate.[132] In this vein, and among

28 EUR. J. INT'L L. 357, 375–76 (2017).

130. Ishikawa, *supra* note 120, at 34.

131. *See id.* at 33–34.

132. *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 271–72 (James Crawford & John S. Bell eds., 2005); B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 112–66 (2d ed. 2017); M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 414–17 (2015); This is also a theme in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW (Luis Eslava, Michael Fakhri, & Vasuki Nesiah eds., 2017). *See also* Priya S. Gupta, *From Statesmen to Technocrats to Financiers: Development Agents in the Third World*, *in* BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW 481, 494 *(*Luis Eslava, Michael Fakhri, & Vasuki Nesiah eds., 2017*)*. Scholars of intellectual legal history such as Matthew Lange, Joseph Slaughter, Jennifer Bair, and Gilbert Rist have also

others, the expansion of corporate obligations rooted in *erga omnes* is a point we develop further in Part IV below.

IV. MERITS: THE APPLICABILITY OF PUBLIC INTERNATIONAL LAW TO INVESTORS IN INVESTMENT ARBITRATION

While IIL is not the traditional forum for debates on corporate subjectivity to international law, it has become increasingly familiar with questions of corporate obligations and enforceability thereof in the last decade. Following the increased acceptance of counterclaims charted above, IIL is beginning to address international human rights and environmental obligations of investors. This begs the question of whether investment arbitration has become a venue to pursue corporate liability.[133] In an initial domestic-law approach to the existence of investor obligations, not unlike transnational human rights litigation, IIL has found investor responsibility when the violation of international law is connected to a violation of domestic law.[134] However, especially in the last five years, a burgeoning "international law-based approach" to corporate obligations has emerged, most explicitly in the cases of *Urbaser v. Argentina* and *David Aven v. Costa Rica.*

In *Urbaser v. Argentina*, the arbitral tribunal rejected the idea that "a foreign investor company could not be a subject to international law obligations."[135] *Urbaser* thus rejected a

penned narratives that suggest law rooted in humanity. *See, e.g.*, Matthew Lange et al., *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 AM. J. SOCIO. 1412, 1414–15 (2006); Joseph Slaughter, *We're in the Middle of a Corporate Civil Rights Movement*, TALKING POINTS MEMO (April 7, 2015, 6:00 AM), https://talkingpointsmemo.com/cafe/corporate-civil-rights-movement; Jennifer Bair, *Corporations at the United Nations: Echoes of the New International Economic Order?*, 6 HUMAN.: INT'L J. HUM. RTS. 159, 160 (2015); GILBERT RIST, THE HISTORY OF DEVELOPMENT (Patrick Camiller trans., 4th ed. 2014).

133. Rafael Tamayo-Álvarez, David Aven v Costa Rica*: A Step Forward Towards Investor Accountability for Environmental Harm?*, 29 REV. EUR., COMPAR. & INT'L ENV'T L. 301, 301–02 (2019); Debadatta Bose, David R Aven v Costa Rica*: The Confluence of Corporations, Public International Law and International Investment Law*, 35 ICSID REV. 20, 20 (2020).

134. Bose*, supra* note 133, at 20–21.

135. Urbaser S.A. v. Republic of Arg., ICSID Case No. ARB/07/26, Award, ¶ 1194 (Dec. 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf.

"principled" position denying international corporate subjectivity by arguing that the capacity of holding rights implies a capacity of holding obligations too.[136] There are three scenarios under which *Urbaser* entertained the idea of international corporate obligations for investors:[137] first, there is a corporate obligation "not to aim at destroying human rights," which is developed in relation to the human right for dignity, adequate housing and living conditions;[138] second, there is corporate obligation to perform,[139] which in the Tribunal's reasoning mirrors the State obligation to enforce the human right to water; and finally, there is a corporate obligation to abstain from committing acts that violate human rights.[140] In this final scenario, *Urbaser* cited the U.S. Alien Tort Statute (ATS) case of *Filártiga v. Peña-Irala* to imply circumstances under which multinational subjectivity could kick in, entailing a violation of this obligation to abstain. The reference to *Filártiga* is merely a footnote, in which Argentina's reliance on that case is dismissed.[141] It is difficult to establish what actionable standard could have been referred to by Argentina when invoking *Filártiga*,[142] or what kind of breach of an international norm, the *Urbaser* tribunal was ready to entertain. We must therefore reconstruct the role *Filártiga* played in the reasoning

136. *Id*. ¶¶ 1193–94.

