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INTERNATIONAL LAW AND PRACTICE

Non-treaty Claims in Investment Treaty Arbitration

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Abstract
This article explores the conditions under which it is possible to bring claims based on non-international investment agreement (IIA) norms of international law in investment treaty arbitration. For that purpose, it analyzes in the first instance broad dispute settlement clauses incorporated in IIAs that make reference to the settlement of 'any investment dispute'. Such clauses grant jurisdiction to investment treaty tribunals to hear non-IIA claims. However, at least two additional conditions need to be satisfied for the investor to bring a self-standing claim based on a non-IIA norm of international law. First, the non-IIA instrument (a contract or another international treaty) may include a dispute settlement clause envisaging exclusive jurisdiction in favour of another forum. Second, the investor's standing to bring a claim based on a non-IIA norm of international law depends on whether this norm attributes any legal entitlement in the benefit of the investor.

Key words
admissibility; exclusive forum selection agreements; investment treaty arbitration; jurisdiction; standing

1. INTRODUCTION

In a number of recent investment arbitration cases,[1] investors partially relied on customary international law in their investment claims.[2] Specific circumstances may account for self-standing claims that invoke the breach of customary international law in investment treaty arbitration. Yet, the protection granted under investment treaty standards generally encompasses – and is even more extensive than – the protection granted under customary international law. This is the case, for instance, with the most common investment treaty undertakings such as the standards of

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1 *Emmis International Holding, Emmis Radio Operating and MEM Magyar Electronic Media v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 March 2013, paras. 33–4; *Accession Mezzanine Capital and Danubius Kereskedöhaz Vagyonkezelö v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013, para. 37; *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, 1976 UNCITRAL Arbitration Rules, Award on Jurisdiction, 13 July 2014, para. 25.

2 K. Parlett, 'Claims under Customary International Law in ICSID Arbitration', (2016) 31(2) *ICSID Review* 434.

fair and equitable treatment, full protection and security, effective means, and the prohibition against unlawful expropriation.

States parties to international treaties – which accord rights to individuals or impose obligations on states in benefit of individuals – usually widen the scope of the protection available under customary international law and envisage additional rights in favour of individuals. Investment treaty standards in international investment agreements (IIAs) do not, however, provide a general basis for the protection of the rights granted to individuals under international law as a whole. This article attempts to address the question of whether investors are entitled to bring self-standing claims based on such (non-investment) international treaties in investment arbitration. To put it differently, instead of claiming the breach of an investment treaty standard, would it be possible for an investor to directly invoke the breach of another international legal norm in investment treaty arbitration?

To give a few examples, freedom of speech in human rights conventions; custom tariffs in trade agreements; environmental norms regarding gas emission or marine pollution; the safeguard of wild life under international environmental agreements; rules preventing double taxation under double taxation treaties; bilateral agreements facilitating the taking of business or entrepreneurial visa or work permit; the right to innocent passage under the United Nations Convention on the Law of the Sea (UNCLOS);[3] or the recognition and enforcement of arbitration agreements and arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[4] can be violated by the host state without leading to a breach of any of the undertakings in the applicable IIA.

To date, some investment tribunals have considered acts in violation of such non-IIA norms as a basis, together with other grounds, for upholding investment treaty claims. In several investment treaty cases, the determination that the non-IIA norm had been breached led to, or at least supported, the tribunal's finding on the breach of the particular IIA undertaking. For example, in *ATA* v. *Jordan* the tribunal's finding on the breach of the New York Convention led to the conclusion that the host state breached the applicable IIA.[5] By the same token, prior to concluding that the investor's investment was subject to unlawful expropriation, the tribunal in *Saipem* v. *Bangladesh* found that the host state's act was contrary to 'international law, in particular to the principle of abuse of rights and the *New York Convention*'.[6] Slightly differently from these two awards, the investment treaty tribunal in *Toto* v. *Lebanon* considered what the right to fair hearing under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)[7] involves with regard to undue delay in domestic court proceedings. Relying on the criteria established under the ICCPR, the tribunal decided that the investor did not demonstrate that the tribunal

3 1833 UNTS 3 (1982), entered into force on 16 November 1994.
4 330 UNTS 3 (1958), entered into force on 7 June 1959.
5 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paras. 125, 128.
6 *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para. 170 (emphasis added).
7 999 UNTS 171 (1966), entered into force on 23 March 1976.

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had *prima facie* jurisdiction to hear the investor's claim that the fair and equitable treatment standard had been breached on the ground of undue delay which occurred before the Lebanese courts.[8]

The analysis presented in this article goes one step further by questioning whether an investor could base its claim upon the violation of non-IIA norms as a self-standing cause of action before investment treaty tribunals. There is no ground to categorically reject the possibility that investors may bring non-IIA claims in investment treaty arbitration. This is rather a question of jurisdiction of investment treaty tribunals. To be more precise, whether or not an investor may invoke the breach of an international norm other than investment treaty provisions depends primarily on the scope of parties' consent to submit their dispute to investment arbitration. It is the scope of the host state's offer to arbitration under the dispute settlement clause of the relevant IIA that will determine the answer to this question (Section 2). This, however, does not conclude the analysis.

It is not hereby suggested that an investor may invoke any breach of international law so long as the applicable IIA provides for broad consent to arbitration. At least two further conditions need to be satisfied for the investor to bring a self-standing claim based on a non-IIA norm of international law. First, some international treaties establish their own dispute settlement mechanism or refer disputes arising from the relevant treaty to the jurisdiction of pre-existing mechanisms. For an investor to invoke a breach of a non-IIA norm before an investment treaty tribunal, the dispute settlement provision of the relevant international treaty should not have taken the investor's option to submit its dispute to another dispute settlement mechanism (Section 3). Second, the investor must have standing for its claim to be admissible. This requires the investor to have a legal entitlement under the relevant non-IIA norm of international law, which constitutes the legal basis of the investor's claim. Otherwise, the investor would not have any legal right to claim before an investment treaty tribunal (Section 4).

2. Scope of consent in investment treaties

In her article entitled 'Claims under Customary International Law in ICSID Arbitration', Parlett notes that:

> the starting point for considering whether such claims are within an ICSID tribunal's jurisdiction is the scope of the parties' consent to arbitration … If the consent to arbitration expressly excludes claims based on customary international law, then it follows that they are definitively outwith the tribunal's jurisdiction.[9]

By the same token, whether a claim based on a non-IIA norm of international law may be directly submitted by an investor to investment treaty arbitration depends on the scope of the parties' consent.

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8 *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras. 152–68.

9 Parlett, *supra* note 2, at 453–4.

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Some international investment agreements – approached with certain scepticism against investment arbitration[10] – aside a vast majority of bilateral and multilateral investment treaties (BITs and MITs) envisage the settlement of investment disputes through arbitration. In the dispute settlement clause of IIAs, contracting states give their consent for investors to submit a category of disputes to investment treaty arbitration. Depending upon the scope of this consent, the types of disputes that are covered by the dispute settlement clause vary across IIAs. That is to say, the host state's offer to arbitration in the applicable IIA is decisive in determining the scope of parties' consent, and thus the jurisdiction of the investment treaty tribunal.

The examination of the terms of the dispute settlement clause in the applicable treaty is indeed essential in determining the jurisdiction of a particular international adjudicatory mechanism as underscored by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[11] The jurisdiction provided by the treaty may either confine disputes in relation to the interpretation and application of that treaty, or disclose a different intention providing broader or even more restricted consent. The same principle applies to IIAs as well.

A survey made by Douglas reveals several prototype provisions in IIAs that record the consent of contracting states to arbitration.[12] Among these, a major category allows the settlement of disputes that only concern alleged breaches of undertakings prescribed by the particular investment treaty. In other words, this category of dispute settlement provisions in IIAs enables investors to arbitrate disputes arising from the substantive provisions of that treaty only. A notable example of such dispute settlement provisions can be found in the Energy Charter Treaty (ECT), which includes within its scope the settlement of '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern *an alleged breach of an obligation of the former under [this Treaty]*'.[13] This category of dispute settlement provisions restrains the material scope of consent, and thus, the subject matter of the tribunal's jurisdiction, exclusively to investment treaty claims.[14] For example, a NAFTA Chapter 11 tribunal rejected its jurisdiction to hear a claim invoking the breach of an international obligation envisaged in another chapter of NAFTA.[15] Indeed, the dispute settlement clauses in Chapter 11 (Articles 1116 and 1117 of NAFTA), which contain NAFTA

[10] E.g., Ch. 14 of the Agreement Between Australia and Japan for an Economic Partnership; Arts. 8.27–8.28 of the Comprehensive Economic and Trade Agreement between Canada-European Union (CETA). See also L. Nottage, 'Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?', (2014) 19(2) *Journal of Japanese Law* 37; L.E. Trakman and D. Musayelyan, 'The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration', (2016) 31(1) *ICSID Review* 194.

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, [2015] ICJ Rep. 3, para. 88.

[12] Z. Douglas, *The International Law of Investment Claims* (2009), 234.

[13] Art. 26(1) of the 1994 Energy Charter Treaty, 2080 UNTS 95 (emphasis added).

[14] Douglas, *supra* note 12, at 235. See also Parlett, *supra* note 2, at 454.

[15] *United Parcel Service of America Inc v. Canada*, Arbitration under Chapter 11 of NAFTA / UNCITRAL, Award on Jurisdiction, 22 November 2002, paras. 60–1, 67.

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contracting states' consent to investor-state arbitration, encompass disputes arising from the obligations envisaged in Chapter 11 of NAFTA but do not cover all of the disputes arising from other chapters of NAFTA. By the same token, a tribunal under the Canada-Venezuela BIT noted that the wording of the dispute settlement clause brings a subject matter limitation, according to which only disputes relating to alleged breaches of the standards undertaken in the IIA could be submitted to international arbitration.[16]

A category of dispute settlement provisions that may usually be found in IIAs concluded by the US offers host state's consent to arbitrate disputes arising from investment treaty undertakings, as well as investment authorizations and investment agreements (contracts).[17] The term 'investment agreement' is defined in the US Model BIT and only covers contracts that grant rights with respect to natural resources, rights to supply services to the public on behalf of the host state, or rights to undertake infrastructure projects.[18] Disputes arising from such investment contracts would thus fall within the scope of the host state's consent regardless of whether the investor simultaneously invokes the breach of one of the treaty standards of treatment.

Another major category of dispute settlement provisions records broader consent compared to the provisions under other categories. IIAs incorporating such consent allow the settlement of *any dispute relating to investment* in investment arbitration. In that case, the investment tribunal's jurisdiction would extend beyond the claims based on investment treaty undertakings.[19] As pointed out by the annulment committee in *Vivendi* v. *Argentina*, this category of dispute settlement clauses 'do[es] not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT'.[20]

It is confirmed several times in investment arbitration case law and by leading authorities that this kind of broader consent encompasses contractual claims, alongside IIA claims, relating to an investment.[21] The annulment committee in *Vivendi* v. *Argentina* held that a claim for breach of contract may fall under the scope of the dispute settlement clause of an IIA.[22] By the same token, the tribunal in *Salini* v. *Morocco* explained that articulation of possible investment treaty breaches in an IIA dispute settlement provision offering consent to arbitration for any investment

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16 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 471.

