

# 投資条約仲裁から見た国際人権法の行為規範としての明確性と実効性 (2022.09.18)

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本報告の元: "In/ex-clusiveness of Human Rights Claims in Investment Arbitration"

欧州国際法学会 (ESIL) 年次大会@Utrecht、International Business and Human Rights Interest Group (IBHR IG) ワークショップでの報告 (2022年9月1日)

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### 参考資料・文献

 [投資条約・仲裁規則](#)

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## 1. はじめに

「投資条約 (仲裁) と人権」 (Dupuy, 2009; Kriebaum, 2018)

- ① 投資家の人権
- ② 非紛争当事者の人権 ... 「ビジネスと人権」 ← 本日の焦点

## ▼ 人権専門家らによる投資条約（仲裁）に関連する勧告等

特別報告者・ワーキンググループ

Special Representative of the Secretary-General (John G Ruggie), Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31 (21 March 2011). 『「ビジネスと人権」指導原則』 (2011)

—, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations*, UN Doc A/HRC/17/31/Add.3 (25 May 2011)

Independent Expert on the Promotion of a Democratic and Equitable International Order (Alfred-Maurice de Zayas), *Report*, UN Doc A/HRC/33/40 (12 July 2016)

← 瀧本 (2019) による批判的検討

Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report on Human Rights-compatible International Investment Agreements*, UN Doc A/76/238 (27 July 2021) 『WGLレポート』 (2021)

Expert Mechanism on the Right to Development, *The Right to Development in International Investment Law: Overview of the Ongoing Study by the Expert Mechanism on the Right to Development—Conference Room Paper*, UN Doc A/HRC/EMRTD/5/CRP.2 (1 March 2022).

条約体▼ CtRC, *General comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights*, UN Doc. [CRC/C/GC/16](#) (17 April 2013)

19. The activities and operations of business enterprises can impact on the realization of article 6 in different ways. For example, environmental degradation and contamination arising from business activities can compromise children's rights to health, food security and access to safe drinking water and sanitation. Selling or leasing land to investors can deprive local populations of access to natural resources linked to their subsistence and cultural heritage; the rights of indigenous children may be particularly at risk in this context.<sup>5</sup> The marketing to children of products such as cigarettes and alcohol as well as

<sup>5</sup> General comment No. 11 (2009) on indigenous children and their rights under the convention, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 41 (A/65/41)*, annex III,

foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives can have a long-term impact on their health.<sup>6</sup> When business employment practices require adults to work long hours, older children, particularly girls, may take on their parent's domestic and childcare obligations, which can negatively impact their right to education and to play; additionally, leaving children alone or in the care of older siblings can have implications for the quality of care and the health of younger children.

## D. Coordination and monitoring measures


### 1. Coordination

#### D. 調整措置および監視措置

##### 1. 調整

75. 条約およびその選択議定書を全面的に実施するためには、政府省庁間で、かつ地方から広域行政圏および中央に至るまでの諸段階の政府間で、部門横断型の調整が効果的に行なわれなければならない<sup>27</sup>。一般的に、企業政策および企業実務に直接関与している省庁は、子どもの権利を直接担当している省庁とは別に活動している。国は、企業法および企業実務を形づくる政府機関および議員が子どもの権利に関わる国の義務を知っていることを確保しなければならない。これらの政府機関および議員は、法律および政策を策定する際ならびに経済、貿易および投資に関する協定を締結する際に条約の全面的遵守を確保する備えを整えられるよう、関連の情報、研修および支援を必要とすることがあろう。国内人権機関は、子どもの権利および企業に関わっている種々の政府部局の連携を図る触媒として、重要な役割を果たしうる。

- ▼ CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24 (10 August 2017)

 General Comment No. 24\_State Obligations under the ICESCR in the Context of B... 243...

13. States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist,<sup>38</sup> as required under the principle of the binding character of treaties.<sup>39</sup> The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of

<sup>38</sup> See A/HRC/19/59/Add.5. See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 23.

<sup>39</sup> See the Vienna Convention on the Law of Treaties, arts. 26 and 30 (4) (b).

any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations.<sup>40</sup> States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.

<sup>40</sup> Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140.

