



# Arbitration and Human Rights

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# Where do we stand?

- Role mostly in investment arbitration
- Investment and human rights treaties have similar effect to limit state sovereignty, yet distant and parallel course
- Human rights arguments have been raised as defense or human rights principles have been used as interpretative tool
  - Based on treaty
  - Based on *jus cogens*
- Human rights analysis plays mostly a role with indirect expropriation and FET

# Treaty-based human rights law

- Human rights as encompassed in treaties (ECHR, UNESCO, International Declaration of Human Rights) applicable to investment arbitrations
- Interpretative tool: Tribunals relying on treaty-based case law:
  - *Lauder v. Czech Republic*: arbitrators looked at the ECHR case law for guidance as to how indirect expropriations were defined
  - *Azurix v. Argentina*: ECHR judgment provided useful guidance to the interpretation of the expropriation clause of the US-Argentina BIT
  - *Michula v. Romania*: Article 15 of the Universal Declaration of Human Rights gives everyone the right to a nationality
  - *Mondev v. US*: right to a court hearing under ECHR Article 6(1)
  - *Tecmed v. Mexico*: reference to human rights rulings relating to « peaceful enjoyment of possessions »

# Treaty-based human rights law (continued)

- *ADC v. Hungary*: ECHR jurisprudence relied upon by arbitrators as part of the expropriation analysis
- *Fireman's Fund v. Mexico*: analysis of the proportionality principle as used by the European Court of Human Rights (but question of whether viable source of interpreting Article 1110 NAFTA)

## - Governments raising treaty-based case law as a defense

- *CMS v. Argentina*: the financial crisis did not affect fundamental human rights that would warrant the non-application of investment treaties
- *Siemens v. Argentina*: tribunal refuses to apply less than fair market value compensation argued by Argentina relying on ECHR on the basis of the margin of appreciation of Article 1 ECHR
- *Continental Casualty v. Argentina*: Argentina's necessity defense upheld by the tribunal
- *Sempra v. Argentina*: Argentina's necessity defense dismissed

# *Jus cogens*-based human rights law

- Most fundamental rules of protection of human rights
  - *Phoenix Action v. Czech Republic*: protection must not be granted to investments made in violation of the most fundamental rules of protection of human rights
  - *Plama Consortium Ltd. v. Bulgaria*: investment obtained through misrepresentations contrary to international public policy
  - *World Duty Free Company Ltd. v. Kenya*: bribery contrary to international public policy

# Looking into the future

- How to apply human rights in investment arbitrations
  - *Proportionality as core principle*: balancing of the investor's legitimate expectations in the legal and regulatory framework and the host state's right to regulate to protect its citizens
  - *Human rights due diligence*: due diligence performed at the stage of initiating the investment in the host state and during the investment; codes of conduct, policy statements

# Looking into the future

- Defense of individual human rights?
  - Freedom of expression
  - Right to a fair trial
  - Right to enjoyment of just and favourable conditions of work
  - Right to be free from hunger
  - Right to water
  - Prevention of slavery and genocide

# Looking into the future

- The rise of the *Amicus Curiae*?
  - Human rights defense not always raised by States (fear of acknowledgment) → *amicus curiae* by human rights protection groups
  - Procedural difficulties: rules rarely allow for third-party submissions, but:
    - NAFTA: FTC Commission's Statement on Third-Party Participation (2003)
      - *Assist tribunals by bringing perspective, knowledge or insight different from that of the disputing parties yet within scope of dispute*
      - *Significant interest in the arbitration as well as public interest in the matter*
    - ICSID: Rule 37(2) (but narrowly interpreted by tribunals up until now)

# Outstanding issues

- Applicability of human rights treaties limited by arbitrators' jurisdiction?
  - Arbitrators' jurisdiction limited by the investment treaty
  - Human rights claims do not have an autonomous standing before investment tribunals
    - Yet we could see arbitral tribunals dismissing jurisdiction if investor committed systemic/widespread violation (WTO solution)
    - Treaties do not operate in vacuum: Art. 31 VCLT enables arbitration tribunals to apply and interpret treaties against the background of international human rights law (cf. *Grand River v. USA*)

# Outstanding issues

- Application of the « clean hands doctrine »?
  - Controversial international law doctrine
  - Has been endorsed by some ICJ judges (*the diversion of water from the Meuse*)
  - Has been used by some investment tribunals to dismiss investments made contrary to law
    - *Gustav F W Hamester GmbH v. Ghana*
    - *Phoenix Action Ltd. v. Czech Republic*
    - *Plama Consortium v. Bulgaria*
  - Room to apply doctrine even if the BIT does not provide that investment must be made « in accordance with the law »
    - If human rights part of domestic law
    - If broadly worded dispute resolution clause and human rights violations allegations are related or connected to underlying investment

# The End

# Thank you!