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International Corporate
Obligations, Human Rights,
and the Urbaser Standard:
Breaking New Ground?

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International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?

by

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A. Introduction¹

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

The current international investment law regime faces widespread legitimacy concerns. Issues arising from the ‘vagueness’ and lack of predictability in international investment law (IIL) standards have ushered the onset of what might be called a ‘crisis of legitimacy’ for IIL.² In recent years in particular, and especially since the Argentinian financial crises,³ arbitral awards have contributed to growing concerns regarding the balance and fairness of claims. A large part of the legitimacy debate centers upon the single directionality, or ‘asymmetry’, of claims that fall within the jurisdiction of arbitral tribunals.⁴ This asymmetry is twofold: it manifests both procedurally and substantively. On the one hand, international investment law provides a cause of action for investors against states to protect investments in a host state, but does not provide a cause of action for host states against investors, and generally refutes attempts by states to bring counterclaims against investors.⁵ On the other hand, international in-

¹ A version of this article is also forthcoming in Boston University International Law Journal, cited as: *35 B.U. Int'l L.J. (forthcoming, 2018)*.

² See *Franck*, *Fordham L Rev*, 73 (Nr. 4, 2005), 1521-1625. The document that best describes the issues raised by this backlash is the Public Statement on the International Investment Regime of 31 August 2010, where pro-investor interpretations of investment treaties were critically questioned and which recommended to withdraw or renegotiate investment treaties. The statement is available at: <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> (visited 11 May 2017).

³ For a general overview of the Argentine financial crisis and its relationship to international investment law, see *Alvarez/Khamsi*, in: Sauvart (ed), *The Yearbook on International Investment Law and Policy*, 379-478.

⁴ See, e.g., *Hoffman*, in: Kinnear/Fischer/Minguez Almeida/Torres/Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID*, 505-520.

⁵ This is a general rule, but in rare circumstances, tribunals have found jurisdiction to hear counterclaims. See, e.g., *Saluka Investments BV v The Czech Republic*, UNCITRAL, 7 May 2004, available at: <https://www.italaw.com/cases/961> (visited 11 May 2017). See also *Antoine Goetz & Consorts and SA Affinage des Metaux v. Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012, available at: <https://www.italaw.com/cases/1487> (visited 11 May 2017). *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, available at: <https://www.italaw.com/cases/767> (visited 11 May 2017). See also older decisions, e.g., *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, available at: <https://www.italaw.com/cases/79> (visited 11 May 2017). *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, available at: <https://www.italaw.com/cases/940> (visited 11 May 2017).

vestment law does not impose substantive obligations on investors, but it does grant them rights. Indeed, as the ICSID in *Spyridon Roussalis v. Romania* put it:

‘The Tribunal ... considers that the ... BIT limit[s] jurisdiction to claims brought by investors about obligations of the host State. The meaning of the ‘dispute’ is the issue of compliance by the State with the BIT. ... *the BIT imposes no obligations on investors, only on contracting States.*’⁶

As a reaction to this asymmetry, calls for reform have prompted states to adopt new counterclaim clauses in investment treaties as a means to impose some obligations on states, at least insofar as their commitment to the investment treaty at issue is concerned.⁷ However, thus far, these attempts merely reflect the *Roussalis* standard, which essentially places the investor at liberty to consent to counterclaims.⁸ Even the (now likely defunct) TPP, with paragraphs devoted to counterclaims in its investment chapter,⁹ implemented a similar asymmetrical standard through some tricky language in a footnote.¹⁰ And the counterclaim language of the 2015 Model India BIT—which looked extremely promising for states—was eliminated in the 2016 version of that treaty.¹¹

Then in December 2016, as the asymmetry debates raged on, along came *Urbaser v. Argentina*, a case in which an ICSID tribunal not only acknowledged the right of a host state to bring counterclaims not anticipated by the investor—and thus implied a symmetrical nature to BITs—but also, in an unprecedented fashion, affirmed the existence of obligations for investors.¹² *Urbaser* grounded both acknowledgements in general international law. *Urbaser* in particular looked into the interrelation between international human rights law, and specifically the human right to water, with the applicable BIT.¹³

⁶ Emphasis added. *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, available at: <<https://www.italaw.com/cases/927>> (visited 11 May 2017).

⁷ See 2015 India Draft Model BIT, Chapter 14, Article 14.11, available at: <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> (last visited 11 May 2017). See also Trans-Pacific Partnership Agreement (TPP), Chapter 9, Article 9.19(2), and accompanying footnote 32.

⁸ *Hoffman*, in: Kinnear/Fischer/Minguez Almeida/Torres/Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID*, 505-520. See also Tietje/Crow in: Griller/Obwexer/Vranes (eds), *Mega-Regional Agreements: TTIP, CETA, TiSA*. (forthcoming 2017).

⁹ TPP Chapter 9.

¹⁰ TPP, Chapter 9, footnote 32.

¹¹ See 2016 Model Text for the Indian Bilateral Investment Treaty, available at: <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> (visited 11 May 2017).

¹² *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Final Award, 8 December 2016, available at: <<http://www.italaw.com/cases/1144#sthash.V6RMmfH4.dpuf>> (visited 11 May 2017).

¹³ Acuerdo para la Promoción y la Protección recíproca de Inversiones entre El Reino de España y La República Argentina (hereinafter “Argentina-Spain BIT”), available at: <<http://www.italaw.com/sites/default/files/laws/italaw6015%281%29.pdf>> (visited 11 May 2017).

While several ICSID tribunals in the past have dealt with human rights considerations in international investment disputes,¹⁴ *Urbaser* makes bolder steps in attempting to define what requirements the human right to water imposes on host states and private actors when water services are privatized. The case was immediately lauded as a victory for human rights,¹⁵ a step toward greater international corporate responsibility,¹⁶ and a counterweight to the past asymmetry of the system.¹⁷ But what standard does it actually set out and what type of corporate action would be necessary in order to meet that standard? How does *Urbaser* ground corporate human rights obligations in international law, and what might it imply for future state counterclaims based on human rights? In exploring these questions, Section B of this paper summarizes the facts of *Urbaser* and situates it within the broader IIL context; Section C provides a synopsis on the human right to water in international law; Section D then explores the question of whether *Urbaser* truly breaks new ground through its allowance of a state counterclaim based on the human right to water, specifically with respect to international corporate human rights obligations and corporate social responsibility (CSR); Section E then concludes with a discussion on the implications of *Urbaser* in theory and in practice.

B. Background

When Argentina privatized drinking water and sewage services in the 1990s, a number of foreign companies invested. After the Argentinian financial crisis in the early 2000s prompted Argentina to freeze tariffs in a manner many companies considered expropriatory, many foreign companies resorted to investor-state dispute settlement (ISDS) mechanisms provided for in applicable BITs. *Urbaser* is the latest in a long line of controversial cases to join this saga.¹⁸

¹⁴ For an overview, see *McIntyre*, in: Addicott/Hossain Bhuiyan/Chowdhury (eds), *Globalization, International Law and Human Rights*, 147-176 and *Karamanian*, *Lewis & Clark L. Rev.* 17 (Nr. 2, 2013).

¹⁵ See *Hepburn*, *Investment Arbitration Reporter*, 12 January 2017, available at: <<http://www.ia-reporter.com/articles/analysis-arbitrators-in-urbaser-v-argentina-water-dispute-deviate-from-prior-impregilo-award-on-necessity-and-damages/>> (visited 11 May 2017).

¹⁶ See *Guntrip*, *EJIL: Talk!*, 10 February 2017, available at: <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>> (visited 11 May 2017).

¹⁷ See *Burova*, *Kluwer Arbitration Blog*, 6 March 2017, available at: <<http://kluwerarbitrationblog.com/2017/03/06/jurisdiction-of-investment-tribunals-over-host-states-counterclaims-wind-of-change/>> (visited 11 May 2017).