『「ビジネスと人権」指導原則』の枠組みによる整理 (WGレポート、2021 ; Steininger, 2021)

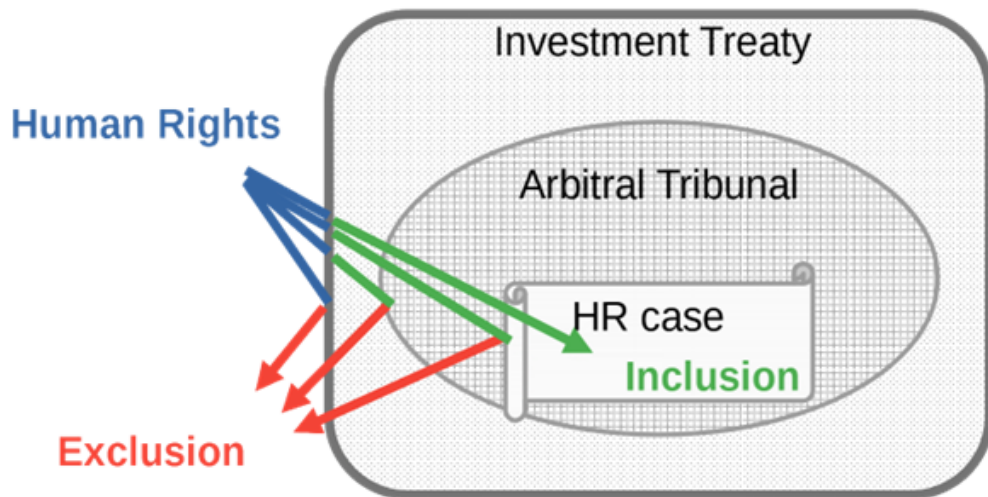
- 保護
  - ホスト国による人権に基づく抗弁 (human rights defence)

- 尊重
  - 投資家のデュー・ディリジェンス
    - 投資家による人権侵害をホスト国が提起する反対請求
    - 投資家による人権侵害をホスト国が寄与過失として主張
- 救済
  - 仲裁判断により影響を受けうる個人／共同体の第三者／*amicus curiae*としての参加

#### 分析の手順

- ① 人権専門家らによる勧告／「次世代型」投資条約
- ② 仲裁判断における人権に基づく主張・申立（human rights claim）の in/ex-clusion 分析

▼ 図



- ③ 国際人権法の行為規範としての機能

## 2. 関連実行・仲裁判断の検討

### 2-1. (保護) ホスト国による人権抗弁 (human rights defence)

- ① 人権専門家らによる勧告／「次世代型」投資条約

## ▼ 『「ビジネスと人権」指導原則』 (2011)

**9. 国家は、例えば投資条約または契約を通じて、他の国家または企業とビジネスに関連する政策目標を追求するとき、その人権義務を果たすために国内政策でしかるべき余地を残しておくべきである。**

**解説**

二国間投資条約、自由貿易協定または投資プロジェクトのための契約のような、国家によって他の国家との間または企業との間で締結される経済合意は、国家にとって経済的機会を生み出す。しかし、これらは同時に、政府の国内政策の余地に影響を与えうる。例えば、国際的投資協定の条項が、国家が人権に関する新たな立法を全面的に施行するのを阻害するか、あるいは国家がそうすれば国際仲裁を避けえないというリスクを生む可能性がある。したがって、国家は、そのような協定のもとでも、必要な投資家保護に配慮する一方で、人権を保護するためしかるべき政策及び規制を実施できる力を確保すべきである。

**9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.**

*Commentary*

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

▼ CESCR, *General Comment No. 24* (2017)

 General Comment No. 24\_State Obligations under the ICESCR in the Context of Busin... 243....

13. States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist,<sup>38</sup> as required under the principle of the binding character of treaties.<sup>39</sup> The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of

<sup>38</sup> See A/HRC/19/59/Add.5. See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 23.

<sup>39</sup> See the Vienna Convention on the Law of Treaties, arts. 26 and 30 (4) (b).

any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations.<sup>40</sup> States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.

<sup>40</sup> Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140.

▼  Morocco-Nigeria BIT (2016) 人権保護を明記**ARTICLE 15****INVESTMENT, LABOUR AND HUMAN RIGHTS PROTECTION**

5) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these law and regulations.