137. We identified and analyzed these scenarios more thoroughly in Crow & Lorenzoni-Escobar, *supra* note 48, at 103–09.

138. *Urbaser S.A.*, Award at ¶ 1199.

139. *Id*. ¶ 1210.

140. *Id.*

141. *Id*. ("The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case."); *Id.* at n.446 ("Therefore, Respondent's reliance on the case *Filártiga v. Peña-Irala*, U.S., Court of Appeal, 2nd Circuit, 630 F.2d 876, June 30, 1980 (ALRA 307), is not convincing.").

142. The authors contacted the National Direction of International Controversies of the Republic of Argentina, seeking insight into the reasons why Argentina relied on *Filártiga*. Their reply, which was not enlightening for the purposes of the present analysis, was that *Filártiga* was invoked because it refers to "the existence of individual obligations in the realm of international investment law, that supported Argentina's arguments." ("*La decisión del caso Filártiga c. Peña-Irala fue invocada en el caso Urbaser porque se refiere a la existencia de obligaciones individuales en el ámbito del derecho internacional de los derechos humanos, en apoyo de los argumentos de Argentina sobre esta cuestión*"). Email from Pablo Rodrigo Salgán Ruiz, Legal Advisor, National Direction of International Controversies, Department of Library and Publications, to author (Mar. 28, 2020, 4:57 GMT-3) (on file with author).

from the reference alone.

In *Filártiga,* U.S. jurisdiction was upheld under the ATS for wrongful death by torture.[143] It is likely, given the facts of the *Urbaser* case—Argentina's counterclaim revolved around the fundamental right to water[144]—that Argentina relied on a broad interpretation of actionable standards under ATS, whereas, given the dismissal of the argument,[145] the *Urbaser* Tribunal relied on a narrower approach. Given the conflation at the U.S. domestic level as to what kind of offences are actionable under the ATS, and the amount of case law that followed *Filártiga v. Peña-Irala* where the standard seemed to be *jus cogens*,[146] we think the reference of the *Urbaser* Tribunal in that footnote, was to *jus cogens* norms. The Tribunal dismissed *Filártiga*, presumably because the violation of the right to water is not a violation of *jus cogens*.[147] *A contrario*, one could conclude that according to the *Urbaser* Tribunal, a violation of *jus cogens* could give rise to an enforceable obligation of corporations, grounded in international law.

Urbaser became part of the caselaw invoked by Respondent and by the Tribunal in *David Aven v. Costa Rica*, where the Tribunal found jurisdiction to hear a counterclaim concerning alleged corporate environmental damage. [148] But what could the State counterclaim under a treaty that spells out only State obligations? Here *Aven* affirmed that " . . . it could be argued that Section A also contains, at least implicitly, some obligations to investors, especially with respect to the environmental laws of the host State."[149] *Aven* quoted, to support these implicit environmental obligations to investors, Article 10.9.3.c of the Treaty, which includes environmental measures as exceptions to the prohibition on performance requirements, and Article 10.11, which is a non-lowering of standards clause referencing

143. Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

144. *Urbaser S.A.*, Award ¶¶ 36, 1156.

145. *Id.* ¶ 1220.

146. *See Filartiga*, 630 F.2d at 885–86 (holding that official torture is prohibited by customary international law).

147. We do not think the reference is to an *erga omnes* obligation because within the ATS context, enforceability is discussed under U.S. Courts wherein the ATS has limited standing to the party suffering the damage. Thus, its enforceability cannot be *erga omnes*. *Urbaser S.A.*, Award ¶ 1210.

148. Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award ¶ 697 (Sept. 18, 2018), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4866/DS11491_En.pdf.