¹⁸ *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, available at: <<https://www.italaw.com/cases/288>> (visited 11 May 2017). *BG Group PLC v The Republic of Argentina*, UNCITRAL Final Award, 24 December 2007, available at: <<https://www.italaw.com/cases/143>> (visited 11 May 2017). *TSA Spectrum de Argentina S.A. v Argentine Republic*, ICSID Case No ARB/05/5, Award, 19 December 2008, available at: <<https://www.italaw.com/cases/1118>> (visited 11 May 2017). *SUAR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Award, 22 May 2014, available at: <<https://www.italaw.com/cases/1456>> (visited 11 May 2017). See also *Urbaser* at par. 49, available at: <http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf> (visited 11 May 2017). The Tribunal in fact recalls the cases that have derived from privatization of water and sewage services in several Argentine provinces.

Claimants, Urbaser and CABB, were majority shareholders of Aguas del Gran Buenos Aires S.A. (AGBA). AGBA entered into a contract with the Province of Buenos Aires in December 1999.¹⁹ The region awarded to AGBA had a population of about 1.7 million low-income inhabitants, of which only 35% had drinking water services and 13% had sewage services.²⁰ Argentina argued that one of the main purposes of the contract was the expansion of this coverage,²¹ and indeed, it relied on the private sector for the technical and financial capacity to achieve expansion.²² Claimants argued that Argentina's decision to freeze tariffs in 2002 negatively impacted the economic-financial equation that prompted AGBA's contract; they brought FET, discrimination, and expropriation claims on this basis.²³ Argentina, on the other hand, argued that the difficulties the contract faced were due to AGBA's deficient management and, in particular, to its failure to perform obligations to invest in the expansion of services.

Most significantly for our purposes here, Argentina filed a counterclaim alleging that Claimants' failure to invest violated Claimants' obligations under international law, specifically those based upon the human right to water.²⁴ Argentina argued that the contract gave rise to bona fide expectations that Claimants would invest. By failing to do so, not only were good faith and *pacta sunt servanda* principles violated, but human rights were also affected.²⁵ While Claimants argued that human rights bind States, not private parties, Argentina countered that because the obligation during the concession was to guarantee access to water, and because both BIT parties were signatories to certain human rights treaties, the obligation of Claimants was to comply with a fundamental right.²⁶

C. Argentina's Premise: The Human Right to Water

The right to water and sanitation has its roots in international humanitarian law. The 1949 Geneva Conventions III and IV underscore the obligation of detaining powers to provide water and soap for those detained, as well as sufficient drinking water. The 1977 Additional Protocols I and II explicitly address drinking water and drinking water installations, linking these to hygiene.²⁷ The right to water migrated to international human rights law through interpretation of the 1966 International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). In particular, General Comment No. 15 of the Committee on

¹⁹ Urbaser held 27.4122% of the capital stock and CABB held 20%. See *Urbaser* par. 61 and following of the award, available at: <http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf> (last visited 11 May 2017).

²⁰ *Ibid.* paragraph 57.

²¹ *Ibid.* paragraph 69.

²² *Ibid.* paragraph 55.

²³ *Ibid.* paragraph 74.

²⁴ *Ibid.* paragraph 36.

²⁵ *Ibid.* paragraph 1156.

²⁶ *Ibid.* paragraph 1157.

²⁷ Protection of Victims of International and Non-International Armed Conflict.

Economic, Social and Cultural Rights, deduces the right to water from ICESCR article 11 (right to an adequate standard of living) and article 12 (right to health).²⁸ Indeed, that Comment specifies that the Covenant entitles everyone to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.²⁹

In the years since the Covenants, the right to water has increasingly appeared in international conventions.³⁰ Recently, the UN General Assembly (UNGA) recognized ‘the right to safe and clean drinking water and sanitation as a human right’³¹ and the UN Human Rights Council (HRC) affirmed the ‘inextricable’ relation of such right with the right to health, life and human dignity.³² The UNGA reaffirmed the *responsibility* of States to *promote* and *protect* human rights, while the HRC reaffirmed the *primary responsibility* of States to *ensure full realization* of all human rights. In addition, the HRC Resolution refers explicitly to non-State service providers. States are encouraged to ensure that non-State service providers ‘fulfil their human rights responsibilities’, *i.a.*³³ Thus, it appears that, from the perspective of UN bodies at least, the human right to water entails some degree of responsibility on the part of non-State actors, specifically service providers, although no clarifications are made as to what this responsibility entails.

D. Investor Rights, Human Rights and General International Law

There is a clear trend in the declarative practice of states towards extending responsibility for respecting human rights to private companies involved in the provision of private services.³⁴ *Urbaser* acknowledges and contributes to this trend. *Urbaser*

²⁸ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), E/C.12/2002/11, 20 January 2003, Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, The right to water (art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), available at: <http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf> (visited 11 May 2017).

²⁹ *Ibid.* at p. 2.

³⁰ For an overview, available at: <<http://www.righttowater.info/progress-so-far/international-time-line/>> (visited 11 May 2017).

³¹ *United Nations*, General Assembly, Resolution 64/292, the human right to water and sanitation, A/RES/64/292, 3 August 2010, available at: <<http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E>> (visited 11 May 2017).

³² *United Nations Human Rights Council*, Resolution 15/9, Human Rights and access to safe drinking water and sanitation, 6 October 2010, A/HRC/RES/15/9, available at: <<http://www.right2water.eu/sites/water/files/UNHRC%20Resolution%2015-9.pdf>> (visited 11 May 2017).

³³ *Ibid.*, Point 9: “Recalls that States should ensure that non-State service providers: (a) fulfil their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them; (b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity; (c) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges; (d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms”.

³⁴ *McIntyre*, in: *Addicott/Bhuiyan/Chowdhury* (eds), *Globalization, International Law and Human Rights*, 147 (152).

approaches investment treaty law as part of the bigger picture of general international law, as will be illustrated in Section I below. In addition, *Urbaser* positively affirms investors' subjectivity in international law, which legally grounds investors' international human rights obligations in public rather than private law. *Urbaser* thus explores the existence and nature of investors' human rights obligations under international human rights law, with mixed outcomes as we will see in Section II below.

I. Urbaser and the Asymmetry of BITs

IIL developed on the premise that foreign investors do not have rights under customary international law. In filling this void, international investment agreements (IIAs) grant substantive and procedural rights to investors while typically not imposing any obligations on them. In IIAs, the host state does not have the same procedural standing as investors do, among other factors because the substantive rights contained in IIAs are not actionable by the state.³⁵ Moreover, the substantive standing of the state has a troubled history in international investment arbitration: investment provisions have sometimes been interpreted in a way that prioritizes economic interests over non-economic interests.³⁶ Of course though, the state has other obligations under international law. The tension between the obligations cast in IIAs and general international law obligations of states has led to an ongoing backlash against IIL and particularly against international investment arbitration.³⁷

While professional specialization in international investment law should not lead arbitrators to overlook adjoining fields, principles and practices of general international law,³⁸ awards by arbitral tribunals under investment treaties have, at times, done so

³⁵ Standards such as most favored nation, national treatment or compensation in case of expropriation, which are the basic content of most IIAs, protect the investor. It is difficult to imagine a scenario in which a host state could bring action based on standards of protection that cannot be violated by the investor.

³⁶ This has led to the framing of the right to regulate as opposed to the interpretive power accorded to arbitrators, an issue that has been propelled especially by recent arbitral decisions. See, e.g., *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, available at: <<https://www.italaw.com/cases/460>> (visited 11 May 2017); see also *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, available at: <<https://www.italaw.com/cases/288>> (visited 11 May 2017); *BG Group PLC v The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, available at: <<https://www.italaw.com/cases/143>> (visited 11 May 2017); *TSA Spectrum de Argentina S.A. v Argentine Republic*, ICSID Case No ARB/05/5, Award, 19 December 2008, available at: <<https://www.italaw.com/cases/1118>> (visited 11 May 2017); *SUAR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Award, 22 May 2014, available at: <<https://www.italaw.com/cases/1456>> (visited 11 May 2017).

³⁷ *Supra*, footnote 2.

³⁸ *United Nations*, International Law Commission, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, A/CN.4/L.682, 13 April 2006, available at: <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> (visited 11 May 2017), page 11, para 8. Indeed, a limited jurisdiction ought not to imply a limitation of the scope of the law applicable in the interpretation and application of given treaty. See page 28, paragraph 45.

in the past.³⁹ Such shortsighted approaches have fueled the IIL asymmetry debate and even convinced counsel to argue cases based on such asymmetry. This was exactly one of the litigation strategies adopted by Claimants in *Urbaser*.