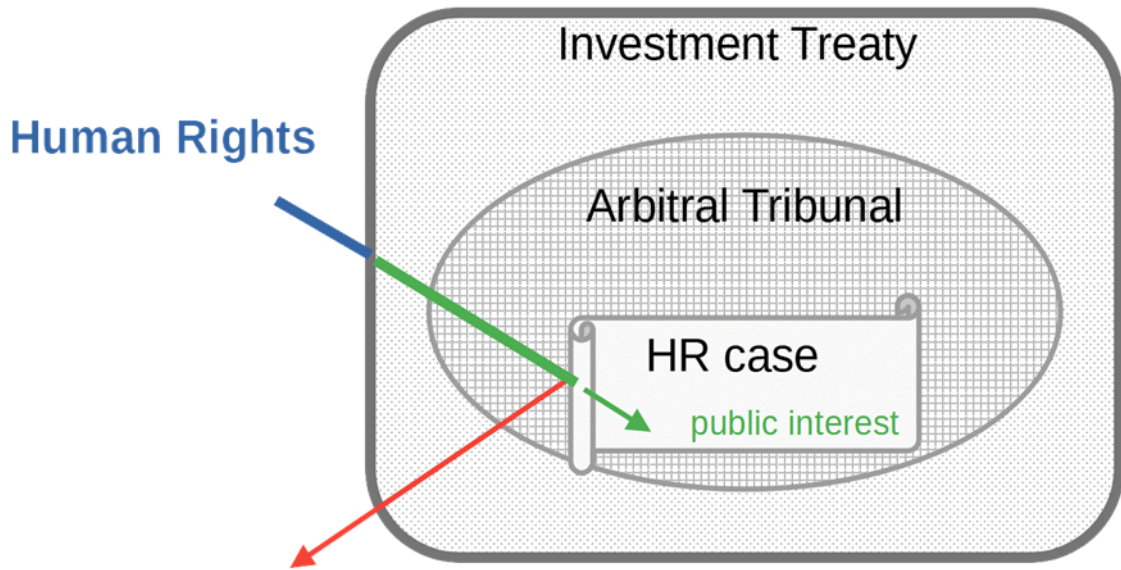
6) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party.

## ▼ 📖 Canada-Colombia FTA (2008) 一般的例外

*“Article 2201: General Exceptions**[...]*

- (3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*
  - (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;*
  - (b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
  - (c) For the conservation of living or non-living exhaustible natural resources.*

## ② 仲裁判断における人権に基づく主張・申立 (human rights claim) の in/ex-clusion 分析



- 人権を考慮し、正当な目的に該当することを明示する判断

- ▼ ⚖️ *Saur v. Argentina* (2012)


330. En réalité, **les droits de l'homme** en général, et le droit à l'eau en particulier, constituent l'une des diverses sources que **le Tribunal devra prendre en compte pour résoudre le différend** car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels<sup>353</sup>, et, de plus, ils font partie **des principes généraux du droit international**. L'accès à l'eau potable constitue, du point de vue de l'État, un service public de première nécessité et, du point de vue du citoyen, un droit fondamental<sup>354</sup>. Pour ce motif, en cette matière, **l'ordre juridique peut et doit réserver à l'Autorité publique des fonctions légitimes de planification, de supervision, de police, de sanction, d'intervention et même de résiliation, afin de protéger l'intérêt général.**



- 投資条約上の義務と人権条約上の義務とが（付託された紛争の事実関係において）抵触しないと指摘する判断

▼  *Suez v. Argentina* (2010) [262]

Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.

▼  *Houben v. Burundi* (2016)

177. Le Tribunal estime également sans pertinence les arguments du Burundi relatifs aux prétendus droits des squatteurs. Le Burundi explique qu'en droit burundais, seul le possesseur est protégé et non le propriétaire, de sorte que seuls les squatteurs entrés en possession du terrain seraient en droit d'être protégés<sup>115</sup>. Le Burundi fait également valoir que le procureur ne pouvait expulser les occupants dès lors que ces occupants avaient érigé sur le terrain litigieux des habitations personnelles et étaient dès lors protégés par l'article 17 du Pacte relatif aux droits civils et politiques<sup>116</sup>. Or, la question n'est pas de savoir si le Burundi était tenu d'expulser les usurpateurs après que ces derniers furent entrés en possession du terrain, ni si leur expulsion, une fois les habitations construites, aurait été contraire au droit international des droits de l'homme, mais si le Burundi a pris les mesures nécessaires pour empêcher, *a priori*, que ces usurpateurs ne prennent possession du terrain. Les circonstances de faits décrites ci-dessus démontrent que tel n'est pas le cas.

- 一般的例外に該当する場合も、ホスト国が補償義務を免れないとする判断

▼  *Eco Oro v. Colombia* (2021) (環境)

830. The Tribunal therefore construes Article 2201(3) such that whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to the payment of compensation.

Cf. Sandsの反対意見

**The 2201(3) exception**

38. Having concluded that there has been no breach of either Article 805 or Article 811, I do not address the interpretation and applicability of Article 2201(3).