17 Art. 24(1)(a)(i) and Art. 24(1)(b)(i) of the US Model BIT (2012), available at ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

18 Art. 1 of the US Model BIT (2012). See also K.J. Vandevelde, *U.S. International Investment Agreements* (2009), 599.

19 Douglas *supra* note 12, at 235.

20 *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 55.

21 Yet, it is to be noted that this view does not constitute a *jurisprudence constante*. Some arbitral tribunals still ignored the contrast in the text of different IIAs' dispute settlement provision and failed to treat the discussion on the scope of their jurisdiction. See, for instance, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 65; *LESI S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision, 12 July 2006, para. 84(i).

22 *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 55.

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dispute[23] should not be interpreted as if it excludes contractual claims from the offer to arbitration.[24] Similarly, the tribunal in *SGS* v. *Philippines*, after having noted that the dispute settlement clause at hand was an 'entirely general provision', held that a dispute arising from an investment contract would constitute a 'dispute with respect to investments' as much as a dispute concerning an alleged breach of the expropriation clause would do under the applicable IIA.[25] The tribunal contrasted the IIA dispute settlement provisions recording broad consent from the ones recording narrower consent. It observed that states parties aiming to limit investment tribunals' jurisdiction to claims arising from the breach of substantive provisions of the IIA would explicitly adopt a more specific language, such as '[d]isputes … regarding the interpretation or application of the provisions of this Agreement'.[26]

This approach has been endorsed by leading scholars as well.[27] In the words of Crawford, 'contractual jurisdiction can be invoked under any sufficiently clear generic dispute settlement clause'.[28] In the same vein, Douglas asserts that the general language in such dispute settlement clauses 'does not expressly carve out contractual claims from its purview'[29] as the state practice refutes the assumption that contractual claims should be excluded from the scope of these broad clauses.[30]

An important caveat worthy of note is that the jurisdiction of an investment treaty tribunal established under broad consent does not extend to contractual disputes between an investor and a state entity having a separate legal personality from the state itself. Since the state is not a party to the contract between the investor and the state entity, it does not owe obligations under the contract. In other words, it is not the state who is supposed to perform the state entity's obligations, e.g., the payment of the contract fee, under the contract. Therefore, a contractual dispute arising from the non-performance of such contract is not between the investor and the state. For that reason, the investor is not entitled to bring its contractual claims against the

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23 Art. 8(1) of the 1990 Italy-Morocco BIT reads as '[a]ll disputes or differences, *including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures*, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor …' (emphasis added).

24 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 59.

25 *SGS Société Générale de Surveillance SA v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 131. For an opposite reading of an identical dispute settlement clause, see *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras. 161–2.

26 *SGS v. Philippines*, *supra* note 25, para. 132(b). See also, ibid., para. 132(e).

27 See, e.g., C. Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered', in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 281, 296–9; S. Alexandrov, 'Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?', in K. Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010) 323, 331–2; Parlett, *supra* note 2, at 437. *Cf* E. Gaillard , 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the SGS Cases Considered', in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 325, 336.

28 J. Crawford, 'Treaty and Contract in Investment Arbitration', (2008) 24(3) *Arbitration International* 351, at 362.

29 Douglas, *supra* note 12, at 238.

30 Douglas, *supra* note 12, at 238–40.

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state under an IIA, which records the state's (rather than the relevant state entity's) consent to arbitration.[31]

By the same token, consent between the host state and the investor to submit investment disputes to arbitration does not in principle extend to disputes arising from a contract between the state and another legal entity – which might be controlled by or controlling the investor who is the claimant in the particular claim. In other words, the investor cannot rely on the contract between its mother company or subsidiary and the host state to bring a contractual claim against the host state, notwithstanding the IIA's dispute settlement clause recording a broad offer to settle any investment dispute in arbitration or the inclusion of an umbrella clause in the IIA.[32] Accordingly, an investment tribunal observed that '[an obligation to observe a contractual undertaking] is not a freely transferrable obligation, without the consent of the State that has given the undertaking'.[33] The same tribunal noted that a host state owing an obligation to observe an undertaking to a legal entity should not suggest that it also owes the same obligation to the company's shareholders.[34]

An open-ended reference to investment disputes in the dispute settlement clause of an IIA should not be construed to incorporate merely contractual claims in the material scope of an investment tribunal's jurisdiction. As indicated by Douglas, the meaning of the reference to 'any' or 'all' disputes with respect to investments is broad enough to encompass all disputes 'that are factually related to investments'.[35] Thus, such reference comprises a basis for claims founded on other sources of state responsibility.

Accordingly, a breach of an international obligation by the host state may give rise to an investment dispute regardless of the origin of this obligation. A dispute arising from the breach of a norm rooted in an international treaty or in customary international law would qualify as an investment dispute if the dispute is factually related to the investment. Whether or not the international norm in question is directly relevant to the investment regime is not significant in characterizing the dispute at hand as an investment dispute.

Two eminent scholars elaborate on the interpretation of general references to investment disputes in IIAs in the context of the enforcement of international environmental norms against host states through investment treaty arbitration. The broad consent in an IIA, Douglas asserts, allows the investor to 'claim damages for

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31 See *Salini v. Morocco*, *supra* note 24, paras. 60–1; *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras. 211–16. See also Crawford, *supra* note 28, at 363. In *Bayindir v Pakistan*, which involved this scenario, the tribunal upheld its jurisdiction only over treaty claims without providing any reasoning as to why it did not have jurisdiction over contractual claims (*Bayindir Insaat v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 263). This is mostly because the tribunal did not have power to make such decision after the investor had withdrawn its argument that the tribunal had jurisdiction over contractual claims (para. 63). In any case, the tribunal did not have jurisdiction to hear those claims because the contract was between the investor and a state entity, who was not a party to the investment dispute.

32 See *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 384; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 205; *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 377.

33 *WNC Factoring Ltd v. The Czech Republic*, PCA Case No. 2014-34, Award, 23 February 2017, para. 322.

34 Ibid., para. 323. See also para. 335.

35 Douglas, *supra* note 12, at 238.

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the host state's failure to comply with an environmental obligation in domestic law or international customary or conventional law so long as such failure has caused damage to its covered investment'.[36] A topical example where this approach may find application would be in the context of contamination of an eco-tourism site.[37] In exploring the possibility of whether environmental claims may be brought to investment arbitration as independent heads of claims, Viñuales underscores the role of the scope of the arbitration clause in the applicable treaty or contract.[38] He concludes that international case law suggests that 'an investor could bring an independent environmental claim if the treaty in question contains a referral clause'.[39] Hence, an investor can directly ensure the enforcement of an environmental norm through investment treaty arbitration although this norm is rooted in a different source of international law than the relevant IIA. It is noteworthy that such norms do not essentially concern the investment, and thus they do not seek to introduce investment regulations. Yet, the breach thereof would amount to an investment dispute provided that this wrongful conduct is directed to an investment.

One of the instances where an investment tribunal rendered a decision contrary to this interpretation is the famous *Biloune* v. *Ghana* case. In this case, the tribunal had to consider whether Mr Biloune's human rights claims fell within its jurisdiction.[40] Parties to this dispute consented to arbitration by concluding a contract, which included an arbitration clause. The clause required '[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise' to be resolved through arbitration.[41] The tribunal rejected its jurisdiction to hear the claim related to the alleged violation of human rights as an independent cause of action.[42] It based its decision on the ground that 'the Government agreed to arbitrate only disputes "in respect of" the foreign investment. Thus, other matters—however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction'.[43]

It seems that the tribunal's reasoning does not substantiate its conclusion. True, the tribunal's jurisdiction was limited to the disputes in respect of the enterprise, Mr Biloune's investment, and did not extend to human rights violations directed at Mr

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36 Z. Douglas, 'The enforcement of environmental norms in investment treaty arbitration', in P.M. Dupuy and J.E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Incentives and Safeguards* (2013) 415, 424–5.

37 See, e.g., the dispute in *Allard v. Barbados*, *supra* note 1, para. 3. The investor claimed in this case the breach of the applicable BIT, as well as the violation of a principle of customary international law which is the prohibition of using its own territory in such a manner as to cause injury to a third person (ibid., para. 25). It seems that the investor abandoned the latter claim at the merits phase (see *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, 1976 UNCITRAL Arbitration Rules, Award, 27 June 2016, para. 51). The investor did not in this case directly invoke any environmental law cause of action but it indirectly claimed the failure of the implementation of domestic environmental law through the operation of the full protection and security standard of the BIT (ibid., para. 239(iii)).

38 J.E. Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship', (2009) 80 BYBIL 244, at 256–7.

39 Ibid., at 257.

40 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 183, 202–3.

41 Ibid., at 202.

42 Ibid., at 203.

43 Ibid.

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Biloune as a person. However, a human rights violation could still have been invoked as an independent cause of action if the act allegedly breaching human rights had been directed at the enterprise or the enterprise had otherwise been affected by this wrongful act. A tribunal constituted under a similar arbitration clause would hardly have jurisdiction over an investor's allegations of torture, which is a violation that solely affects an investor's personal rights. The same tribunal might, nevertheless, have jurisdiction over disputes concerning the breach of other human rights, so long as this breach affects the investment rather than affecting investor's personal rights only. For instance, violation of investor's property rights under Article 1 of Additional Protocol No 1[44] to the European Convention on Human Rights (ECHR)[45] or arbitrary detention of the investor acting as the manager of the enterprise are human rights breaches that may at the same time give rise to implications affecting the investment itself.[46] Therefore, an investment tribunal having the jurisdiction to settle disputes concerning the investor's investment can hear self-standing claims based on human rights breaches in cases where the investor alleges that the breach has affected the investment.