In *Urbaser*, Claimants argued that the ‘uneven manner in which investor and host States are treated is widely recognized’.⁴⁰ BITs would have an asymmetric nature that, on the one hand, prevents a State from invoking any rights based on such a treaty, even a counterclaim and that, on the other hand, implies that investment treaties do not impose obligations on the investors.⁴¹ In Claimants’ view, the Spain–Argentina BIT adopts this ‘classical’ asymmetric BIT model.⁴² The Tribunal, however, found that no provision in the BIT allows an inference that the host State does not have rights under it. Indeed, the BIT refers to general principles of international law and general international law, all of which are extra BIT sources that can be applicable. The BIT is not to be interpreted in isolation, but rather due consideration must be given to rules of international law external to the BIT’s own rules.⁴³ As the Tribunal put it:

‘The BIT cannot be interpreted and applied in a vacuum...The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.’⁴⁴

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

II. *Urbaser* and the Subjectivity of Corporations

Wading into a rather controversial and doctrinal issue of international law, the Tribunal stated that it was ‘reluctant’ to take a principled position that private companies may never borne human rights duties. While past tribunals considered that corporations are not subjects of international law and therefore not duty holders under international law, *Urbaser* found that this approach has ‘lost impact and relevance’.⁴⁵ The Tribunal found that through the Spain–Argentina BIT’s MFN clause, investors are entitled to invoke rights resulting from international law.

³⁹ For a discussion on specific examples of fragmentation in international investment law, see *van Aaken*, Finnish Y.B. Int’l L., 17 (Nr.1, 2008), 91-130. For detailed examples of legal fragmentation in a variety of specialized areas of international law, see *Fisher-Lescanol Teubner*, Mich. J. Int’l L., 25 (Nr. 1, 2004), 999-1046; *Barnhoorn/Wellens* (eds), Diversity in Secondary Rules and the Unity of International Law; see also *Roberts*, Mod. L. Rev. 68, (Nr. 1, 2005), 1-24.

⁴⁰ *Urbaser* at paragraph 1131.

⁴¹ *Ibid.* at paragraph 1120.

⁴² *Ibid.* at paragraph 1167.

⁴³ *Ibid.* at paragraph 1192.

⁴⁴ *Ibid.* at paragraph 1200.

⁴⁵ *Ibid.* at paragraph 1194.

‘If the BIT therefore is not based on a corporations’ incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations’.⁴⁶

The Tribunal’s reasoning is premised on the fact that under the BIT the investor can bring claims and invoke *rights* grounded in international law, especially through the MFN clause. Surely then, the investor could be held to *obligations* under international law. The Tribunal also inferred the subjectivity of corporations through CSR: a ‘standard’ of crucial importance that is accepted by international law and in consideration of which transnational companies are no longer “immune” from international subjectivity.⁴⁷

The existence of rights for transnational corporations is often invoked to ground the establishment of a ‘full’ international subjectivity that includes obligations. In this sense, the Tribunal aligns with many scholars that make this same argument.⁴⁸ However, international subjectivity remains a theoretical minefield⁴⁹ and the Tribunal’s reasoning is dogmatically shaky.⁵⁰

The starting point to analyze international subjectivity generally is the decision of the International Court of Justice (ICJ) in the *Reparations to Injuries* case,⁵¹ where the ICJ was careful to stress that subjects of law are not necessarily identical in their nature or in the extent of their rights.⁵² Concluding that the UN was an international person, the ICJ found, ‘is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same of those of a ‘State’’.⁵³ The ICJ stated that the rights and duties of an organization depend on its purposes and functions.⁵⁴ At the same time, the ICJ’s decision is devoid of actual criteria to delimit subjectivity.⁵⁵ For the purpose of establishing international duties for corporations or for investors in investor-state arbitration, international subjectivity might not even be an adequate category, because of its difficult analogy with the State.⁵⁶ States are territorial-based regulators, whereas businesses are private, profit-

⁴⁶ *Ibid.* at paragraph 1194.

⁴⁷ *Ibid.* at paragraph 1195.

⁴⁸ The *necessity* of the correlation between rights and duties, however, is dogmatically questionable, at least under the traditional theory of international subjectivity. See *Nowrot*, Beiträge zum Europa und Völkerrecht, Heft 7 (2012), for an extensive overview of the theory of subjectivity under international law and a critical approach to the conclusion that rights have to be mirrored by duties.

⁴⁹ *Koskenniemi*, Mich. L. Rev., 88 (Nr.6, 1900), 1946 (1946). *Koskenniemi* uses the phrase „theoretical minefield in reference to ‘mysteries’ of customary law formation.

⁵⁰ See *Nowrot*, Beiträge zum Europa und Völkerrecht, Heft 7 (2012).

⁵¹ ICJ, *Reparation of Injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, 4 (9). The UN was described by the ICJ as an organization “...which occupies a position in certain respects in detachment from its Members”.

⁵² *Ibid.*, 4 (8).

⁵³ *Ibid.*, 4 (9).

⁵⁴ *Ibid.*, 4 (10).

⁵⁵ See *Alvarez*, Santa Clara J. Int’l L., 9 (1, 2011), 1 (26).

⁵⁶ *Ibid.*, *Alvarez* however takes efforts to point out that “skepticism about the “personhood” of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly now they have both” (p.31).

seeking and do not have territorial control or legal jurisdiction.⁵⁷ Taking the State as a reference for international law obligations of non-state actors (a ‘top down’ approach) loses sight of the ways that corporations are distinct from States or natural persons.⁵⁸

The Tribunal seems to be aware of these difficulties: it uses the category of international subjectivity but the dogmatic weight of this language is not reflected in the analysis ultimately undertaken in *Urbaser*.⁵⁹ The Tribunal’s considerations on subjectivity of corporations are premised by the rejection of ‘principled’ positions and by the consideration that the subjectivity of investors cannot be rejected by ‘necessity’. The Tribunal did not offer criteria to delimit corporate international subjectivity but it seems to consider that the purposes and functions of the corporation frame its international subjectivity, especially because it is careful to establish differences between the State and the corporation as a service provider.⁶⁰ The insight on the context of a corporation’s operations is reinforced by the Tribunal’s consideration of CSR. CSR is characterized as a ‘standard’ that requires contextualization and that trickles subjectivity to corporations. If then CSR is so important a development to create or contribute towards subjectivity in international law for corporations, then *Urbaser* seems to look at subjectivity as participation,⁶¹ at least to the extent that CSR has a private origin.⁶² In this sense, while making use of traditional language which conceptualizes international law made by subjects, it seems that the Tribunal – by linking CSR to subjectivity - is actually referring to participants.

Regardless of the theoretical shortcomings, which are representative of the state of flux of international law in this regard, ultimately *Urbaser* affirms subjectivity for corporations. To this end, the Tribunal explored the existence of human rights obligations for corporations under international law through traditional human rights treaties (1). Through its reference to CSR, the Tribunal left the door open to considerations on how CSR molds human rights obligations of corporations (2).

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

What, then, does *Urbaser* actually change about the obligations of a foreign investor to a host state under classical BIT interpretation when it comes to human rights? Turning to the question of corporate international subjectivity, the *Urbaser* Tribunal found that the 1948 Universal Declaration of Human Rights (UDHR) ‘may also address multinational companies’⁶³ insofar as the enjoyment of individual rights implies

⁵⁷ *Aftab*, Rocky Mt. Min. L. Inst., 1, 9 (2014).

⁵⁸ *Alvarez*, Santa Clara J. Int’l L., 9 (1, 2011), 1 (26).

⁵⁹ This reveals the gap between theory and practice that is made especially evident in the domain of subjectivity in international law. See *Nowrot*, Beiträge zum Europa und Völkerrecht, Heft 7 (2012), 25 ff.

⁶⁰ *Urbaser* at paragraph 1206 and following.

⁶¹ *Higgins*, Problems and Process, 50.