③ 国際人権法の行為規範としての機能

- 「人権抗弁」には、およそ期待できない (Hirano & Hamamoto, 2017)
- 国家による人権保護を目的とする政策目標 + 適正な手段

## 2-2. (尊重) 投資家のデュー・ディリジェンス

① 人権専門家らによる勧告 / 「次世代型」投資条約

- ▶ 『「ビジネスと人権」指導原則』 (2011)
- ▼ 📄 Morocco-Nigeria BIT (2016) 投資家による人権保護を明記

### ARTICLE 18

#### POST-ESTABLISHMENT OBLIGATIONS

- 1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.
  - 2) Investors and investments shall uphold **human rights** in the host state.
  - 3) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
  - 4) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and **human rights** obligations to which the host state and/or home state are Parties.
- ▼ 📄 Dutch Model BIT (2019)

#### *Article 7*

#### *Corporate Social Responsibility*

3. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.
4. Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

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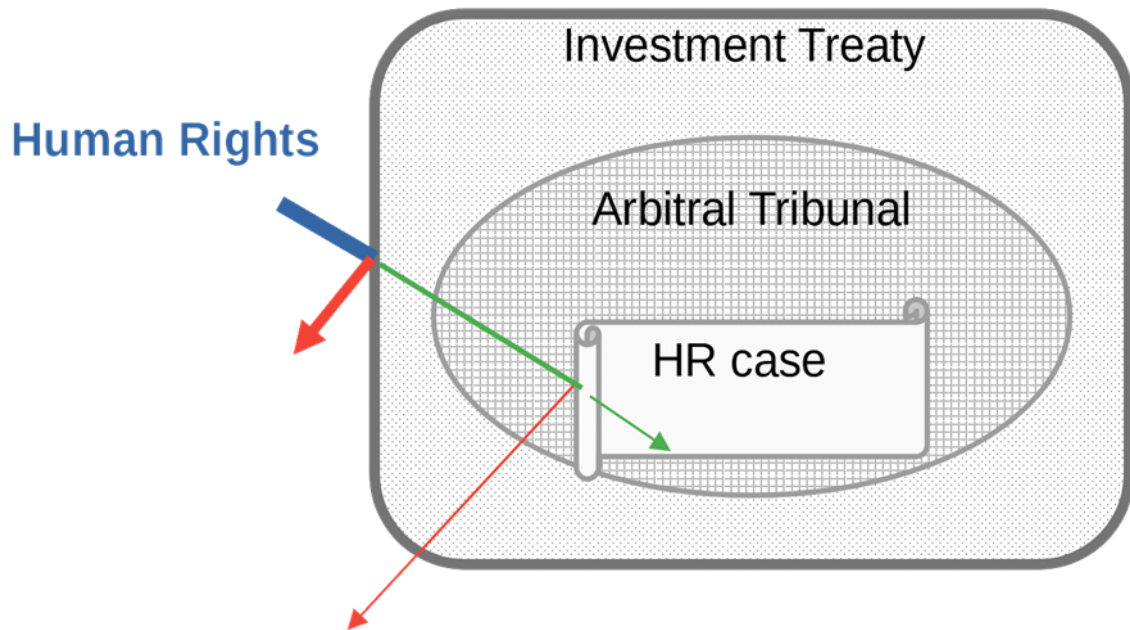
#### *Article 23*

#### *Behavior of the investor*

Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

## ② 仲裁判断における人権に基づく主張・申立 (human rights claim) の in/ex-clusion 分析

## ホスト国による反対請求 (counterclaim)



- 反対請求の可能性に道を開いた判断

- ▼ ⚖️ *Urbaser v. Argentina* (2016)

- 適用されたBITが反対請求を許容

Interestingly, Article X(1) of the BIT does not contain such an exclusion, declaring that it applies to “disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement.” No distinction is made in respect of the party entitled with the rights that are at the basis of the dispute. Thus, they can be rights of the investor as they can be rights of the host State.