The finding in the *Emmis* v. *Hungary* case goes against the conclusion in *Biloune* v. *Ghana*, and thereby favours the above-presented interpretation of general references to investment disputes. The investment treaty tribunal in this case was constituted under two different IIAs (Netherlands-Hungary BIT[47] and Switzerland-Hungary BIT[48]). Although the applicable IIAs envisage a variety of investment treaty undertakings, contracting states offered their consent to arbitration only for the settlement of expropriation disputes, this of course being without prejudice to the binding nature of other obligations under the relevant IIA provisions. In other words, investors under these IIAs are entitled only to invoke claims based on a single cause of action, i.e., expropriation.[49] Yet, the dispute settlement clauses incorporated in these two IIAs are not identical, and this slight difference played a role in the tribunal's decision to construe these provisions distinctly. The Switzerland-Hungary BIT refers specifically to Article 6 of the BIT concerning the expropriation to identify the only category of disputes falling within the scope of the dispute settlement clause; whereas the Netherlands-Hungary BIT refers more generally to disputes concerning expropriation in determining the scope of the contracting states' offer to arbitrate investment disputes. Although the difference might at first glance seem negligible, it is not. In the former BIT, contracting states provide their consent to arbitrate disputes arising only from the breach of Article 6 of the BIT.[50] However, by making a rather general reference to 'any dispute … concerning expropriation', the latter BIT incorporates an offer to arbitration that is slightly broader in scope: the

44 ETS 9 (1952).
45 213 UNTS 221 (1950), entered into force on 3 September 1953.
46 See *Balkan Energy (Ghana) Limited v. The Republic of Ghana*, PCA Case No. 2010-7, Award on the Merits, 1 April 2014, para. 553.
47 Concluded on 2 September 1987, entered into force on 1 July 1988.
48 Concluded on 5 October 1988, entered into force on 16 May 1989.
49 *Emmis International Holding, Emmis Radio Operating and MEM Magyar Electronic Media v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 143. See also *Accession Mezzanine v. Hungary, supra note* 1, para. 64.
50 *Emmis v. Hungary, supra* note 1, para. 81.

dispute concerning expropriation need not arise from the specific BIT provision on expropriation. Indeed, a tribunal constituted under this BIT would also have jurisdiction over an investor's expropriation related claim grounded on the breach of an international minimum standard under customary international law,[51] or even another international norm, such as Article 1 of Additional Protocol No 1 to the ECHR that safeguards against unlawful expropriation. Such a slight contrast between the dispute settlement clauses of different IIAs may lead to divergent outcomes in cases where the protection against unlawful expropriation under an applicable international convention is broader in scope than the protection under the applicable IIA.[52]

This analysis demonstrates that the causes of action for investors' claims in investment treaty arbitration, where consent to arbitration is rooted in an IIA, are not necessarily limited to treaty undertakings. An investor can benefit from broad consent recorded in the dispute settlement clause of this IIA in order to invoke another cause of action based upon an international norm, which is not directly connected with any of the substantive investment treaty provisions. Accordingly, an investor can seek damages in investment treaty arbitration resulting from the host state's breach of any international norm so long as the breach factually concerns the investor's investment.

This finding applies to the violation of all customary or conventional norms of international law. Thus, the basis of the investor's cause of action can be the violation of a human rights treaty; a trade agreement; a double taxation agreement, or an international convention regulating the enforcement of arbitral awards. Yet, as expressed previously, this finding does not conclude the analysis of whether non-IIA claims can be heard by tribunals constituted under IIAs. Beside the availability of broad consent in the relevant IIA, there are two further conditions that must be met. First, there should not be an exclusive jurisdiction agreement for the settlement of disputes arising from the application of the non-IIA norm in question that constitutes the basis of the investor's claim. Such an exclusive jurisdiction agreement would prevent the investor from submitting the dispute to investment arbitration under an IIA. Second, in order to invoke a claim based upon the violation of a customary or a conventional norm, the investor should be entitled to a legal interest under the international norm that underlies the cause of action. The investor cannot base the claim on its mere interest in the application of that international norm by the host state.

3. Jurisdiction of other dispute settlement mechanisms

3.1. Forum selection agreements under or in relation to investment contracts

Some IIAs allow investors to bring contractual claims in investment arbitration by recording broad consent to arbitration in the dispute settlement clause. Yet, there is a possibility that the contract, upon which the claim is based, might include

[51] Ibid., para. 82.
[52] Cf. *Accession Mezzanine v. Hungary, supra* note 1, para. 72.

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its own dispute settlement clause, thereby envisaging a forum selection agreement. In the case of a conflict between the dispute settlement clause of the applicable IIA and the forum selection agreement in the contract, the conflict shall be resolved.

The approach adopted in the beginning of the twentieth century concerning *Calvo* clauses may shed some light on the effect of an exclusive forum selection clause on an international claim having a contractual basis. In the case law developed by claims commissions at that time, it was generally accepted that an individual could not impede the right of its state to make international reclamation.[53] More specifically, the Mexico-United States General Claims Commission made a distinction between contractual claims and international claims. It held that *Calvo* clauses barred the submission of the former to claims commissions, but these clauses would not prevent the submission of international claims, e.g., denial of justice claims, to such commissions.[54] These remarks on *Calvo* clauses may provide some guidance for investment treaty tribunals dealing with exclusive forum selection agreements today.[55]

The tribunal in *SGS* v. *Philippines* had to examine the legal implications of an exclusive forum selection agreement in a contract on the contractual and treaty claims brought before an investment treaty tribunal. The tribunal refused to adjudicate on the contractual dispute as the main issue of the contractual claim (first consequence of the forum selection agreement) and as an incidental question to the treaty claims of the investor (second consequence of the forum selection agreement).

As to the first consequence, the reason why the forum selection agreement in the contract precluded the investment tribunal from entering into the merits of the contractual claim was that parties had agreed in the contract to refer claims arising from the contract exclusively to domestic courts of the host state.[56] This exclusive effect can be compared to the approach taken by claims commissions in relation to the effect of *Calvo* clauses on contractual disputes. In this case, the question would be whether the broad consent in an IIA might be extended to contractual disputes that the parties have agreed to submit exclusively to another forum. Thus, the main issue underlying the discussion herein pertains to the scope of these two forum selection agreements – one being specific to the contractual dispute present in the contract itself, whereas the other providing consent for submission of investment disputes to arbitration in general terms. Such a general consent in the IIA cannot supersede the more specific jurisdictional agreement between the parties. As this more specific jurisdictional agreement has an exclusive effect, an investment treaty tribunal should conclude that it does not enjoy jurisdiction over contractual claims notwithstanding the broad consent recorded in the IIA.[57] All other fora, either courts or tribunals, should respect the jurisdiction of the contractually agreed forum having

53 See, e.g., *Woodruff*, USA/Venezuela Mixed Claims Commission, 1903-1905, IX UNRIAA 213, 222.
54 *North American Dredging Company of Texas (USA) v. United Mexican States*, Mexico/USA General Claims Commission, 31 March 1926, IV UNRIAA 26, paras. 14, 20, 23.
55 See also Douglas *supra* note 12, at 366–70.
56 *SGS v. Philippines*, *supra* note 25, paras. 154–5.
57 Douglas, *supra note* 12, at 364 and Rule 45.

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exclusive jurisdiction over the contractual dispute irrespective of the question of whether this forum is a domestic court or an arbitral tribunal.[58] In any event, parties must observe their contractual arrangements envisaging an agreement that requires them to submit disputes arising from the contract to a particular forum.[59] Pursuant to such contractual agreements, other courts and tribunals are supposed to respect this kind of binding jurisdiction agreements between the parties.[60] By concluding an exclusive jurisdiction agreement, an investor renounces the possibility to litigate or arbitrate a particular dispute in any other fora (including before an investment treaty tribunal) than the one that has been agreed upon.[61]

A tribunal explained the effect of the exclusive jurisdiction agreement in a similar way. According to the tribunal, parties 'waive ... the ability to bring before other fora the same claims that they could bring before a tribunal constituted pursuant to [the dispute settlement clause of the contract]'.[62] Since the nature of the impediment to adjudication in other fora resulting from this exclusive forum selection agreement is jurisdictional,[63] it is not at the discretion of the investment treaty tribunal to stay the proceedings.[64]

Whether or not the nature of the impediment would still be jurisdictional when a contractual claim is brought before an investment treaty tribunal on the ground of an umbrella clause (rather than on the ground of broad consent) remains open to discussion. In such an instance, the investment treaty tribunal in *Toto* v. *Lebanon* considered the nature of the impediment stemming from the exclusive forum selection agreement in the contract as jurisdictional.[65] It seems that this approach does not take sufficient account of the legal basis of the particular claim in question. True, the dispute at hand still arises out of the contract, which includes an exclusive forum selection agreement. Yet, this does not prejudice the right of an investor to invoke the umbrella clause under the applicable IIA.[66] Hence, the tribunal constituted under an IIA has the adjudicative power to hear claims related to breaches of the treaty, including the breach of the umbrella clause. The key point, however, is that although the tribunal would have jurisdiction over such claims, it is barred to exercise this power since the content of the dispute involves issues that the parties have agreed to submit exclusively to another dispute settlement mechanism. For this very reason, it would be more plausible in this scenario to consider the impediment posed by exclusive jurisdiction agreements as an issue related to the admissibility of the claim, rather than a jurisdictional issue, when it comes to a claim brought under an umbrella clause.[67]

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58 *SGS v. Philippines*, *supra* note 25, para. 138.
59 Crawford, *supra* note 28, at 363.
60 *SGS v. Philippines*, *supra* note 25, para. 138.
61 Crawford, *supra* note 28, at 363.
62 *MNSS and Recupero Credito Acciaio v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 159.
63 See Crawford, *supra* note 28, at 363.
64 Douglas, *supra* note 12, at 393.
65 *Toto v. Lebanon*, *supra* note 8, para. 202.
66 See *SGS v Philippines*, *supra* note 25, para. 128.
67 Cf. *SGS v. Philippines*, *supra* note 25, paras. 154–5.

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The second consequence of the contractual jurisdiction agreements constitutes an impediment to the admissibility of treaty claims.[68] Notwithstanding their distinct nature from contractual claims (claims directly based on contractual provisions), treaty claims (claims based on substantive investment treaty undertakings) may be affected from exclusive forum selection agreements related to contractual disputes. The legal implications ensuing from the forum selection agreement in a contract are thus not limited to the operation of the broad dispute settlement clause and of the umbrella clause.

The effects of the forum selection agreements on treaty claims may vary. For instance, although the tribunal in *SGS* v. *Philippines* had jurisdiction over the investor's treaty claims, it nevertheless had to stay the proceedings so that the contractually agreed forum (Philippine courts) could pronounce on the contractual rights of the parties, which were incidental to treaty claims.[69]

To clarify the effects of the forum selection agreements on treaty claims, one might think of a case where the investor has a contractual relationship with the host state and the investment is also under the protection of the IIA concluded between the host state and the investor's home state. Although the conduct of the host state may amount to a breach of both the contract and substantive obligations under the applicable IIA at the same time, the occurrence of the latter does not necessarily depend on the former. It could well be possible for an investment treaty tribunal to adjudicate on a treaty claim on the basis of international standards envisaged in the IIA only, without any need for making an analysis of whether a contractual breach has occurred. As underscored by the *Vivendi* Annulment Committee, the protection granted under investment treaty undertakings, particularly the prohibition against unlawful expropriation and the obligation to provide fair and equitable treatment, do not directly concern the contractual relationship between the parties.[70] The violation of these treaty undertakings and contractual stipulations are subject to different standards. Hence, in an oft-cited passage, the *Vivendi* Annulment Committee stated, '[a] state may breach a treaty without breaching a contract, and *vice versa*'.[71] It may indeed be unnecessary for an investment treaty tribunal to pronounce on alleged contractual violations or resolve the contractual dispute between the parties in order to resolve treaty disputes. Even if the treaty claim invoked by the investor in a given case has, one way or another, some bearing on issues related to the contractual relationship between the parties, it still can be settled without requiring the investment treaty tribunal to consider contractual violations. Since the contractual dispute does not, in this instance, become an incidental question that needs to be settled prior to the resolution of the treaty dispute, the exclusive forum selection agreement in the contract would not constitute an impediment whatsoever for the

[68] *SGS v. Philippines*, *supra* note 25, para. 154. See also *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para 76, where the annulment committee refused to consider the forum selection agreement in the contract as an issue affecting the jurisdiction of the tribunal over treaty claims.