⁶² CSR standards are labelled as private, underscoring their common thread which is to be an alternative to government regulation. However, the word private does not entail that CSR is necessarily corporate-led. CSR initiatives span from industry self-regulatory initiatives to multi-stakeholder initiatives. See *Mares*, TLT, 1 (Nr. 2, 2010), (221) 224 and 240.

⁶³ *Urbaser* at p. 317, paragraph 1196.

that no other entities may disregard them. After reviewing the ICESCR and the ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, the Tribunal found that:

‘[T]he human right for everyone’s dignity and [the right to] adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights’.⁶⁴

Turning to the specific question of whether the investor’s actions violated the human right to water, the Tribunal found that ‘[t]he human right to water entails an *obligation of compliance* on the part of the State, but it does not contain an *obligation for performance* on part of any company providing the contractually required service.’⁶⁵ Moreover, for ‘an obligation to perform to be applicable to a particular investor, a contract...relationship...is required.’⁶⁶ Indeed, ‘the investor’s obligation to perform has its source in domestic law; it does not find its legal ground in general international law.’⁶⁷ Having established this, the tribunal stressed that the compliance obligation did not preclude an abstention obligation: ‘The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights, would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.’⁶⁸ This differs only slightly from the initial standard, however, by differentiating the individual *mens rea* component (‘aimed at’ / ‘intention’) for contexts of criminality. That is, an investor has an obligation to abstain from criminal activity that obstructs human rights regardless of whether the investor engages in such criminal activity with the *intention* of obstructing human rights.

The Tribunal thus indicates that foreign investors could carry obligations to host states based in public international law, such as the UDHR and the other treaties comprising the international bill of rights.⁶⁹ But such treaties inform only the treatment of individuals under the law, not necessarily corporate persons,⁷⁰ and as dis-

⁶⁴ *Ibid.* at p. 318, paragraph 1199.

⁶⁵ *Ibid.* at p. 321, paragraph 208. In particular the Tribunal finds that the investor’s obligations with regard to water in the present case were based on the concession, not on the BIT or on international law.

⁶⁶ *Ibid.* at paragraph 1210

⁶⁷ *Ibid.* at paragraph 1210.

⁶⁸ *Ibid.* at p. 321, paragraph 1210.

⁶⁹ *Ibid.*

⁷⁰ The UDHR assigns rights to ‘individuals’ and to ‘human beings’ and obligations to states in ensuring those rights are protected. See, e.g., Article 1: ‘All human beings are born free and equal in dignity and rights...’; Article 2: ‘Everyone is entitled to all rights and freedoms set forth in this Declaration...’. However, there is some debate, especially from followers of *John Ruggie*, about whether the UDHR’s Preamble also imposes obligations on corporations as ‘organs of society.’ See UDHR Preamble: ‘The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition

cussed above, the question of how to define corporate personhood under international law is far from settled.⁷¹ In interpreting the treatment of corporate investors under the *Urbaser* standard, international criminal law (ICL) may provide some guidance.⁷² Under both statutory and judge-made ICL, the leaders of states and military organizations can be held jointly liable as a ‘joint criminal enterprise’ (JCE). JCE was originally a judge-made doctrine that emerged in modern ICL from the ICTY in *Prosecutor v. Tadic*,⁷³ but has since been codified in the Rome Statute.⁷⁴ The JCE doctrine is controversial because, under one of its formulations (JCE III), it eliminates the individual *mens rea* element typically required to assign criminal culpability;⁷⁵ it seeks instead to determine the JCE’s ‘common purpose’ and, subject to certain conditions, projects that purpose onto each participant in the enterprise.⁷⁶ In this sense, a JCE carries ‘international legal personhood’ in the same way an investor might, insofar as an investing enterprise might be treated as an individual for *mens rea* purposes. By contrast to JCE, however, in the event of a corporate entity’s involvement with an armed conflict, it has been unclear whether those treaties or rules of custom that enable ICL to apply to private actors (such as the Genocide Convention) and to political entities (through JCE) could also apply to corporate entities.⁷⁷ The *Urbaser* decision moves toward an answer, at least for those corporate entities that have willfully bound themselves under BITs.

Urbaser found that legal instruments traditionally governing state obligations, like BITs and the Geneva Conventions, “may also address multinational companies”.⁷⁸ The standards it sets forth describe a ‘spectrum’ of three standards for potential investor liability based in public international law. At one end of the spectrum, *Urbaser* accords both investors and states an obligation not to engage in activity *aimed* at destroying human rights,⁷⁹ and at the other end, an obligation not to act in ways that are prohibited by peremptory norms.⁸⁰ In the middle, however, lies a potential inroad for CSR obligations under international law. In the following analysis of the three standards on the spectrum, two distinct sources emerge from which a Tribunal may find a

and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.’

⁷¹ *Alvarez*, José E., Santa Clara J. Int’l L., 9 (1, 2011), 1-36.

⁷² ICL deals with specific tragic circumstances and with criminal culpability rather than monetary liability, so obviously the customary principles that emerge from ICL cannot be directly transferred to the practice of IIL. However, the concept of *mens rea* in ICL is helpful in determining what type of action might be necessary to determine corporate “intent” under international law.

⁷³ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.

⁷⁴ *UN General Assembly*, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Art. 28.

⁷⁵ See, e.g., *Ambos*, J. Int’l Crim. Just. 5 (Nr. 1, 2007), 159-183.

⁷⁶ *Ibid.*

⁷⁷ See *UN General Assembly*, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277; see also *Alvarez*, J. World Invest. & Trade, 17 (2016), 171-288.

⁷⁸ *Urbaser* at par. 1210.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at paragraph 1215.

justiciable performance obligations for corporations: through treaty, or through general principles of international law.

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

The first standard reflects the JCE *mens rea* requirement under ICL—*intent* to destroy—which amounts to an almost cartoonish standard for investor liability under IIL. After analysis of Covenants, the Tribunal concludes that investors and states have an obligation *not to engage in activity aimed at destroying human rights*. According to the tribunal, this standard “complements” positive rights (dignity, housing, etc.) without actually according them.⁸¹

This initial standard appears nominal; the type of action required to meet the standard is unclear and the mental state required for the action is debatably unprovable.⁸² Indeed, for a successful counterclaim by this standard, Argentina would need to demonstrate that Claimants actively aimed to destroy Argentina’s ability to provide clean water and sanitation. There is no international legal standard by which to demonstrate the ‘aim’ of a corporate entity, but in theory, the Tribunal could have borrowed from ICL’s JCE doctrines.⁸³ The goal of general JCE, initially spawned by the Nuremberg Tribunals, was to bypass the justifications of sovereign immunity or superior responsibility when it came to assigning responsibility to individuals for the commission of mass atrocities.⁸⁴ In parsing out a corporate *mens rea* standard for an IIL case, therefore, JCE’s utility does not lie in transposing the *mens rea* element from a corporation to an individual. Rather, JCE is useful, and JCE III in particular, because it employs a standard by which to determine the mental state of a legal person—an ‘enterprise’ in JCE but a ‘corporation’ for our purposes here—without attaching any requirement for individual *mens rea*.⁸⁵ The corporate standard then, first articulat-

⁸¹ *Ibid.* at paragraph 1214.

⁸² Domestically, most jurisdictions hold that corporations are incapable of committing crimes because they are incapable of authorizing them; it is only the individuals within them that can foster the *mens rea* necessary to incur criminal culpability. See, e.g., *De Jonge*, *Transnational Corporations and International Law: Accountability in the Global Business Environment*, 127. However, on the international stage, lawyers would be remiss to ignore JCE’s similarity to the corporate legal person. It is worth noting also that JCE III in particular places great weight on what would appear to be the *mens rea* of the enterprise; through the structure of the enterprise, it lowers the *mens rea* standard necessary to prove individual culpability.

⁸³ Here, JCE is described as ‘doctrines’ rather than ‘doctrine’ because the evolution of JCE has produced three similar but separate doctrines, each with slightly different *mens rea* requirements. *Jose Alvarez’s* has cautioned generally about transposing such concepts of public law to the international investment arena, even as a way to generally inform arbitral interpretation, because the circumstances and stakeholders in the various branches of international law tend to differ so vastly. See *Alvarez*, *J. World Invest. & Trade*, 17 (2016), 171-228.