149. *Id.* ¶ 732.

environmental standards.[150] *Aven* concluded then that the logical effect of Article 10.11 is that the measures adopted by the home state, "should be deemed compulsory for everybody under the jurisdiction of the State, particularly the foreign investors."[151] The Tribunal argued, based on this, that the obligation of investors to comply with environmental domestic laws and regulations, is not only a domestic law obligation, but also one that stems from Section A, Chapter 10 of the DR-CAFTA.[152] Accordingly, the Tribunal concluded that "No investor can ignore or breach such measures and its breach is a violation of both domestic and international law . . . ."[153] The reasoning in this part of the award effectively reflects a domestic-law-based approach, building on the existence of environmental laws of the host state. Indeed, the treaty-based international law *Aven* relies on, Articles 10.9.3.c and 10.11, codifies State regulatory obligations and prerogatives. Therefore, these articles do not enshrine an international environmental obligation for investors: the implicit environmental obligations to investors are those of domestic law, hence, the domestic-law based approach.

However, *Aven* pushes its reasoning further into the international law-based approach, drawing a distinction between subjectivity and enforcement: "It is true that the enforcement of environmental law is primarily to the States, but it cannot be admitted that a foreign investor could not be subject to international law obligations in this field . . . ."[154] Indeed, the Tribunal draws a parallel between State enforcement and corporate breach, quoting *Urbaser*'s view that investors operating internationally are no longer immune from becoming direct subjects of international law.[155] *Aven* adds that the argument that international investors should be subject to international law is "particularly convincing" when attached to a legal issue that can be characterized as a common concern of

150. *Id.* ¶¶ 732–33 ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

151. *Id.* ¶ 734.

152. *Id.* ¶ 742.

153. *Id.* ¶ 734.

154. *Id.* ¶ 737.

155. *Id.* ¶ 738.

all States.[156] *Aven* then quotes *Barcelona Traction*'s famous *erga omnes dictum*, which is discussed Section II(A) above.[157]

"[T]here is a tendency among publicists to use the *erga omnes* concept as a legal vade mecum," leading to an inflationary reliance that blurs the nature of *erga omnes* as it was framed by the ICJ in relation to standing.[158] But the concept of *erga omnes* has different legal effects[159] and has been referred to in different situations that are not necessarily related to questions of standing.[160]

We think the reference in *Aven* to *erga omnes* goes beyond the issue of standing; in fact, we suggest *erga omnes* is a concept that splits its substantive and procedural dimensions. Specifically, *Aven* refined its contours to accord subjectivity to corporations for conduct (substance) but not enforcement (procedure)—the latter remains the task of the State. In *Aven*, the tribunal asks itself: "Does the investor have obligations arising out of the investment according to international law?" and answers, quoting *Urbaser*, that the argument of subjectivity for investors is particularly convincing "when it comes to rights and obligations that are the concern of all states, as it happens in the protection of the environment."[161]

Although the starting point of the Tribunal is *Barcelona Traction*, the *erga omnes* effect is understood not from a procedural and law enforcement perspective, but rather, from a substantive perspective, which consists in the creation of international obligations for investors. *Aven* accordingly extends State *erga omnes* obligations to investors with the effect of granting subjectivity for questions of substance. However, it does not appear that the *erga omnes* effect in *Aven* would grant investors a right of standing against a State. In this sense, investors have placed one foot into that *omnium* that was previously inhabited only by the State, but only for the purposes of outlining an internationally binding framework for *conduct*—not for *enforcement*. The *Aven* Tribunal grounds this partial

156. *Id.*

157. *Id*. (quoting Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5)).

158. Christian J. Tams & Antonios Tzanakopoulos, Barcelona Traction *at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. INT'L L. 781, 794 (2010).

159. TAMS, *supra* note 20, at 6.

160. *Id*. at 99.

161. *Aven*, Final Award ¶ 738. *Aven* carries out this reasoning by also quoting *Barcelona Traction*. *Id.*

transfer of *erga omnes* effects on the importance of the substantive obligation itself: the fact that the obligation is "of the concern of all States" would instill subjectivity to non-State actors—or at the very least to investors. In this way, *Aven* reinforces *Urbaser*'s path toward acknowledging international obligations for investors—even suggesting a presumption of subjectivity in certain areas—while underscoring the theoretical gaps that must still be explored to bring consistent corporate subjectivity to fruition.