[69] *SGS v. Philippines*, *supra* note 25, paras. 175, 177(c).

[70] *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 95.

[71] *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 95.

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tribunal to decide upon treaty claims.[72] In other words, even if an exclusive forum selection agreement is incorporated into the contract, the investor is not barred from invoking claims based on international causes of action, the settlement of which is not contingent upon pronouncements about the contractual dispute itself. This might be seen as resembling the legal implication ensuing from the application of *Calvo* clauses to international claims.

In some cases an investment treaty tribunal's analysis of expropriation or fair and equitable treatment claims *might* be contingent upon the pronouncements made with respect to the contractual dispute between the parties. In these cases, it would be inevitable for the investment treaty tribunal to elaborate on the contractual dispute. To be precise, the tribunal would consider the alleged contractual breach as an incidental question before it starts with its analysis of the alleged treaty breach. The treaty breach may not be resolved without the tribunal having first examined the contractual issue as this examination might be essential for determining the investor's rights that have been affected by the host state's treatment. It should be noted, however, that in case parties previously agreed to submit their contractual dispute exclusively to another forum, the investment treaty tribunal would not have jurisdiction over the contractual dispute.[73]

As noted by Douglas,

> If the object of the claimant's claim is the vindication of contractual rights, then the integrity of the contractual bargain must be preserved; one of the essential terms of that bargain cannot be bypassed at the suit of one of the parties.[74]

Following the same rationale, the *Vivendi* Annulment Committee noted that 'where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.[75] As a consequence, in the absence of any prior pronouncement by the contractually agreed forum on issues arising from the contract, the settlement of which are essential for the adjudication of the treaty claim, it will not be possible for the investment treaty tribunal to enter in the merits of the latter claim.[76] This would render the claim inadmissible rather than leaving the investment treaty tribunal

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[72] See *Impregilo v. Pakistan*, *supra* note 31, para. 289 (consider in conjunction with the analysis in paras. 264–7 and 281). See also *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 101.

[73] *Contra Nykomb Synergetics v. Republic of Latvia*, SCC, Award, 16 December 2003, Section 2.4, where the tribunal concluded that 'it has jurisdiction to determine, as a preliminary matter, whether there has been a breach of the contract, insofar as it is necessary for its decision in relation to the claims raised on the basis of the Treaty'.

In this case, a subsidiary of the investor (but not the investor itself) was a party to the contract which fixed the general tariff for average sales prices of electricity and which involved an exclusive jurisdiction agreement. Although it is true that the jurisdiction agreement would not bind a person that is not a party to it, that person would not be entitled to invoke the rights under this contract even under the guise of a treaty claim. In other words, as opposed to what was explicitly suggested by the tribunal, the investor's claims cannot be based on alleged breaches of its subsidiary's contract.

[74] Douglas, *supra* note 12, at 364.

[75] *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 98. See also Douglas, *supra note* 12, at 371.

[76] For instance, the presence of an unresolved contractual dispute as to the amount payable in *SGS v. Philippines* made the adjudication of the treaty claim by the investment tribunal 'inappropriate and premature'. See *SGS v. Philippines*, *supra* note 25, para. 162.

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without jurisdiction over the claim.[77] The investment tribunal shall, in such a case, decline to exercise its adjudicative power either by rejecting the claim or staying the proceedings.[78]

Pursuant to the annulment committee's decision, the tribunal in the resubmitted *Vivendi* claim reconsidered the effects of exclusive jurisdiction agreements in the contract on the investment tribunal's adjudicative power. In an attempt to shed some light on this issue, it remarked that '[w]hether there is a breach of contract or a breach of the Treaty involves two different inquiries'.[79] Refraining from making a conclusion on the breach of contract,[80] the new tribunal clearly purported to remain within the jurisdictional ambit designated by the annulment committee.[81] This, however, did not keep the tribunal in the resubmitted claim from rejecting the argument that the exclusive jurisdiction agreement precluded the investment tribunal from 'ascertain[ing] whether a Treaty breach may have occurred as a result of or having regard, *inter alia*, to breaches (by either of the parties) of the Concession Agreement'.[82] It also stated that the tribunal could 'come to a view as to whether either of the parties failed to live up to [the contract's] terms'.[83] One may read these lines as if the tribunal could, for the purposes of resolving the incidental questions, establish that a party has breached the contract while exercising its jurisdiction over the treaty dispute. It can, however, also be interpreted that the tribunal's intention was not to interfere with the jurisdictional limits of the forum exclusively agreed upon by the parties for the settlement of contractual disputes. Instead, the tribunal delineated the exercise of its own jurisdiction as 'taking the contractual background into account in determining whether or not a breach of the Treaty has occurred'.[84] This approach is in line with the annulment committee's observation that 'it is one thing to exercise contractual jurisdiction … and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law'.[85] In keeping with the annulment committee's finding, the tribunal in the resubmitted *Vivendi* claim held that its considerations on the contractual relationship between the parties would not require coming to a definite view as to whether there had been any contractual breach.[86] This demonstrates that the essential basis of the claim rooted in that particular investment dispute was not a breach of contract but the treaty.

As a corollary of this finding, an exclusive jurisdiction clause in a contract does not divest an investment treaty tribunal of its jurisdiction under an IIA in relation

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77 See *SGS v. Philippines*, *supra* note 25, para. 163.
78 Douglas, *supra* note 12, at 364, 390 and Rule 44.
79 *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Resubmitted Claim), 20 August 2007, para. 7.3.10.
80 Ibid., para. 7.3.8.
81 Three sentences in *Vivendi v. Argentina*, Award in the Resubmitted Claim, *supra* note 79, para. 7.3.10, which conclude the discussion on the tribunal's power to consider alleged breaches of the contract, are almost identical with the ones in *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 95.
82 *Vivendi v. Argentina*, Award in the Resubmitted Claim, *supra* note 79, para. 7.3.8.
83 Ibid., para. 7.3.9.
84 Ibid.
85 *Vivendi v. Argentina*, Decision on Annulment, *supra* note 20, para. 105.
86 *Vivendi v. Argentina*, Award in the Resubmitted Claim, *supra* note 79, para. 7.3.11.

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to investment treaty claims. This should not, however, suggest that an investment treaty tribunal would not enjoy its adjudicative power only if the dispute is purely contractual. A treaty claim that can be heard by an investment treaty tribunal in such cases is a claim that does not relate to the performance of contractual obligations at all.[87] There may be indeed circumstances where the investor invokes a treaty claim but bases its claim on the non-performance or late performance of the contract. Such treaty claims would also be affected by the exclusive jurisdiction clause in the contract.

For this reason, it would not be completely correct to affirm that the arbitration or jurisdiction clause in the contract would not affect the investment treaty tribunal's jurisdiction over treaty claims, as the contractual clause covers only contractual issues and does not extend to treaty disputes.[88] Underscoring the distinct nature of treaty claims compared to contractual claims[89] would not suffice either to establish the investment tribunal's adjudicatory power to hear the dispute. The *Bayindir* Tribunal's statement that it could 'resolve any underlying contract issue as a preliminary question'[90] and the *MNSS* Tribunal's statement that '[i]n determining claims for breach of the BIT, the Tribunal may examine as a question of fact whether the [contract] was breached, by way of background to a [treaty claim]'[91] could hardly be deemed to be compatible with remarks made by the *Vivendi* Annulment Committee. Both tribunals grounded this power on the distinct nature of treaty and contractual claims.[92] In doing so, however, the tribunals failed to consider that the distinct nature of these claims, which enabled them to arbitrate treaty claims independently, does not empower investment treaty tribunals to decide on issues that must be submitted exclusively to the contractually agreed forum. Indeed, whether or not there has been a breach of the contract is a question of law and not a question of fact. This will be the case, unless the contractually designated forum ascertains the breach or there is no dispute between the parties on the fact that the contract has been breached. But this is an unlikely scenario. Despite being an incidental (or background) question, this issue must be determined by the forum exclusively designated in the contractual jurisdiction agreement.

As a subsidiary ground for not staying the proceedings, the tribunal in *Bayindir* v. *Pakistan* alluded to practical difficulties that would occur in case the forum selection

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87 *Crystallex v. Venezuela, supra* note 16, para. 480.

88 See *Bayindir v. Pakistan, supra* note 31, para. 151; *Toto v. Lebanon, supra* note 8, para. 217. Schreuer also notes, 'consistent line of authorities demonstrates that a forum selection clause contained in a contract between the investor and the host State does not affect the competence of a tribunal, based on a BIT'; Schreuer, *supra* note 27, at 293.

89 See, e.g., *Bayindir v. Pakistan, supra* note 31, paras. 166-167; *Suez, Sociedad General de Aguas de Barcelona S.A, and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, in conjunction with *AWG Group Ltd v. Argentine Republic*, UNCITRAL (together *Suez v. Argentina*), Decision on Jurisdiction, 3 August 2006, para. 43; *MNSS v. Montenegro, supra* note 62, para. 196.

90 *Bayindir v. Pakistan, supra* note 31, para. 270.

91 *MNSS v. Montenegro, supra* note 62, para. 196.

92 See also Gaillard, *supra* note 27, at 344–5 who considers that the scope of application of an exclusive contractual forum selection agreement would be distinct from the scope of application of the dispute settlement clause in a particular IIA even when the investment treaty claim is based on the umbrella clause of the IIA.

agreement is respected.[93] Turning a blind eye to exclusive forum selection agreements is not the appropriate method to overcome these difficulties. Furthermore, investment treaty tribunals do not enjoy discretion not to take into consideration an issue that directly concerns their jurisdiction or adjudicative power to decide on a matter. Therefore, rather than opting for not exercising its power of staying the proceedings in cases where there are *compelling* reasons to do so,[94] the tribunal in *Bayindir* v. *Pakistan* should have recognized this possibility in case there are *legal* reasons ensuing from the forum selection agreement between the parties.[95] Indeed, respecting the exclusive forum selection agreement in the contract is not discretionary when the settlement of the investment dispute before a treaty tribunal hinges upon the resolution of a contractual dispute as an incidental or main question.[96]

In order for this analysis to be valid, the forum selection agreement in the contract should be qualified as an *exclusive* jurisdiction/arbitration agreement. A non-exclusive forum selection agreement would raise neither any jurisdictional conflict between the contractually agreed forum and the investment treaty tribunal, nor an issue related to the admissibility of claims.[97] While non-exclusive jurisdiction agreements allow the parties to litigate their disputes before the designated court therein, these agreements do not require them to submit their disputes exclusively to that particular court.[98] They would either confirm the availability of a local forum that already has jurisdiction[99] or enable the parties to access, among other courts having jurisdiction to hear the dispute, a court that would otherwise not have jurisdiction over a particular claim. Hence, non-exclusive jurisdiction agreements establish the jurisdiction of this alternate forum without prejudice to the jurisdiction of other courts or tribunals.