⁸⁴ For a brief history of JCE’s evolution, see *Bigi*, in: Von Bogdandy/Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, 14 (2010), 51-83.

⁸⁵ The authors recognize that the equation of an ‘enterprise’ in JCE to a ‘corporation’ under general international law is problematic, at least because of the different avenues through which corporations and JCEs are formed. Nevertheless, JCE is the only such tool in international law available to determine *mens rea*, and as such, could be considered by an ICSID Tribunal’s interpretation of “aimed”. This is because the ICSID Convention requires that the terms of treaties litigated under its rules be interpreted according to the VCLT art. 31. The VCLT Article 31(3)(c) stipulates that,

ed by the ICTY, is that the legal person have a ‘common plan or purpose’, which is demonstrated through the results of the legal person’s actions.⁸⁶

In *Urbaser* and in ICSID cases generally, the results of a legal person’s actions are highly unlikely to reach the level of criminality required for ‘entity liability’ under ICL. The only crimes under the Rome Statute that require a demonstration of the ‘intent’ or ‘aim’ of an enterprise to incur liability are that of Genocide,⁸⁷ and the crime against humanity of ‘[o]ther inhumane acts...intentionally causing great suffering’.⁸⁸ Unless a denial of water and sewage rights could be construed as an ‘intent to destroy, in whole or in part’ the Argentinian people, or as an inhumane act intended to cause ‘great suffering’, *Urbaser’s* standard would not be met. Even considering the lower standard of proof for civil as opposed to criminal cases (preponderance of the evidence rather than beyond a reasonable doubt⁸⁹), the fact that most ‘crimes against humanity’ require a mental state only of ‘knowledge’ for a JCE—rather than a demonstration of ‘intent’ or ‘aim’—highlights the almost cartoonish absurdity of *Urbaser’s* counterclaim standard.

b) Urbaser’s Second Standard: An Obligation to Perform

Turning to the ‘middle’ standard on the *Urbaser* spectrum, the Tribunal veers away from the ‘aimed at’ extreme in asking whether other parts of international law, and specifically water and sanitation, impose positive obligations on investors.⁹⁰ After surveying multiple sources, the Tribunal found that both investors and states have an obligation to comply with *some* performances required by public international law. However, the required performances significantly differ. While the state has a positive performance obligation to provide access to water and sanitation services, there is no basis in international law that would accord the same positive performance obligation to the investor, at least with respect to the human right to water. Rather, the investor could only be obligated to provide water and sewage on the basis of private contractual law, but could be obligated to fulfill those contractual obligations in a way which did not violate general international law, which would be the only justiciable question before an arbitral tribunal.⁹¹ The Tribunal does not exclude that a justiciable interna-

in interpreting treaty language “any relevant rules of international law applicable in the relations between the parties” be taken into account. And as an element of public international law to which virtually all the world’s states are party, the ICJ Statute can inform the sources arbitrator use; specifically, Art. 38(1) of that statute stipulates that “international custom” and “general principles of law” can be considered, among other sources.

⁸⁶ The Rome Statute requires that the ‘aim’ of each individual to further the criminal purpose of the enterprise, but the standard remains results-based for demonstrating ‘common plan’. *See* Rome Statute, Article 28. The intent behind individual participation in the enterprise—the most controversial element of JCE III—is not at issue here.

⁸⁷ *See* Rome Statute, Article 6.

⁸⁸ *Ibid.* at Article 7.

⁸⁹ *Ibid.* at Article 66.

⁹⁰ *Urbaser* at paragraph 1210.

⁹¹ ‘Although the conduct of corporations under these treaties is regulated by an international instrument, the international legal obligation under the treaty rests with the state, which needs to adopt national measures to regulate the activity of the corporations on the domestic legal level. Corpo-

tional obligation could exist, but such an obligation must arise either from another treaty or from a general principle of international law.⁹² It found neither in this case.

The reasoning in *Urbaser* appears to reject ‘private law’ theories about IIL by drawing a sharp distinction between an investor’s contractual obligations and general international law. At the same time, it could be read to elevate private investors to the level of states in international economic law by drawing just such a distinction.⁹³ Curiously, it also appears to create horizontal obligations, even if limited, between investors as foreign individuals and citizens of a host state—a perplexing and paradoxical position indeed from the perspective of traditional human rights law.⁹⁴ On the one hand, unless it can be gleaned from the prohibition on aggression enshrined in the Geneva Conventions,⁹⁵ there is no negative obligation on states not to actively engage in activity ‘aimed at’ obstructing the activity of other states in protecting the human rights of citizens. On the other hand, individuals have neither positive nor negative obligations under the Covenants; the Covenants impose positive obligations only upon states. However, according to *Urbaser*, the Covenants now impose negative obligations on investors as well. This convoluted web of liabilities between individuals and states, international law and individuals, and international law and private law constitutes the second *Urbaser* standard: the middle ground.

c) *Urbaser’s Third Standard: An Obligation to Abstain*

In the third and final standard comprising the *Urbaser* spectrum, the Tribunal states that investors have an obligation to abstain from activity prohibited under general international law,⁹⁶ which includes international criminal law, international human rights law, and the law of armed conflict. This standard notably renders ‘intent’ irrelevant in such cases. It would appear that ‘activity prohibited under general international law’ refers to activity that would violate *jus cogens* rights, as there is no explicit reference to specific prohibited activity,⁹⁷ and while there is much debate on the point

rate responsibility under these treaties is thus purely domestic rather than international’. See *De Brabandere*, in: D’Aspremont (ed), *Participants in the International Legal System*, 268 (275).

⁹² *Urbaser* at paragraph 1207.

⁹³ The Tribunal’s finding implies that the investor is bound by treaties that typically govern only state action toward individuals, which suggests that investors carry greater obligations than individuals. However, the finding does not place investors under the same standard as states under international law, as is clear in the first ‘negative’ standard. Thus, investors appear to be placed in an undefined zone with greater responsibilities than individuals but lesser responsibilities than states. See *Urbaser* paragraphs 1207-1210.

⁹⁴ CSR nuances this to the extent that horizontal relationships are created beyond the binary dichotomies of binding or non-binding law. As we will see at point 2) below, after the United Nations Guiding Principles, it is universally accepted that companies hold responsibilities – a category that is distinct but not necessarily below the category of obligations – vis-à-vis the society in which they operate. These responsibilities are thus horizontal.

⁹⁵ See, e.g., *International Committee of the Red Cross (ICRC)*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

⁹⁶ *Urbaser* at par. 1210.

⁹⁷ *Ibid.*

at which a norm becomes a peremptory norm (or *jus cogens*),⁹⁸ activities prohibited by *jus cogens* generally do not include those that would violate the ICESCR as a primary aim.⁹⁹ Indeed, the Tribunal is quick to state that this standard ‘is not a matter for concern in the instant case.’¹⁰⁰

Nevertheless, footnote 446 to the Award may provide some insight into situations in which the *jus cogens* standard might amount to ‘a matter for concern’.¹⁰¹ That footnote essentially states that because no prohibited activity under ‘general international law’ is at stake, Argentina’s reliance in its counterclaim on the 1980 U.S. 2nd Circuit case of *Filártiga v. Peña-Irala* was unconvincing.¹⁰² The Tribunal does not detail how exactly Argentina relied upon that case and none of the submissions of the parties have been made available to the public.¹⁰³ However, one might presume that, because *Filártiga* involved a civil claim heard and upheld in the U.S. for wrongful death by a torture committed in Paraguay, the *Urbaser* Tribunal found the *Filártiga* norm on torture insufficiently applied when it came to a discontinuance of water and sewage services. Footnote 446 implies that it is the lack of a violation of *jus cogens* alone that renders *Filártiga* unconvincing. Thus, it implies that the converse is presumably true: if there is a violation of *jus cogens*, the *Filártiga* reasoning would be ‘convincing’. In *Filártiga*, the 2nd Circuit found that a violation of “the law of nations”—based upon the UN Charter, the UDHR, other international instruments and customary international law—could stand in US courts under the Alien Tort Statute, even though the parties did not explicitly agree to grant the US such jurisdiction.¹⁰⁴ It proceeded to find that torture was “clearly” a violation of the law of nations.¹⁰⁵

While *Filártiga* involved a dispute between individuals, *Urbaser* opens a similar window through which states may be able to hold foreign individuals liable for financial damage caused by the investor’s violations of *jus cogens*,¹⁰⁶ and indeed, Tribunals have found *jus cogens* a justiciable standard to impose liability in the past.¹⁰⁷ Under the *jus cogens* prong of the *Urbaser* spectrum, no showing of intent is necessary for such liability—paragraph 1210 notably omits the ‘aimed’ language set out in paragraph

⁹⁸ VCLT, Article 53.