V. CONCLUSION: WHAT DOES A CORPORATION OWE?

Based on our analysis of counterclaim standards and the use of *erga omnes* and *jus cogens* as principles that can potentially broaden the scope of investor subjectivity to international law, we conclude that IIL is treading a path toward a presumption of direct investor subjectivity to international law. That is, private international actors are increasingly incurring direct legal obligations sourced from public international law. Following the *Aven* case, it is clear that investors can incur those obligations that have been traditionally owed by the State 'toward all'—especially as scholarship that roots the legitimacy of international law in humanity rather than in the State starts to permeate into the purview of arbitral tribunals.

Recent awards angle toward two narrow categories of international obligations that apply only to investors. We believe that these are defined by arbitral tribunals by virtue of their importance in a fashion similar to tort litigation. In *Urbaser* these were *jus cogens* obligations—in line with claims under tort litigation.[162] And in *Aven* these were *erga omnes* obligations—in line with *Barcelona Traction*.[163] In neither case did the tribunals find means of attaching substantive obligations directly to investors. In both cases international investor obligations are mirrored by or derived from international State obligations, hence the failure, in our opinion, of the Tribunals to make them enforceable.

We believe the potential of *erga omnes* to source obligations is largely untapped, and that as environmental issues and inter-State collective action problems come increasingly to the fore, we believe *erga omnes* could take a more prominent place in arbitral

162. *See* Crow & Lorenzoni-Escobar, *supra* note 48, at 107–08.
163. *Aven*, Final Award ¶¶ 737–38.

reasoning. This is because an *erga omnes* obligation is owed to the international community as a whole.[164] Unlike bilateral obligations, an *erga omnes* obligation is not held on a basis of reciprocity.[165] The effect of an *erga omnes* characterization is a procedural right of standing of all States to hold the breaching State accountable; it relates to law enforcement.[166] While this terrain appears ripe with possibility, it also presents a particular difficulty: if enforcement is the obligation of all, it may in effect become the obligation of none.[167]

Hence, what a corporation owes depends upon the scope of jurisdiction a Tribunal reads into a relevant article (such as Article 46's pallet of interpretations) and the source from which a Tribunal finds non-codified obligations arise (*erga omnes* or *jus cogens*). As discussed in the foregoing sections, different legal consequences attach to *jus cogens* and *erga omnes* obligations. Treaties that go against the former are void, whereas *erga omnes* obligations, as long as they are not also *jus cogens*, are derogable.[168] In practice, while the International Law Commission has identified certain *jus cogens* norms,[169] judicial bodies have extended the list of norms with peremptory status in a systematic pattern that lacks reference to State practice, lacks reference to *opinio juris*, or references the practice of only a few States to support the conclusion that a given norm is *jus cogens*.[170] The ICJ has even adopted a natural law approach to defining norms.[171] On the other hand, the category of *erga*

164. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

165. *See* Tams & Tzanakopoulos, *supra* note 158, at 791–92.

166. *Id.* at 792. *See also* TAMS, *supra* note 20, at 102 ("At least in *Barcelona Traction*, '*erga omnes*' seems to have been used in a different sense. As the reference to the 'legal interest' of all States, and to the 'corresponding rights of protection' suggests, the Court was not concerned with the scope of a *primary* obligation, but intended to describe specific features of the *secondary* rules governing the invocation of responsibility for violations of obligations called '*erga omnes*'. Not the obligation as such, but its performance in a specific case therefore is owed to all States (i.e. *erga omnes*).").

167. Some authors point out that, by very definition, *jus cogens* always expresses *erga omnes* obligations. *See* Ulf Linderfalk, *Normative Conflict and the Fuzziness of the International* jus cogens *Regime*, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 961, 970 (2009).

168. *See* LINDERFALK, *supra* note 28, at 7.

169. *See* Erika de Wet, *Jus Cogens and Obligations* Erga Omnes, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 543 (2013).

170. *Id.* at 544.

171. de Wet, *supra* note 169, at 15.

omnes, despite its many "spillover effects" on international law, has very little development in ICJ cases.[172]

Yet this analysis raises doctrinal and theoretical difficulties. For instance, if human rights obligations are to be grafted directly onto corporate behaviors, how should international lawyers make sense of the fact that the international agreements that define human rights largely assume the State's responsibility to uphold them? At least in the area of environmental law, *erga omnes* provides a clearer hook to corporate subjectivity: environmental rules have long been applicable to corporations, especially those of a procedural nature—e.g. environmental impact assessments and polluter-pays policies.[173] Such policies are motivated by principles that exist in international law and are therefore readily available to attach to corporations; by their very nature, the application of these rules is context-specific and can therefore be tailored to the specifics of the contexts in which corporations operate.