There may be two means to qualify a jurisdiction agreement as exclusive. The first and the most straightforward is the parties' specific agreement on the exclusivity of the selected forum. The second possibility is the instance where the jurisdiction agreement does not address the question of exclusivity itself, but the law applicable to the agreement qualifies it as an exclusive jurisdiction agreement. In the latter case, common law jurisdictions will generally not interpret such jurisdiction agreements as exclusive since they lack a reference to the exclusivity.[100] In stark contrast to the

93 *Bayindir v. Pakistan*, *supra* note 31, paras. 272–3.

94 Ibid., para. 271.

95 It is to be noted that in the context of the *Bayindir v. Pakistan* case, the relevant contract was not between the parties of the investment dispute (the investor had signed a contract with a state entity, not with the state itself). Therefore, even if there had not been any forum selection clause in that contract, the investment tribunal should have avoided making any conclusion on the contractual dispute.

96 Alternatively, one could also easily argue that in each case where there is an exclusive forum selection agreement, there are *compelling* reasons of principle and policy that mandate preserving the efficacy of such agreements, such as protecting legal certainty, avoiding the potential risk of multiple proceedings, and honouring the collective will of the parties; Douglas, *supra* note 12, at 364–5.

97 Douglas, *supra* note 12, at 375 and 377.

98 G.B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2013), 17.

99 Cf. *Lanco International v. Argentine Republic*, ICSID Case N.o ARB/97/6, Preliminary Decision, 8 December 1998, para. 26. See also *SGS v. Philippines*, *supra* note 25, para. 138. The tribunal in *Lanco* did not consider the contractual dispute settlement clause for the settlement of administrative disputes as a proper forum selection agreement, but rather as a confirmation of the pre-existing jurisdiction, because administrative jurisdiction could not be selected by the mutual agreement of parties (para. 26).

100 Born, *supra* note 98, at 19.

common law approach, a jurisdiction agreement, which does not specify whether or not it is exclusive, is deemed exclusive under the Brussels I Recast.[101] A similar provision may be found in the Hague Convention on Choice of Court Agreements.[102] Arbitration agreements, on the other hand, are in principle deemed exclusive.[103] The New York Convention confirms this principle by requiring domestic courts of contracting states to 'refer the parties to arbitration' once they are seized by either party to an arbitration agreement.[104] Nevertheless, it is always – at least theoretically – possible for parties to conclude a 'non-exclusive' arbitration agreement[105] for the resolution of their disputes.[106]

As a final note, exclusive jurisdiction agreements must be distinguished from the host state's offer to investment arbitration being subject to contrary agreement of the parties or an explicit waiver by the investor.[107] The state and the investor may make an agreement whereby parties refer investment disputes to another forum or the investor waives its rights under the applicable IIA. In case of 'contrary agreement', the tribunal designated in the host state's general offer to arbitrate investment disputes would not have jurisdiction to hear the claim, this time, however, for a slightly different reason. Instead of a more specific jurisdictional agreement, which prevents the more general offer from extending to a specific set of claims (contractual claims), the parties directly preclude the general offer from operating between themselves. By concluding a 'contrary agreement', the parties either replace the designated forum with another one in the specificity of their case, or extinguish its application even with regard to treaty claims.[108]

3.2. Dispute settlement provisions within international treaties

It has been argued in Section 2 of this article that the dispute settlement clause within the applicable IIA recording the host state's broad consent allows an investor to bring a claim in investment treaty arbitration, not only for the host state's breach of an IIA norm, but also for the breach of another international treaty norm. However, some

[101] Art. 25(1) of the EU Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (application as of 10 January 2015).

[102] Art. 3(b) of the Convention of 30 June 2005 on Choice of Court Agreements (entered into force on 1 October 2015).

[103] See E. Gaillard and J. Savage (eds.), *Fouchard Goldman Gaillard on International Commercial Arbitration* (1999), 381; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (2003), 4.

[104] Art. II(3) of the New York Convention, *supra* note 4.

[105] Arbitration agreements providing that 'the parties *may* refer any disputes under the contract to arbitration' (emphasis added) or 'any Party *may* submit the dispute to binding arbitration' (emphasis added) were not construed as typical exclusive arbitration agreements by the Court of Appeal for Ontario in *Canadian National Railway Company v. Lovat Tunnel Equipment Inc* (1999), 174 DLR (4th) 385 and by the UK Privy Council in *Anzen Limited and others v. Hermes One Limited* [2016] UKPC 1 respectively. Notwithstanding that, both courts considered the submission of the dispute to another forum as neither binding nor final. They rather interpreted the dispute settlement clause in a way that arbitration would become binding after either party initiates an arbitral proceeding, even if the matter had previously been submitted to a domestic court (*Canadian National Railway Company*, paras. 12–14; *Anzen v. Hermes*, paras. 32–5).

[106] G.B. Born, *International Commercial Arbitration* (2014), 1392.

[107] For an investment tribunal distinguishing these two interpretations, see *MNSS v. Montenegro*, *supra* note 62, paras. 155–9.

[108] See *Getma International v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on Jurisdiction, 29 December 2012, paras. 97–125; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, paras. 187–94.

of these international treaties encompass their own dispute settlement provisions. By and large, such provisions either grant jurisdiction to a pre-existing international court or envisage the settlement of disputes arising from the violation of the treaty's substantive norms through international arbitration. Some international treaties may, although occasionally, establish a particular court, tribunal, or a body for the settlement of these disputes.

For instance, international human rights instruments establish their own dispute settlement mechanisms and grant jurisdiction thereto over disputes arising from the interpretation and application of substantive norms envisaged in these instruments.[109] By the same token, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) established the Dispute Settlement Body (DSB) for the settlement of disputes arising from trade agreements concluded within the framework of the World Trade Organization (WTO).[110] International courts of regional organizations usually have jurisdiction to interpret and apply treaties establishing the relevant regional organization as well as regulations, directives, and resolutions concluded under the auspices of this organization.[111] Member states of these organizations may also, in a subsequent protocol, confer jurisdiction to these courts over disputes arising from the specified international conventions concluded between each other. This would enable international courts of regional organizations to interpret and apply these international conventions, albeit such conventions do not officially constitute an act of the particular regional organization. An example can be given from the Court of Justice of the European Union (ECJ), which has jurisdiction to interpret some private international law instruments. Some of these instruments are in the form of EU regulations and the ECJ finds jurisdiction over disputes concerning the interpretation and application of these instruments since they constitute EU legislative acts.[112] Some rather old instruments are, however, in

[109] Art. 28 of the ICCPR established the Human Rights Committee. As per Art. 41, the Committee has jurisdiction to hear claims of a state party alleging that another state party has breached its obligations under the Covenant on the condition that both states parties have recognized the competence of the Committee. Art. 19 of the ECHR established the European Court of Human Rights (ECtHR), which, under Art. 32, has jurisdiction to hear all disputes concerning the interpretation and application of the Convention and its Protocols. Art. 30 of the African Charter on Human and Peoples Rights established the African Commission on Human and Peoples' Rights, which, under Art. 49, has jurisdiction to hear disputes between states parties concerning a state party's allegation that the other has violated the provisions of the Charter. Art. 52 of the American Convention on Human Rights established the Inter-American Court of Human Rights, which, under Arts. 61 and 62, has jurisdiction over claims submitted by states parties, as well as by the Inter-American Commission on Human Rights, against another state party that has recognized the Court's jurisdiction for disputes concerning the interpretation and application of the provisions of the Convention.

[110] App. 1 to the DSU lists the agreements that are covered by this particular dispute settlement mechanism.

[111] E.g., under Arts. 258 and 259 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has jurisdiction over disputes concerning the obligations prescribed by this treaty and the Treaty on European Union, and under Art. 263, over legislative acts, recommendations, opinions, and other acts of the organs of the European Union.

[112] E.g., Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation recast); Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I Regulation); Regulation No. 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation); Regulation No. 1259/2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation (Rome III Regulation); Regulation No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and

the form of international conventions[113] and the ECJ finds jurisdiction over disputes arising from these conventions owing to a subsequent protocol concluded between member states.[114]

The crux of the discussion is the question of whether a dispute, which falls within the scope of an international treaty's dispute settlement provision establishing the jurisdiction of a pre-existing or a new forum, can also be brought in investment treaty arbitration. Would the dispute settlement provision of an international treaty operate as a jurisdictional impediment to the jurisdiction of a tribunal established under another international treaty over claims for the breach of the former treaty? More precisely, in cases where the dispute is factually related to an investment and thus covered by the relevant IIA's broad dispute settlement clause, can the investor invoke before an investment treaty tribunal a cause of action based on a non-investment treaty which incorporates its own dispute settlement clause? Or would the dispute settlement provision in the particular international treaty preclude an investment treaty tribunal from hearing claims grounded on this non-IIA norm?

To concretize the issue to be examined, one may assume a case where the host state has violated a human rights treaty (e.g., the ICCPR or ECHR), a trade agreement (e.g., the GATS or NAFTA), or alternatively its domestic courts have misapplied the conflict of laws rule under the Rome Convention. Let us also suppose that the treaty in question envisages the settlement of disputes concerning its interpretation and application through a specific international dispute settlement mechanism. It is, however, possible that the dispute settlement provision incorporated in an IIA records broad consent of the host state, which is also a contracting state to the international treaty in question. In this case, considering that the treaty in question refers disputes arising from the substantive norms of that treaty to another mechanism, would the dispute settlement provision in the particular treaty preclude the investor from pursuing an investment arbitration claim, despite the broad consent recorded in the IIA?

To address this question, it may be useful in the first place to make an analogy with contractual claims that are submitted to investment treaty arbitration. Indeed, contracts including a forum selection clause pose a theoretically similar (or even

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acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Rome IV Regulation). These instruments are in the form of EU regulations rather than international conventions.

[113] E.g., Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) and Convention on the law applicable to contractual obligations (Rome Convention). The Rome Convention may still find application due to intertemporal rules in the Rome I Regulation, which replaced the Rome Convention. Art. 28 of the Rome I Regulation states that the Regulation is to apply to contracts concluded after 17 December 2009. Contracts concluded before this date are still governed by the Rome Convention.

[114] Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (see curia.europa.eu/common/recdoc/convention/en/c-textes/bruxo3-idx.htm) gave jurisdiction to the ECJ to interpret the Brussels Convention. First Protocol of 19 December 1988 on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations (*Official Journal of the European Communities L 048*, 20 February 1989, at 1–16) and Second Protocol of 19 December 1988 conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations (*Official Journal of the European Communities L 048*, 20 February 1989, at 17–22) gave jurisdiction to the ECJ to interpret the Rome Convention.

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identical) problem. In both scenarios, the investor invokes before an investment treaty tribunal a claim grounded on a cause of action that is rooted in a non-IIA instrument providing for its own dispute settlement mechanism. The above discussion[115] about the legal implications of contractual forum selection agreements reaches three conclusions that are applicable along similar lines also to conventional dispute settlement provisions.