⁹⁹ See, e.g., *Zenović*, RGSL Research Papers No. 6 (2012), available at: <http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf> (visited 11 May 2017).

¹⁰⁰ *Urbaser* paragraph 1210.

¹⁰¹ *Ibid.* at p. 322, fn. 446.

¹⁰² *Filártiga v. Peña-Irala*, U.S. Court of Appeal, 2nd Circuit, 630 F.2d 876, 30 June 1980 (ALRA 307).

¹⁰³ See generally *Urbaser*.

¹⁰⁴ *Filártiga v. Peña-Irala*, U.S. Court of Appeal, 2nd Circuit, 630 F.2d 876, 30 June 1980 (ALRA 307).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Urbaser* at paragraph 1210.

¹⁰⁷ See, e.g., *Sabahi*, Compensation and Restitution in Investor-State Arbitration: Principles and Practice, 143. *Sabahi* discusses Turkish arbitration cases in which the states successfully alleged damage to its international reputation as a result of the “jurisdictionally baseless claim asserted in bad faith”. See also *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, available at: <<https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf>> (visited 11 May 2017).

1207.¹⁰⁸ Fascinatingly then, under this standard, an investor could be held liable for providing a state with, for example, chemicals produced without the intent of violating the Geneva Conventions,¹⁰⁹ but that end up debatably violating the Conventions nonetheless, as was the case with Monsanto, Dow Chemical Company, and seven other manufacturers producing Agent Orange during the Vietnam War.¹¹⁰ A similar situation could have occurred, hypothetically, during Nazi Germany, had Degesch been foreign-owned.¹¹¹ However, a simple thought experiment reveals that this standard too is essentially nominal: In order to incur liability, a BIT between the investor home state and the host state would need to be in force, some investment on the part of the manufacturers would need to be present in the host state, some expropriation, unfair treatment or other term of the BIT would need to be violated by the actions of the host state, and the manufacturers would need to nevertheless initiate a claim against the state with the full knowledge that one of the standards in the *Urbaser* spectrum could be applied. Such a situation places counterclaims for states squarely back within the ultimate discretion of the investor, as was the case long before *Urbaser*.¹¹²

Therefore, for the reasons above, all three standards set out on the *Urbaser* spectrum do not appear to change much, if anything, about the actual arbitral practice of IIL. On one end of the spectrum, states must demonstrate that investors actively aimed at destroying human rights in order to succeed on a counterclaim, and at the other end, in the rare event that an investor tortures, uses chemical weapons, or violates some other *jus cogens* norm under international law, the investor still carries discretion over whether to bring a claim in the first place—an arrangement tantamount to the nominal ‘counterclaim’ clauses in the 2015 draft model India BIT¹¹³ and the Investment Chapter of the TPP,¹¹⁴ and to the ‘investor consent’ standard set out in *Spyridon Roussalis v. Romania*.¹¹⁵ However, in the middle of the spectrum lies a vague standard regarding positive obligations on the part of the state to fulfill human rights and a negative obligation on investors to fulfill their private contractual obligations (rooted in domestic, not international, law) in a way that does not interfere with the states’ positive obligations, but that does not exclude the possibility that investors

¹⁰⁸ *Ibid.* The standard makes no mention of intention.

¹⁰⁹ E.g., Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65 (1925).

¹¹⁰ See e.g., Monsanto’s webpage detailing involvement with the government-sanctioned manufacture of Agent Orange during the Vietnam War, available at: <<http://www.monsanto.com/newsviews/pages/agent-orange-background-monsanto-involvement.aspx>> (visited 11 May 2017).

¹¹¹ Degesch was the private company responsible for producing the chemicals that were used to kill German prisoners, primarily of Jewish decent, in the gas chambers in Auschwitz and other locations.

¹¹² See *Tietjel Crow*, in: *Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations* (forthcoming, OUP 2017).

¹¹³ 2015 India Draft Model BIT, Chapter 14, Article 14.11, available at: <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> (visited 11 May 2017).

¹¹⁴ TPP Chapter 9.

¹¹⁵ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, available at: <<https://www.italaw.com/cases/927>> (visited 11 May 2017).

could have positive performance obligations rooted in international law.¹¹⁶ Accordingly, because the spectrum of standards the tribunal set out for a successful state counterclaim against an investor is either stringent or vague, international lawyers should be cautious to buy the human rights ‘hype’ surrounding *Urbaser*. Nevertheless, the case opens a window for IIL tribunals to enforce extra-IIL treaty obligations upon states through IIL suits.

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

The “middle ground standard” identified above highlights the difficulty of framing corporate human rights obligations within traditional international law. Indeed, at present a legal basis for human rights obligations of private actors remains vague.¹¹⁷ By focusing on the category of traditional binding obligations, however, the Tribunal overlooked the possibilities offered by CSR and the horizontal performance responsibilities it places on corporations.¹¹⁸ This is revealing of the theoretical difficulties of navigating the diffused governance embodied by CSR and its intersection with international law. While it is of extreme interest that the Tribunal gives consideration to CSR in its analysis, the Tribunal then leaves the potential implications of CSR for the case untouched.

a) *Urbaser and the CSR Standard*

The Tribunal refers to CSR as a “standard” of crucial importance that is accepted by international law. It concludes that in light of CSR, “it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law”.¹¹⁹ Both the premise and the conclusion are bold. On the one hand, defining CSR as a standard raises the question on whether “standard” is an adequate word to describe the heterogeneity of initiatives that inhabit the CSR landscape, which is beyond the scope of this contribution.¹²⁰ On the other hand, stating that this standard is “accepted” by international law raises the question of what “acceptance” in

¹¹⁶ *Urbaser* at 1210. See also the discussion under “*Urbaser’s* Second Standard” above.

¹¹⁷ *Heinemann*, in *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma*, (718) 719.

¹¹⁸ By using the language of “responsibility” for corporate human rights duties, *Ruggie* clearly took issue with single-minded proponents of either corporate voluntarism or legalistic solutions. See *Mares*, *IJGLS*, 23 (Nr. 1, 2016), (1), 3.

¹¹⁹ *Urbaser* at page 317, paragraph 1195.

¹²⁰ In general, CSR can be defined as a response to an expectation that corporations will address a triple bottom line in their operations, which thus includes social and environmental issues in addition to financial ones. See *Mares*, *TLT*, 1 (Nr. 2, 2010), (221) 231. Business and human rights literature shows an increasing refinement of this expectation in the sense that it is “hardening” either through increased standardization of CSR content or through complementarities with hard law. See *Aftab*, *Rocky Mt. Min. L. Inst.*, 60 (2014) 1 (3); *Mares*, in: *Mares* (ed), *The UN Guiding Principles on Human Rights*, (1) 30.

international law entails. It seems to be that in this case acceptance entails incapability of subjectivity, even in the case of a “soft standard” such as CSR.¹²¹

In bringing CSR into the picture to support subjectivity of corporations, the Tribunal also acknowledged CSR can contextualize a corporation’s activities as they relate to human rights and that CSR can even determine whether these activities are attached to international law.¹²² Thus, in theory, the Tribunal could have used CSR to—in the Tribunal’s language—“attach” Claimant’s activities to international law.

b) The Untouched Potential of the CSR Standard in Urbaser

The failure to find an obligation to perform on the part of the investor is the natural consequence of human rights law being tailored to bestow obligations on States, which makes efforts to extend such obligations to non-state actors feel like a procrustean task. Indeed, there is no easy answer to the human rights obligations of corporations. On a general level, there is no single type of corporation and there is no presumption of equality among them; rather, this is a fiction that states apply. On the level of water and sanitation provision services specifically, there is no single contractual relationship for all scenarios and the involvement of the private sector will differ depending on the form of privatization employed.¹²³ All of these variables impact the nature and extent of state obligations and corporate relationships with human rights.