The road to more specifically defining corporate obligations may come through Corporate Social Responsibility (CSR) policies—a possibility with which *Urbaser* flirted. These policies often have shared principles and most of the world's largest multinationals published have policies that allude to international legal texts such as the UDHR, the Covenants, the ILO Tripartite Declaration, and many others.[174] This would suggest a basis for *erga omnes* obligations, owed by all legal persons—States and corporations—toward all natural ones, with responsibilities for enforcement still rooted in States.

Another possible inroad may come in the form of private

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172. The currently debated Rohinga case is a recent and sole exception. *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, Order of 23 January 2020, 2021 I.C.J. 3. The ICJ has accepted that because the obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case" . . . [i]t follows that any State party to the Genocide Convention . . . may invoke the responsibility of another State party." *Id.* ¶ 41. Accordingly, the ICJ has concluded that "The Gambia has prima facie standing to submit to [the court] the dispute." *Id.* ¶ 42. It must be noted that the ICJ refers to *erga omnes partes*, not *erga omnes*. *See generally* TAMS, *supra* note 20, at 117–28 (2005) (describing the distinction between sources of *erga omnes* and *erga omnes partes*).

173. *See, e.g.*, CROW, *supra* note 14, at 55–58.

174. Kevin Crow, Survey, CSR Policies of F100 Companies (2020) (on file with author).

normative orders. Bigtech firms provide prominent and visible example. The language of human rights concerns originates from and is defined in many ways by international legal instruments, but the form it takes at Meta, for instance, flows from an internal norm-creation process.[175] At Meta, content moderation policies form the basis for corporate action, and the creation of these policies involves no reference to State or international legal practice.[176] According to Meta, its process of policy-creation is meant to "root [its] policies in sources of knowledge and experience that go beyond Facebook."[177] Firms that engage in similar practices with greater degrees of transparency will create touchpoints for arbitrators seeking to determine the purpose behind their actions and seeking to align those purposes with organs of society or other anchors in international law.

The obligations that corporations owe will depend upon how arbitrators determine the source. Where *jus cogens* as a normative basis has potential to provide a greater array of "settled" standards and general principles, *erga omnes* obligations have the benefit of justifying inquiries into, e.g. the distributive responsibilities of States that receive payouts from investors due to counterclaims or the direct obligation of a multinational to act consistently according to international environmental standards across borders. The relatively settled body of *jus cogens* obligations typically concern States and not corporations, and as such, transferring a *jus cogens* obligation from a State to a corporation requires a fairly exceptional set of circumstances. Yet the entanglement of CSR policies and private normative orders with international law may provide an anchor for tribunals to link international corporate practices with State obligations. At any rate, our analysis indicates that direct corporate subjectivity is possible through an increasing range of concepts and avenues and is therefore likely to shape the future of corporate obligations in public international law.

International corporate obligations are like a large ship

175. Mattias C. Ketteman & Wolfgang Schulz, *Setting Rules for 2.7 Billion, A (First) Look into Facebook's Norm-Making System: Results of a Pilot Study* 9–10 (Working Papers of the Hans-Bredow Institute, Working Paper No. 1, 2020), https://leibniz-hbi.de/uploads/media/Publikationen/cms/media/5pz9hwo_AP_WiP001InsideFacebook.pdf.

176. *Id.* at 30.

177. *Id.* at 15 (quoting *Stakeholder Engagement*, FACEBOOK, https://www.facebook.com/communitystandards/stakeholder_engagement (last visited Jan. 13, 2022)).

afloat on a sea of entrenched norms. While it takes quite some effort to change the direction of such a ship, and while that change is often slow, once it begins, it is just as difficult to reverse course. We think investment arbitration has changed the course of the ship. While questions remain as to how that subjectivity will relate to external State enforcement and internal normative enforcement, cases such as *Urbaser* and *Aven* have changed the question of corporate subjectivity from "whether" to "how."