The first point to note is that concluding a forum selection agreement with respect to contractual disputes does not in and of itself preclude the parties from submitting their contractual claims to another forum. For a forum selection agreement to bar the jurisdiction of other courts or tribunals that would otherwise enjoy jurisdiction to hear a particular dispute, the forum selection agreement should be qualified as an exclusive jurisdiction agreement. The exclusive nature derives either from explicit contractual terms or, in the absence thereof, from procedural rules under the law applicable to the forum selection agreement. By the same token, a dispute settlement provision in an international treaty may grant exclusive jurisdiction to a court or tribunal over disputes arising from substantive norms of that particular treaty. Oppositely, the non-IIA treaty in question may specifically enounce that the designated court or tribunal for the resolution of such disputes does not enjoy exclusive jurisdiction. It may also be the case that the dispute settlement provision in the non-IIA treaty involves no qualification as to the exclusivity of the designated court or tribunal's jurisdiction. In the latter scenario, there is no general principle of law to the effect that dispute settlement provisions in international treaties should be construed *per se* as if they grant exclusive jurisdiction to the designated forum unless otherwise agreed by contracting states. In order to determine whether these *naked* dispute settlement provisions have an exclusive effect, one should resort to the guidance of international law on treaty interpretation. These rules can be found in the Vienna Convention on the Law of Treaties (VCLT).[116] Accordingly, the dispute settlement provision in question should be interpreted 'in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose'.[117] There is no basis under this rule for considering *naked* dispute settlement provisions as if they provide exclusive jurisdiction in favour of the designated court or tribunal. Therefore, dispute settlement provisions in international treaties should be deemed as non-exclusive unless the particular provision explicitly provides exclusivity or unless the context, object, and purpose of the treaty, and more specifically of that particular provision, or other applicable means of interpretation prove otherwise.

Second, even if an IIA offers broad consent for the settlement of investment disputes through investment arbitration, a tribunal constituted under such IIA would not have jurisdiction to hear a contractual claim provided that the contract includes an exclusive jurisdiction agreement. Since the contractually agreed forum establishes a more specific jurisdiction for that claim and it explicitly excludes the juris-

[115] See Section 3.1.
[116] 1155 UNTS 331 (1969), entered into force 27 January 1980.
[117] Art. 31(1) of the VCLT.

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diction of other courts and tribunals, state's offer for arbitration under the applicable IIA will not extend to that particular contractual dispute. In a similar fashion, on condition that the conventional dispute settlement provision establishes an exclusive jurisdiction in favour of the designated mechanism, this explicit provision will exclude the jurisdiction of other courts and tribunals to hear international claims with regard to the application of this treaty. Therefore, an investor may invoke in investment arbitration an international cause of action based on a non-IIA treaty, only if this treaty does not include an exclusive dispute settlement provision.

Third, when the essential basis of an investment treaty claim is a breach of contract, the treaty claim will not be admissible, provided that there is an exclusive forum selection agreement in the contract. In that case, the incidental issue of whether the contract has been breached cannot be heard by the investment treaty tribunal. The tribunal shall refer the parties to the contractually agreed forum so that the contractual dispute be resolved by its proper forum. In the same vein, when the essential basis of an investment treaty claim is the breach of a non-IIA treaty, the claim will not be admissible if there is an exclusive dispute settlement provision in this non-IIA treaty. In other words, it would not be permissible for an investor to argue in investment treaty arbitration that a breach of such non-IIA treaty amounts to an unlawful expropriation, the breach of the fair and equitable treatment standard, or the breach of any other investment treaty undertaking. This separate and incidental internationally wrongful act should be adjudged in the particular court or tribunal exclusively designated by the treaty. An investment treaty should not thus make any finding on the application of this treaty, even within the context of an incidental question to an investment treaty claim. On the other hand, if the same acts leading to the breach of the treaty are already incompatible with the investment treaty undertakings, there would not be any admissibility problem in invoking the investment treaty cause of action. In other words, an investment treaty tribunal can hear an investment treaty claim without discussing the breach of the substantive norms of the non-IIA treaty, even if this treaty incorporates an exclusive dispute settlement provision. In that scenario, the question of whether the host state has breached investment treaty undertakings would be an independent question from the breach of the non-IIA treaty.

For a non-IIA treaty to trigger an impediment as to the jurisdiction of an investment tribunal to hear a dispute arising from that treaty or admissibility of a claim based on investment treaty undertakings, the non-IIA treaty should incorporate a dispute settlement provision granting exclusive jurisdiction. Otherwise, such a jurisdictional or admissibility problem does not arise. Non-IIA treaties not containing any dispute settlement provision[118] do not thus raise any problem in that regard. It is, however, paramount to discuss whether the dispute settlement provision in a non-IIA treaty establishes exclusive jurisdiction in favour of the designated mechanism. If so, the dispute settlement provision will preclude other mechanisms from

[118] E.g., the New York Convention, *supra* note 4.

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adjudging as a main question or making findings as an incidental question a dispute arising from that treaty.

There are a number of international treaties, which contain an imperfect dispute settlement provision. The dispute settlement provision in these treaties do not incorporate contracting states' prior binding consent to resolve disputes arising from this treaty before a given mechanism.[119] The dispute settlement provisions of these treaties do clearly not establish exclusive jurisdiction and constitute an impediment as to the jurisdiction of an investment tribunal or admissibility of an investment treaty claim. This article will discuss less obvious scenarios. It will treat dispute settlement provisions of three major international treaties, which provide binding consent for the settlement of disputes arising from respective treaties and which at the same time established their own dispute settlement mechanisms (European Court of Human Rights (ECtHR), International Tribunal for Law of the Sea (ITLOS), and DSB of the WTO).

Article 19 of the ECHR established the ECtHR. The jurisdiction of the Court is envisaged in the following articles: Article 32(1) grants jurisdiction to the Court for all matters concerning the interpretation and application of the ECHR. Articles 33 and 34 respectively specify that the breach of the ECHR may be invoked against a Contracting Party by another Contracting Party and by individuals. Nothing in these articles suggest that the ECtHR would have an exclusive jurisdiction over disputes arising from an alleged breach of the rights set forth in the ECHR.[120] Although the Court is empowered to hear any dispute as to the application of the ECHR, this power does not preclude other courts and tribunals from enjoying jurisdiction to apply the ECHR. Contracting Parties and individuals may perfectly submit their disputes to other fora, which find jurisdiction over the dispute.

The ITLOS, which is established under the Annex VI of the UNCLOS, is only one of the fora where the claimant state can submit its claims deriving from the Convention. The UNCLOS designates four different mechanisms, at least one of which shall be chosen by any ratifying state party for settling potential disputes arising from the Convention.[121] Each state party thus accepts the compulsory jurisdiction of at least one dispute settlement mechanism to litigate its UNCLOS disputes.[122] The ITLOS has been listed among these mechanisms. Nevertheless, the chosen mechanism by a state party might not be the ITLOS, in which case the ITLOS will not have jurisdiction over the claims brought against that particular state party.[123] Submission of the

[119] E.g., Art. 11(3) of the 1985 Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 293 (entered into force on 22 September 1988); Art. 22(2) of the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1936 UNTS 269 (entered into force on 6 October 1996); Art. XVIII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243 (entered into force on 1 July 1975).

[120] Art. 33 reads: '[a]ny High Contracting Party *may* refer to the Court any alleged breach of the provisions of the Convention … by another High Contracting Party' (emphasis added) and Art. 34 reads: '[t]he Court *may* receive applications from any person … claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention …' (emphasis added).

[121] Art. 287(1) of the UNCLOS.

[122] J.G. Merrils, *International Dispute Settlement* (2017), 180.

[123] Art. 287(5) of the UNCLOS.

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dispute to this chosen forum is, however, subject to the operation of Article 280, which reads:

> Nothing in [Part XV: Settlement of Disputes] impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Besides, Article 282 of the UNCLOS allows states parties to agree, through another international instrument (e.g., general, regional, or bilateral treaties), that their UNCLOS disputes be settled by another mechanism in lieu of the dispute settlement mechanism envisaged in the UNCLOS. These provisions clearly allow other courts and tribunals to hear UNCLOS disputes provided that parties agree to such mechanism. For this reason, Shany characterizes the UNCLOS dispute settlement procedures as 'residual adjudicative mechanisms' that obviously do not enjoy exclusive jurisdiction.[124] Indeed, a more specific regional international convention excluded the UNCLOS tribunal's jurisdiction in *Southern Bluefin Tuna*.[125] In *MOX Plant*, on the other hand, the tribunal decided to suspend the proceedings in face of other international instruments that found application until the norms, which would not fall within the jurisdiction of such other judicial institutions, were identified.[126]

In similar lines, the tribunal in *South China Sea* considered the applicability of the UNCLOS jurisdictional rules against several more specific international law instruments, but then concluded that none of these instruments satisfied the conditions to prevent the claimant from bringing an UNCLOS claim.[127]

In contradistinction with the ECtHR and the ITLOS, the DSB of the WTO is granted with an exclusive jurisdiction to settle disputes arising from substantive norms of the set of international treaties establishing the mechanism.[128] The settlement of trade disputes under the DSB is set forth in Annex 2 to the Agreement Establishing the World Trade Organization, that is, the DSU. Article 23 of the DSU specifies that any dispute arising from a breach of trade standards stipulated under WTO agreements shall be submitted to the settlement procedure and mechanism envisaged in the DSU. It reads, '[w]hen Members seek the redress of a violation of obligations … under the covered agreements … they *shall have recourse to, and abide by*, the rules and procedures of this Understanding'.[129] The language of this dispute settlement clause, which requires WTO Members to settle their trade disputes arising from WTO agreements in accordance with the DSU, clearly excludes the possibility to invoke the breach of WTO trade standards in another forum.

As a corollary, Iwasawa explains, even if the complaining party is entitled by a regional trade agreement, such as NAFTA, to choose either the dispute settlement

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[124] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), 201–2.

[125] *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, XXIII RIAA 1, para. 59.

[126] See *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Order No. 3, 24 June 2003, paras. 23–8.

[127] *South China Sea (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 159.

[128] Shany, *supra* note 124, at 183; J. Crawford, *Brownlie's Principles of Public International Law* (2012), 739; Merrils, *supra* note 122, at 232.

[129] Emphasis added.

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procedures of this regional trade agreement or the WTO procedures to settle a dispute concerning a WTO agreement, the DSU would require referral of the dispute to the WTO.[130] The availability of one single procedure and forum in case a WTO dispute arises – and the exclusion of other fora – serves to the safeguard of the WTO agreements and functioning of the WTO system.[131] As the general provisions underscore, the WTO dispute settlement system is 'a central element in providing security and predictability to the multilateral trading system'.[132] The title of Article 23 of the DSU also suggests that a single dispute settlement mechanism will strengthen the multilateral system. WTO trade agreements are thus interpreted more homogeneously and the scope and the extent of the obligations that the trade agreements impose are more certain. The exclusion of the possibility to submit WTO disputes elsewhere protects also the hierarchy of remedies within the WTO system. Indeed, the primary remedy under the DSU is the full implementation of the DSB's recommendation, which would bring a member state's measure into conformity with the WTO agreements. Compensation and retaliation could merely be temporary measures and they are not preferred to full implementation of the recommendation.[133] This rule reflects the purpose of the WTO, which is to facilitate international trade. The resolution of a WTO dispute elsewhere could have impaired this principle. For all these reasons, the purpose behind WTO agreements justify the exclusivity of the dispute settlement clause, according to which a WTO dispute shall be solely resolved pursuant to the DSU.