Nevertheless, *Urbaser* was not faced with the task of accommodating all these variables, but rather with the possibility of exploring the existence of a performance obligation of investors in light of the specific case. While a state-centric human rights regime cannot logically apply to business ‘as is’, it is possible to build frameworks that link concrete business operations to the substance of the rights,¹²⁴ through a functional rather than formal approach.¹²⁵ CSR enables building such linkages: CSR manages human rights contingencies of specific business operations, and in this sense, it has a functional approach to human rights. Indeed this is exactly how the Tribunal sees CSR. The Tribunal considers that CSR, on its own, is insufficient to oblige corporations to harmonize internal policies with human rights law and that, therefore, the focus must be on ‘contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual’.¹²⁶ However, the Tribunal failed to follow up on this statement and thus the enabling venue offered by CSR was one that *Urbaser* did

¹²¹ The example of CSR “standard” that the Tribunal refers to are the United Nations Guiding Principles, a document which is precisely characterized and premised on not being binding in the formal sense. At any rate, CSR is characterized by its “soft” nature, either because it is principled based or because, even if providing for detailed provisions, it is voluntary.

¹²² *Urbaser* at page. 317, paragraph 1195.

¹²³ *McIntyre*, in: Addicott/Hossain Bhuiyan/Chowdhury (eds), *Globalization, International Law and Human Rights*, 147 (149).

¹²⁴ *Aftab*, *Rocky Mt. Min. L. Inst.*, 60 (2014) 1 (9).

¹²⁵ *Catá Backer*, *Pac. McGeorge Global Business & Development Law Journal*, 25 (Nr. 1, 2012), 69 (167).

¹²⁶ *Urbaser* at paragraph 1195.

not explore. This begs the question: Could the Tribunal have ‘attached’ human rights obligations to Claimants through their CSR policies?

c) *The CSR Standard in Practice: An Exercise of Performance Obligations Through CSR in Urbaser*

In *Urbaser*, Claimants consist of two companies, Urbaser and CABB, which together were majority shareholders of AGBA, the concessionaire. AGBA has no running website and information retrievable online indicates that the status of the company is currently in process of liquidation.¹²⁷ Accordingly, it is difficult to assess CSR commitments AGBA could have made at the time, at least based on information available in the Internet. Instead, Urbaser and CABB do have running websites where their CSR commitments can be traced.¹²⁸ The overview of the CSR commitments of Urbaser and CABB here will be limited to the case of Urbaser.¹²⁹

Urbaser belonged to the ACS Group, a Spanish corporation, until December 2016.¹³⁰ Urbaser’s website contains a link on corporate social responsibility which refers to the corporate social responsibility of its prior parent company, ACS Group.¹³¹ Thus, it is presumable that Urbaser’s CSR policies were those of ACS Group in the past,¹³² and ACS Group provides plenty of information on its CSR approach.¹³³ While

¹²⁷ This information is available at: <<http://buscar-cuit.com/?q=30-70605947-0&view=resultados>> and <[https://www.cuitonline.com/detalle/30706059470/aguas-del-gran-buenos-aires-s-a-\(en-liquidacion\).html](https://www.cuitonline.com/detalle/30706059470/aguas-del-gran-buenos-aires-s-a-(en-liquidacion).html)> (visited 11 May 2017).

¹²⁸ It must be clarified that the analysis is solely based on information that is retrievable online in the companies’ websites. It has not been cross referenced and contacts with the companies have not being sought for the purposes of this contribution. The information variable on the websites is taken as is for the sake of the argumentation here and is not intended to be an assessment nor judgment on the solidity of the companies’ CSR policies nor on the companies’ good faith when implementing them.

¹²⁹ CABB joined the UN Global Compact in 2012 and, as far as can be gathered from the website, has published CSR reports since 2013, given that its CSR report of 2014 is referred to as the second one in the Global Reporting Initiative Report Check certificate that is uploaded on the company’s website. The 2014 CSR Report is also available at: <<http://www.consorciodeaguas.com/Web/Transparencia/PDF/INSTITUCIONAL/CAS/mrsc.pdf>> (visited 11 May 2017). CABB also has a published environmental policy of 2008 available at: <http://www.consorciodeaguas.com/Web/GestionAmbiental/PDF/Politica/Ingurumen_Politika.pdf> (visited 11 May 2017) and an Ethic Code adopted in 2014, available at: <http://www.consorciodeaguas.com/Web/Transparencia/PDF/INSTITUCIONAL/CAS/Codigo_etico.pdf> (visited 11 May 2017).

¹³⁰ ACS Group sold Urbaser to Firion Investments S.L.U, as communicated by ACS Group in its press release of the 7 of December of 2016. See <<http://www.grupoacs.com/sala-de-prensa/noticias/notas-de-prensa/acs-realiza-la-venta-de-urbaser/>> (visited 11 May 2017).

¹³¹ See <<http://www.urbaser.es/seccion-1/Informacion-General>> (visited 11 May 2017).

¹³² Again, this is a rebuttable presumption that is based solely on the information that has been found online.

¹³³ Indeed, ACS Group has a multi-layered CSR policy that consists of several components: a CSR strategy with a commitment statement in favor of CSR and the explanation of how CSR values are shared among the several companies that conform the group; a CSR policy of February 2016; policies that are referred to as “related” to CSR, among which a Human Rights Policy of July 2016; CSR reports, all published from 2006 onwards; and finally a mention of the initiatives the company adheres to and the prizes it has been awarded. Available at: <<http://www.grupoacs.com/responsabilidad-corporativa/estrategia-de-rsc/>> (visited 11 May 2017).

ACS CSR commitments have evolved over time, two elements of ACS Group's CSR commitment go back to the time of the facts of the case.

The first element is that ACS Group joined the UN Global Compact in 2002.¹³⁴ Principle 1 of the Compact states that businesses should "support and respect the protection of internationally proclaimed human rights". There seems to be consensus on the fact that the human right to water has been "proclaimed" internationally,¹³⁵ the question then being whether the UN Global Compact can play a role in realizing it.¹³⁶

The second element is ACS Group's CSR Report of 2006, which states that adherence to the UN Global Compact commits the Group to "integrate" the principles of the Compact to the Group's strategies and operations,¹³⁷ so that the Group's actions will "at all moments" be in line with the UN Global Compact.¹³⁸ The 2006 CSR Report also states that the operations of ACS Group are based on the provisions contained in the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and that the Group has committed to adopt actions to integrate the guidelines to its operations.¹³⁹ The version of the OECD Guidelines applicable at the time of the facts is the text of 2000.¹⁴⁰ One might presume that the ACS Group was aware of the OECD Guidelines before reporting adherence to them in its 2006 CSR Report. If this is the case, the 2000 OECD Guidelines already offered insights on a company's duty in light of human rights.¹⁴¹ In particular, the 2000 OECD Guidelines acknowledge that business activities can have social and environmental implications, which can be managed through self-regulatory practices and management systems.¹⁴²

Throughout the years 1999 and 2006, when the facts of *Urbaser* developed, ACS Group had assumed a commitment to CSR by reference to the UN Global Compact and the OECD Guidelines. This commitment translates into "integration" of the principles of these instruments, among which human rights, into the company's oper-

¹³⁴ See <<http://www.grupoacs.com/responsabilidad-corporativa/premios-reconocimientos-y-adhesiones/>> (visited 11 May 2017). The UN Global Compact is not a code of conduct but rather a forum where private companies engage in collective learning through dialogue on how to achieve the Compact's ten principles. The principles are not binding; however, Compact companies have a duty to submit an annual Communication on Progress. See *Heinemann*, in *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma*, 718 (722); *Slaughter*, *SJIL*, 40 (Nr. 2, 2004), 283 (308).