Among the dispute settlement clauses analyzed above, only Article 23 of the DSU grants exclusive jurisdiction. Therefore, an investment treaty tribunal established on the basis of broad consent offered in an IIA can make determinations, as a main or incidental question, on an investment claim, which invokes the breach of any substantive norm stipulated within the ECHR or the UNCLOS. The host state may be held responsible in investment treaty arbitration for its breach of these treaties following its wrongful act, which affected the investment. Investment tribunals may also decide that the host state's act, which is not in conformity with the ECHR or the UNCLOS, constitutes at the same time a breach of an investment treaty undertaking (e.g., the fair and equitable treatment standard). Nevertheless, even via an IIA dispute settlement clause offering broad consent, an investor cannot bring a claim for the infringement of substantive norms stipulated within WTO agreements. It can claim neither directly that the host state has breached these trade agreements, nor indirectly that the breach of the trade agreement led to the breach of an investment treaty undertaking. Due to the exclusive dispute settlement provision in the DSU, an investment treaty tribunal cannot make a judgment on the question of whether the host state has violated a WTO agreement. In that context,

[130] Y. Iwasawa, 'Settlement of Disputes Concerning the WTO Agreement: Various Means Other Than Panel Procedures', in M.K. Young and Y. Iwasawa (eds.), *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (1996), 377, 400. See also Merrils, *supra note* 122, at 232; cf. Shany *supra* note 124, at 184.

[131] For the objectives of the WTO dispute settlement procedure, see M. Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* (2015), 90.

[132] Art. 3(2) of the WTO DSU.

[133] Art. 22(1) of the WTO DSU.

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an investor can merely argue that the trade measure taken by the host state amounts to a breach of investment treaty undertakings, regardless of whether this measure violates WTO agreements at the same time. The investment claim needs to be based on a completely independent cause of action from the breach of WTO agreements.

4. Investor's standing to invoke the particular international cause of action

It is accepted in the case law of international courts that international treaties can create rights directly vested in individuals (individual rights).[134] The individual right need not have the character of a human right so that it could be directly conferred upon the individual.[135] It is a right 'which [individuals] acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals'.[136] Whether an international treaty creates such individual rights is a matter of treaty interpretation.[137] Paparinskis explains that the ICJ in the *LaGrand* case considered two aspects in its determination that the treaty norm at issue created an individual right. Those two considerations were the 'formulation of the treaty rule in such a manner that its application is conditional upon the individual's conduct' and 'the formulation of unconditional obligations by the state in the language of individual "rights"'.[138]

Among different models suggested to explain the nature of investors' rights under IIAs, the two most plausible models are based respectively on 'substantive-direct' theory and 'procedural-direct' theory.[139] Whereas in the model based on 'substantive-direct' theory substantive rights under IIAs are directly vested in investors, only the procedural right to bring a claim is directly vested in the investor in the second model. According to the 'procedural-direct' theory, even though the IIAs do not directly confer substantive rights on the investor, they grant individuals legal capacity or standing to claim state responsibility in investment arbitration. That is to say, under the 'procedural-direct' theory, an individual can bring an investment claim before an investment treaty tribunal although it is not entitled to any substantive right under the relevant IIA. The finding that an investor can bring such claims despite not being granted with a substantive right under one of the most plausible theories conceptualizing the investment treaty arbitration mechanism has never become a

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[134] *LaGrand (Germany v. USA)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466, para. 77; *Avena and Other Mexican Nationals (Mexico v USA)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12, para. 40. Cf. *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, PCIJ Rep. Series B No 15 (1928) 3, at 17–18. See also E. Lauterpacht (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, Vol I (1970), 469–70; K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011), 47–175.

[135] *LaGrand*, *supra* note 134, para. 78; *Avena*, *supra* note 134, para. 124.

[136] R. Jennings and A. Watts, *Oppenheim's International Law* (1992), 847 (footnote omitted).

[137] *LaGrand*, *supra* note 134, para. 77. See also M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', (2013) 24(2) EJIL 617, at 626.

[138] Paparinskis, *supra* note 137, at 626.

[139] Douglas, *supra* note 12, at 32–8; Parlett, *supra* note 134, at 103–19. See also Paparinskis, *supra* note 137; A. Peters, *Beyond Human Rights* (2016), 301–17.

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serious concern.[140] Acknowledging this theory as a plausible model suggests that the investment treaty arbitration mechanism does not specifically require investors to invoke their own direct rights when they claim state responsibility for the breach of an international norm. This must be because of dispute settlement clauses in IIAs, which establish individual's capacity to bring claims related to the investment. The fact that these dispute settlement clauses establish standing at that extent does not depend on the theory conceptualizing investment treaty arbitration. Therefore, the finding that an investor can bring an investment claim even if it is not entitled to any substantive right must be effective regardless of the theory adopted. Accordingly, investor's standing in investment treaty arbitration does not depend on the conferral of substantive rights to the individual but on the presence of a claim related to the investment.

This should not, however, be read too broadly suggesting that investor's standing would extend to each claim for any internationally wrongful act having adverse effect on the investment. Notwithstanding the adverse effect generated as a result of the breach of the international norm, an investor would not have standing to invoke a breach, should the norm in question not confer any legal interest on the investor. If the investor does not have any legal interest with regard to a particular norm, it would not have standing to claim its breach. That is to say, an investor would not have standing to invoke a purely inter-state cause of action, as the investor would not vindicate any interest from that norm.[141]

The limits of investor's standing in investment arbitration should be designated with reference to investor's legal interests. Even if an investor is not a direct right-holder, it may be a beneficiary of an international norm. Under such an international norm, the investor would also have a legal entitlement or interest that it can vindicate. So long as an investor can vindicate a legal interest conferred upon it by an international norm, it will have standing in investment arbitration to claim state responsibility for the breach of this norm.

As noted above, the breach of an international law norm (located either in customary international law or in an international treaty) does not necessarily infringe legal interests ascribed to individuals. An important number of international treaties do indeed regulate inter-state issues. Even if the breach of an inter-state regulatory norm might have some negative effects on the individual, and more specifically on the investor, the individual would not still be eligible to claim the responsibility of the state breaching this norm as it does not bear any right, benefit, legal interest, or any other entitlement whatsoever under this norm. It is thus paramount to

[140] This might be contrasted with the general understanding in international law, which is expressed by Peters in the following terms: 'the violation of a State obligation that is owed only among States and that benefits individuals only reflexively (without a corresponding primary right of that individual against the State) cannot trigger State responsibility vis-à-vis that individual, but it might trigger international responsibility vis-à-vis the individual's home State'; Peters, *supra* note 139, at 167.

[141] The investor may, however, claim that this wrongful act is at the same time in breach of another norm, which protects the investor or its investment, such as the breach of the fair and equitable treatment standard. This would depend on the interpretation of the content of the relevant norm. The investor would have standing to invoke this international cause of action under the traditional investment treaty arbitration regime.

distinguish purely inter-state norms from the norms creating a certain legal entitlement or standard of protection in the benefit of individuals.

To give an example, the main obligations enumerated under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention)[142] require the states parties to refrain from developing, producing, acquiring, stockpiling or retaining chemical weapons, transferring them to anyone, using chemical weapons, and to destroy chemical weapons and production facilities in the possession of contracting states or located under their jurisdiction.[143] This is a purely inter-state norm. Likewise, parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change[144] engaged in reducing carbon dioxide gas emissions.[145] Along the same line, Article 2 of the UNCLOS regulates the legal status of the territorial sea and Article 3 permits states to establish the breadth of their territorial sea up to a limit not exceeding 12 nautical miles. These international norms regulate inter-state relations and they create rights and obligations purely on inter-state level. They do not provide a certain legal entitlement or protection in the benefit of individuals.

An investor who has invested in green energy, for instance, cannot invoke the breach of the Kyoto Protocol although it incurred some loss as a result of the host state's failure to implement measures envisaged in the Kyoto Protocol. This claim would be inadmissible due to lack of standing, as the investor does not vindicate any legal entitlement or interest under the Kyoto Protocol. The investor is not the beneficiary of the breached norms and these norms do not provide any standard of protection to the benefit of the investor.

Within the context of international environmental law, there are some other norms that are not of purely inter-state character and that concern individual's interests.[146] Even these norms, however, are not directly enforceable most of the time, as they do not require the state to respect a particular substantive right but to bring regulations guaranteeing and promoting individual access to information, decision-making, and justice in environmental matters.[147] This would also confirm that individual's legal interest in international environmental law is to a large extent limited at present with the right of information, which is not a substantive norm but

[142] 1974 UNTS 45 (1992), entered into force 29 April 1997.
[143] Art. 1 of the Chemical Weapons Convention, ibid.
[144] 2303 UNTS 162 (1997), entered into force 16 February 2005.
[145] Art. 3 of the Kyoto Protocol, ibid.
[146] Principle 1 of the Rio Declaration on Environment and Development states that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. This is a non-binding soft law instrument. Besides, whereas this norm puts human beings at the centre of concerns, it aims to protect the humankind and the societies rather than individuals. For this reason, it must be construed as an inter-state norm as well. The only norm recognizing the rights of individuals is Principle 10, which provides for an entitlement to an appropriate level of access to information concerning the environment that is held by public authorities. This principle is still not binding *per se*. It inspired, however, the adoption of the 1998 Aarhus Convention. See P. Sands and J. Peel, *Principles of International Environmental Law* (2012), 91.
[147] See Arts. 1, 3(1) and 3(7) of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 446 (entered into force 30 October 2001).

a procedural one.[148] Therefore, an individual would not usually have legal standing before an international court or tribunal to invoke a specific substantive norm of international environmental law against a state. Nevertheless, it is possible to consider the environmental harm as a breach of an existing international obligation on a case-by-case basis. An individual can claim that (s)he is a victim of a human rights violation due to the environmental harm.[149] For instance, the ECtHR in *Lopez Ostra* v. *Spain* found a breach of the right to respect for individual's home as a result of environmental pollution made by a plant.[150] Still, this is different from directly enforcing a substantive environmental norm.

Notwithstanding the inter-state nature of a particular international treaty in general, it may still incorporate some norms, which envisage states parties' conduct towards individuals. These particular norms do not only operate on an inter-state level; they, at the same time, provide individuals with certain legal interests. An example may be found in Articles 17 ff. of the UNCLOS, which regulate the right of innocent passage. This set of rules grant to ships the right of innocent passage through the territorial sea of other states.[151] It is stipulated that the coastal state shall not hamper the innocent passage of foreign ships, impose requirements having the practical effect of denying or impairing this right, discriminate against the ships of any state,[152] and levy any charge upon foreign ships by reason only of their passage through the territorial sea.[153] The innocent passage of foreign ships through the territorial sea of the coastal state is not a purely inter-state issue. The legal beneficiary of this right is the group of individuals navigating by ships through the territorial sea of states parties to the Convention. A consistent case law under the UNCLOS acknowledges that the Convention protects the ship, crew, all persons and objects on board, as well as the ship's owner and every person involved or interested in its operation.[154] A tribunal even noted:

> in some of the provisions [of the UNCLOS] … rights appear to be conferred on a ship or persons involved. The term "ship" in those provisions can be understood to denote persons with an interest in that ship, such as an owner or operator of it.[155]

Although the UNCLOS does not permit ship owners to directly bring their own claim against the coastal state infringing their right to innocent passage, it is clear that the Convention confers a legal entitlement or interest on ship owners. This legal interest

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[148] See, however, Sands and Peel, *supra* note 146, at 781.

[149] Sands and Peel, *supra* note 146, at 181; F. Francioni, '*The private sector and the challenge of implementation*', in P.M. Dupuy and J.E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Incentives and Safeguards* (2013) 24, at 36–7. Cf. A. Boyle, 'Human Rights and the Environment: Where Next?', (2012) 23(3) EJIL 613.

[150] *López Ostra v. Spain*, ECtHR Case No. 16798/90, 9 December 1994, para. 58.

[151] On navigational rights and freedoms, see Y. Tanaka, 'Navigational Rights and Freedoms', in D.R. Rothwell et al., *The Oxford Handbook of the Law of the Sea* (2015), 536.

[152] Art. 24(1) of the UNCLOS.

[153] Art. 26(1) of the UNCLOS.

[154] *M/V "Saiga" (Saint Vincent and the Grenadines v Guinea)*, ITLOS Case No. 2, Judgment, 1 July 1999, para. 106; *M/V "Virginia G" (Panama/Guinea-Bissau)*, ITLOS Case No. 19, Judgment, 14 April 2014, para. 127; *Artic Sunrise (The Kingdom of the Netherlands v. The Russian Federation)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 172; *Duzgit Integrity (The Republic of Malta v. The Democratic Republic of São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 150.

[155] *M/V "Virginia G"*, *supra* note 154, para. 156.

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may be vindicated by the individual before a court or tribunal having jurisdiction to hear this dispute. Under a sufficiently broad dispute settlement clause, a ship owner investor would have jurisdiction and also standing to invoke state responsibility in investment arbitration for the breach of the right to innocent passage through the territorial sea of the coastal state. It is thus theoretically possible that a ship owner, who happens to be a foreign investor, brings an investment claim for the damage incurred to its investment as a result of the breach of this particular provision of the UNCLOS.

On the other hand, it is beyond doubt that human rights treaties (such as the ICCPR, International Covenant on Economic, Social and Cultural Rights,[156] Convention on the Elimination of All Forms of Discrimination against Women,[157] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[158] as well as regional human rights treaties such as the ECHR) confer legal entitlement on individuals.[159] For instance, Article 1 of the ECHR requires Contracting Parties to 'secure to *everyone within their jurisdiction* the rights and freedoms' provided for in the ECHR.[160] Human rights, such as the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, are obviously rights directly vested in individuals.

Another large category of international instruments, which typically create legal entitlement or interest in the benefit of individuals, consists of double taxation treaties. These treaties apply to persons who are residents of contracting states to the treaty.[161] They regulate which activities are taxable in which state party and aim to eliminate double taxation by finding a solution to situations normally triggering taxation by both states parties. A breach of this treaty by tax authorities of a state party leads to imposition of tax in two countries for the same activity of the investor and thus to double payment of tax. Since the investor has a legal interest in the elimination of double taxation situations as envisaged in the applicable treaty, it has standing to invoke state responsibility for the breach of the double taxation treaty. Regardless of the authority (tax authority or the judiciary), which has failed to properly apply the double taxation treaty, an investor taxpayer may thus invoke this international cause of action before an investment treaty tribunal under a sufficiently broad dispute settlement clause of an IIA.

The New York Convention is another major instrument, the invocation of which before investment tribunals needs to be examined in more detail. An investment treaty tribunal's jurisdiction to hear a claim directly based on the breach of the New York Convention depends on the scope of consent offered by the host state in the applicable IIA. An investor's standing to invoke the New York Convention as the cause of action of its claim is contingent, however, on the question of whether the

[156] 993 UNTS 3 (1966), entered into force on 3 January 1976.
[157] 1249 UNTS 13 (1979), entered into force on 3 September 1981.
[158] 1465 UNTS 85 (1984), entered into force on 26 June 1987.
[159] See also Parlett, *supra* note 134, at 278–339.
[160] Emphasis added.
[161] E.g., Art. 1 of UK/France Double Taxation Convention (concluded on 19 July 2008; entered into force on 18 December 2009).

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Convention confers legal entitlement or interest upon the investor. The New York Convention does not regulate purely inter-state issues but it does not either create individual rights enforceable against the state. Articles II and III of the New York Convention clearly stipulate what a contracting state to the New York Convention is obliged to do.[162] These rules concern the effects of a valid arbitration agreement and the procedure of enforcement of foreign arbitral awards (mostly) between two private persons. They confer thus a legal interest upon the individual *vis-à-vis* another individual. This does not, however, remove the responsibility of the state to conduct a judicial procedure, to which the New York Convention applies, in compliance with the provisions of the Convention. A misapplication or non-application of these norms is a breach infringing individual's legal interests. It should be noted that individual's legal entitlement or interest in the New York Convention is obvious: both the recognition of an arbitration agreement under Article II and the procedure of enforcement of foreign arbitral awards under Article III become operative upon individual's request[163] and both provisions envisage certain positive consequences in the benefit of the individual. Given this legal entitlement or interest, an individual would have standing to invoke the breach of the New York Convention by the state whose domestic courts have been called to apply Article II or III of the Convention.[164]

Finally, the question of whether an investor has standing to invoke the breach of customary international law norms needs to be examined. In the context of diplomatic protection cases, the traditional approach conceives the state exercising diplomatic protection as a state acting on its own behalf since the injury to its national is deemed to be an injury to the state itself.[165] The Permanent Court of International Justice stated in *Mavrommatis Palestine Concessions* '[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights'.[166] As explained by the Special Rapporteur of the ILC Articles on Diplomatic Protection, John Dugard, this is a fiction and the correctness of this fiction may be put in question.[167] Indeed, international claims brought by a state invoking its own rights are distinguished from claims where it espouses an individual's rights, especially for

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[162] Art. II(1) requires that '[e]ach Contracting State *shall recognize* an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship' (emphasis added).

Art. II(3) requires that '[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration agreement], *shall … refer the parties to arbitration*' (emphasis added).Art. III requires that '[e]ach Contracting State *shall recognize arbitral awards as binding and enforce them* …' (emphasis added).

[163] The mechanism under Art. II(3) (the obligation of a domestic court to refer the parties to arbitration) is triggered *at the request of one of the parties* to the litigation before that court.

Art. IV explains how to obtain the recognition and enforcement of a foreign arbitral award. It stipulates that *the party applying for recognition and enforcement* needs to supply a certain number of documents.

[164] See B. Demirkol, 'Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration', (2015) 30(1) *ICSID Review* 56.

[165] See the famous maxim of E. de Vattel, *Le Droit des gens, ou principes de la loi naturelle* (M.P. Pradier-Fodéré, ed., 1863), Livre II, Chapitre VI, §71: 'whoever ill-treats a citizen indirectly injures the State, which must protect that citizen'.

[166] *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924, PCIJ Rep Series A No 2 (1924) 5, 12.

[167] ILC Commentary to Articles on Diplomatic Protection, Art. 1, para. 3.

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purposes of the operation of the local remedies rule.[168] Therefore, it is at least necessary to acknowledge that by espousing diplomatic protection, the home state does not only assert its own rights but at the same time the *rights* of its injured national.[169] The possibility to invoke the breach of the international minimum standard under customary international law in a diplomatic protection claim infers that customary international law confers legal entitlement or interest on individuals.[170] Lauterpacht also acknowledges that individuals enjoy, in the field of customary international law, the benefits of international law as a matter of right.[171] Accordingly, an investor would have standing to invoke in investment treaty arbitration state responsibility for the breach of a customary international law norm, which confers legal entitlement or interest on individuals. Although substantive undertakings under the applicable IIA are not less expansive than the protection afforded by customary international law on the investor, there may be several reasons for the investor to rely on the customary international law norm.[172] The most realistic reason seems to be that the investment may not be protected under the relevant IIA due to the temporal application of the substantive norms of the treaty, whereas the operation of the customary international law norm would not generate such problem.

5. Conclusion

The relevance of non-IIA norms of international law in investment arbitration has become more apparent in recent years. First, the breach of these norms was considered as an element, factor, or indication of the breach of the investment treaty standards of treatment. Then, investors started to invoke customary international law as one of the bases of their claim.

Reference to international law norms need not be limited to these two functions. It is permissible in investment treaty arbitration for an investor to invoke a breach of a non-IIA norm as a cause of action, should the contracting states to the applicable IIA have offered broad consent to arbitration for the settlement of investment disputes.

Apart from the consensual requirement satisfied by a broad dispute settlement clause, there are two further preliminary (jurisdictional and admissibility) considerations for an investor to rely its investment claim on a non-IIA norm of international law. Parallel to the problem caused by exclusive jurisdiction agreements in contracts, should the dispute settlement clause of an international treaty provide for exclusive jurisdiction in favour of a particular mechanism for the resolution of disputes arising from this treaty, an investment treaty tribunal would be barred from hearing the claim that a norm of that treaty has been breached. This is so regardless of whether the non-IIA claim is the investor's main claim or consists of a preliminary question for the IIA claim. The second problem concerns the legal entitlement or interest

[168] See, e.g., *Avena*, *supra* note 134, para. 40.
[169] ILC Commentary to Articles on Diplomatic Protection, Art. 1, para. 3. See further Peters, *supra* note 139, at 392–6.
[170] See ILC Commentary to Articles on Diplomatic Protection, Art. 1, para. 4.
[171] Lauterpacht, *supra* note 134, at 470.
[172] Parlett, *supra* note 2, at 435–6.

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of an investor under a particular treaty. If the applicable treaty provides for purely inter-state obligations, the investor would not be a beneficiary or right-holder under this treaty. Given lack of legal entitlement or interest, it will not have standing to invoke the norms of this treaty in investment treaty arbitration.

Save these two constraints, an investor may directly bring a claim against the host state on the grounds that it has breached a non-IIA international treaty norm. Its cause of action need not be found in one of the investment treaty undertakings. Due to the mentioned constraints, however, an investor cannot invoke the breach of a WTO agreement or an international environmental norm in investment treaty arbitration. On the one hand, the WTO DSU excludes the jurisdiction of other international courts and tribunals to hear a WTO dispute; on the other hand, a vast majority of international environmental norms are purely inter-state norms, which do not grant any legal entitlement or interest to individuals. An investor would still have standing to bring an investment claim directly invoking the breach of the New York Convention, human rights treaties, double taxation agreements, the right to innocent passage under the UNCLOS, and certain customary international law norms, which confer on individuals a legal entitlement or interest in their benefit.