¹³⁵ See section C.

¹³⁶ Given the voluntary nature of the UN Global Compact, commentators are in some instances skeptical. See for example *Williams*, *Mich. J. Int'l L.*, 469 (489).

¹³⁷ ACS Group, *Informe de Responsabilidad Corporativa*, (Mar. 25, 2017, 7:00 PM), available at: <http://www.grupoacs.com/ficheros_editor/File/03_accionistas_inversores/03_informe_anual/2006/08_acs__ia06__03_resp_corporativa.pdf> (last visited 11 May 2017), page 314.

¹³⁸ *Ibid.* at page 247.

¹³⁹ *Ibid.* at page 314.

¹⁴⁰ *OECD*, 2011 Update of the OECD Guidelines for Multinational Enterprises, Comparative table of changes made to the 2000 text available at: <<http://www.oecd.org/corporate/mne/49744860.pdf>> (visited 11 May 2017).

¹⁴¹ The General Policies of the 2000 OECD Guidelines for Multinational Enterprises encourage companies to respect the human rights of those affected by their activities (at the time, the human rights that are consistent with the host government's international obligations and commitments). Respect for human rights is encouraged not only in dealings with employees but also in dealings with those affected by the company's activities. See *id.* at point 4.

¹⁴² See *id.* at point 8.

ations. CSR is flexible on how this integration can take place and in this regard falls back on the voluntary undertakings of each corporation.¹⁴³ It is true that with the UN Guiding Principles on Business and Human Rights, CSR has become more precise, even assuming the contours of a “legal science”;¹⁴⁴ this does not mean though that the margin of flexibility offered by CSR before the UN Guiding Principles left companies clueless on what measures could be adopted. Surely ACS Group must have been aware of tools such as self-regulating mechanisms, management systems and impact assessments.

ACS Group had already assumed the commitment to respect human rights through its CSR policy. This commitment is not nominal under a serious CSR policy. Rather, it translates into specific measures taken at the corporate level to address the relationship between the corporation’s activities and human rights. These measures are performance duties that naturally follow from a CSR commitment. In practice, they often consisted at the time in corporate codes of conduct, impact assessments and integration of human rights considerations into the company’s management systems.¹⁴⁵ Because the submissions of the parties are not public, we cannot know whether Urbaser mentioned its CSR policy. One can speculate it did not since it would not have favored its asymmetry claims.

It is difficult to know what conclusions the Tribunal would have drawn from consideration of Urbaser’s CSR policy. On the one hand, the Tribunal stated that for a corporate obligation to perform to exist and be relevant in the framework of a BIT, it must either be part of a treaty or be a general principle of international law. On the other hand, the Tribunal acknowledges the potential of CSR to contextualize a company’s activities and determine whether such activities attach international law obligations to a company. In Urbaser’s case, its CSR commitment, among which to respect international human rights, implied integrating such rights to its operations. It is the integration of human rights into the company’s operations that attaches these operations to international law, an attachment that that was voluntarily taken upon by ACS Group. In this sense, the integration of human rights into a company’s operations provides perhaps the missing link to international law that could have made a corporate obligation to perform human rights justiciable. Indeed, the voluntary undertaking of human rights through a CSR policy can bring international human rights obligations to the company level, where company performance—albeit functional—can be assessed.

¹⁴³ The dichotomy between voluntarism and hard law however is nuanced and complex. See *Aftab/Wynhoven*, in: Walker-Said/Kelly (eds), *Corporate Social Responsibility?, Human Rights in the new Global Economy*, (2015), 232 (233 ff.); see also *Mares*, in Mares (ed): *The UN Guiding Principles on Human Rights – Foundations and Implementation* (2012), 1 (30).

¹⁴⁴ *Aftab*, *Rocky Mt. Min. L. Inst.*, 60 (2014), 1 (14).

¹⁴⁵ The operationalization of CSR has changed significantly after the introduction of *Ruggie’s* “protect, respect, remedy” framework, in the sense that businesses are offered a clearer blueprint of how to articulate their human rights commitments. The UN Guiding Principles translate a business’ responsibility to respect human rights in a policy commitment, a due diligence process and a remediation process. The core of the system is the due diligence process. For an overview, see *Aftab*, *Rocky Mt. Min. L. Inst.*, 60 (2014), 1, (3).

E. Conclusions

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

First, it is notable that the Tribunal was able to entertain the issue of human rights to the extent it did because of Respondent’s counterclaim. As noted above, counterclaims are an exception in investment arbitration and tend to have limited footing in investment agreements. Nevertheless, *Urbaser* may set a precedent for human rights to be given more space in investment arbitration, regardless of whether counterclaims are admitted or not. Tribunals have been traditionally hesitant to approach human rights-based arguments because of jurisdictional limitations.¹⁴⁶ But *Urbaser* sees a manifest link between the claim and the counterclaim: they are based on the same investment or lack thereof, in relation to the same concession. This would be sufficient, says the Tribunal, to adopt jurisdiction, but it also adds: “The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only”.¹⁴⁷ One can expect this broadened interpretation of what constitutes a connection to the investment to enable more human rights-based defenses in the future.

In practice, however, *Urbaser* does not bring forward a theory for corporate human rights obligations under international law. *Urbaser* sets forth three standards, two of which are nominal. The third one—the possibility of a performance obligation—was found not to be applicable in the case, and it is difficult to imagine a case in which it would be applicable given the present state of human rights law. Indeed, no international law corporate obligation to perform human rights exists under international human rights law, and this is what *Urbaser* confirms. Without understating the importance of acknowledging the potential for such obligations in international law, which *Urbaser* does, this would mean that *Urbaser* “merely” acknowledges the status quo. On the other hand, though, the CSR “standard” has direct implications for the human rights obligations of corporations, implications that the Tribunal did not take into consideration. The possibility of performance obligations for investors through CSR should not go unnoticed since it sets the stage for the most immediate and practical implications of *Urbaser*.

CSR, seen as a corporate operationalization of human rights, opens a scenario of risk for investors in investment arbitration that is real. *Allen & Overy* rightly noted, commenting on *Urbaser*, that human rights counterclaims “may expose investors to

¹⁴⁶ For an overview of human rights in investment arbitration and in particular in the Grand River Enterprises Six Nations, Ltd. v. United States case, *Karamanian*, Lewis & Clark L. Rev., 17 (Nr. 2, 2013), 423 (426).

¹⁴⁷ *Urbaser* at Paragraph 1151.

financial liability”.¹⁴⁸ The uncertainty surrounding the nature of the obligations that might be justiciable and the future developments the CSR “standard” might have in international law put investors in the uneasy position of being—if not formally bound—socially expected to comply with a set of standards whose contours are the object of progressive development. This might have the paradoxical result of discouraging CSR practice in transnational investment or of companies framing it in terms so broad, so as to delimit the scenarios of “attachment” of a given CSR policy to human rights. The uncertain risk generated by possible corporate human rights obligations might also lead to a situation where the corporate sector actually advocates for a CSR treaty, so as to have guidance on what is exactly expected and thus to limit its legal risk. The latter is a strenuous challenge to the extent any “hard” obligations under CSR would have to be preceded by a debate on the nature of a company’s personality under international law and consequently on the structure of the obligations to be bestowed.

Urbaser acknowledges the debate on asymmetry, which has been the core of the backlash against the IIL. To a certain extent, *Urbaser* brings this debate to its maturation, taking a definite position on IIL as part of general international law and on investors as duty bearers. In doing so, *Urbaser* touches upon issues that are far from settled and that are paradigmatic of attempts to describe current international life using traditional international law language and categories.¹⁴⁹ The status of transnational corporations and the implications of this status for the human rights are questions that will continue to engage legal scholars for years to come. While *Urbaser* contributes to this debate, it provides no definite answers. Nevertheless, it leaves the door open for more holistic approaches to investment law in international investment arbitration.

¹⁴⁸ *Briercliffe*, *Supra Business Advisor*, available at: <<http://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/>> (visited 11 May 2017).

¹⁴⁹ The finding of unspecified human rights responsibilities of service providers by the HRC, as highlighted in section C above, is another expression of this difficulty.

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