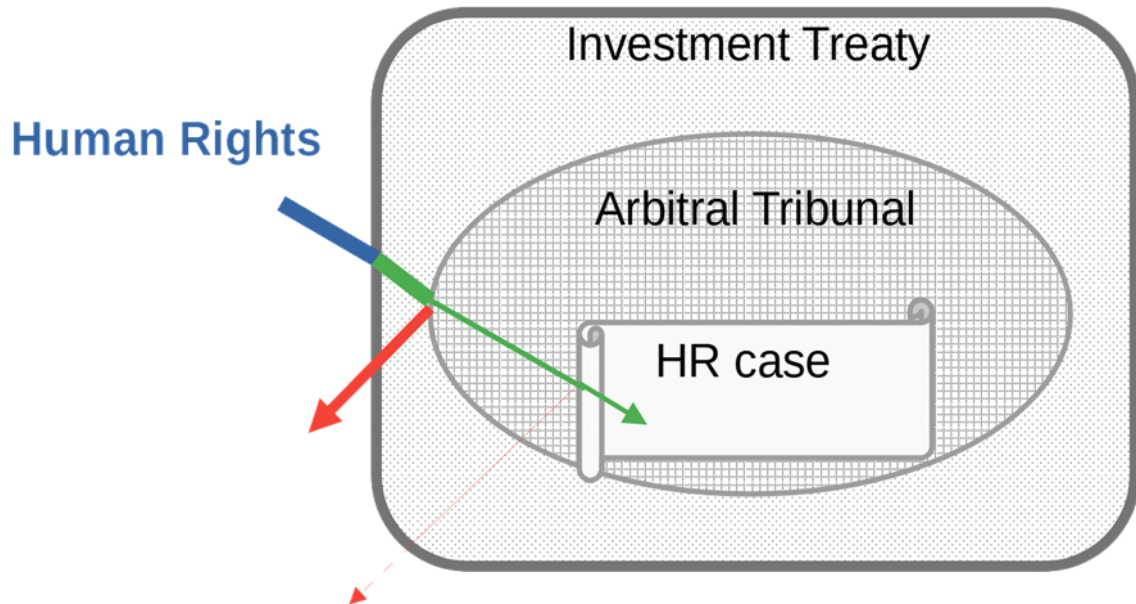
- 人権の企業への適用可能性

1193. On a preliminary level, the Tribunal is reluctant to share Claimants’ principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants.<sup>433</sup> When ex- than the country of their seat or incorporation.<sup>434</sup> In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives

- 人権規範の内容

This is incorrect. The 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. Such obligation would have to be distinct from the State’s responsibility to serve its population with drinking water and sewage services.

## ホスト国による投資家の寄与過失 (contributory fault) の主張



- 人権を考慮し、正当な目的に該当することを明示する判断

### ▼ ⚖️ *Bear Creek Mining v Peru* (2017)

#### 多数意見

406. Even though the concept of “social license” is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.<sup>525</sup> In its application for a

410. For its legal evaluation, the Tribunal agrees with the *Abengoa* Award, in which the tribunal held: “For the international responsibility of a State to be excluded or reduced based on the investor’s omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered. In other words, for the argument to

411. In the view of the Tribunal, Respondent has not been able to prove such a causal link between Claimant’s activity in relation to its Santa Ana Project and Supreme Decree 032. Rather, the evidence

#### Sandsの反対意見

4. I disagree, however, with the Majority’s assessment of the amount of damages that are due, in application of this approach, and in particular the failure to reduce that amount by reason of the fault of the Claimant in contributing to the unrest.<sup>4</sup> Whilst I agree that it is for the Respondent to establish any contributory fault, my assessment of the evidence before the Tribunal is that the Respondent has clearly established the Claimant’s contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being. I set out my reasons in this Partial Dissent.

### ③ 国際人権法の行為規範としての機能

#### 反対請求

- 国際人権法に依拠する場合、投資家に求められる具体的義務内容を同定する方法論の欠如（菊間、2019）→ 「人権を保護する国家の義務」？
- 反対請求が認められた場合に、賠償を受ける主体は？—国家？個人？

#### 寄与過失

- 現行法 BUT 事実認定のハードル  
→ 「社会的操業許可（Social License to Operate）」獲得に向けた人権に基づく行動指針？  
Ex. Free, Prior, and Informed Consent (FPIC)
- 

## 2-3. (救済) 第三者/*amicus curiae*による仲裁手続への参加

### ④ 人権専門家らによる勧告／「次世代型」投資条約

- ▼ 『WGLレポート』（2021）

78. **The Working Group recommends that adjudicators of investment-related disputes:**

(b) **Invite affected communities and civil society organizations, or allow their request, to submit amicus briefs about any alleged adverse impacts of investment-related projects on human rights or the environment and attend arbitral proceedings;**

## ▼ 『「ビジネスと人権」指導原則』 (2011)

非司法的苦情処理メカニズムのための実効性の要件

31. その実効性を確保するために、非司法的苦情処理メカニズムは、国家基盤型及び非国家基盤型を問わず、次の要件を充たすべきである。

- a. 正当性がある (...)
- b. アクセスすることができる (...)
- c. 予測可能である (...)
- d. 公平である (...)
- e. 透明性がある (...)
- f. 権利に矛盾しない (...)
- g. 継続的学習の源となる (...)
- h. エンゲージメント及び対話に基づく (...)



## EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS

**31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:**

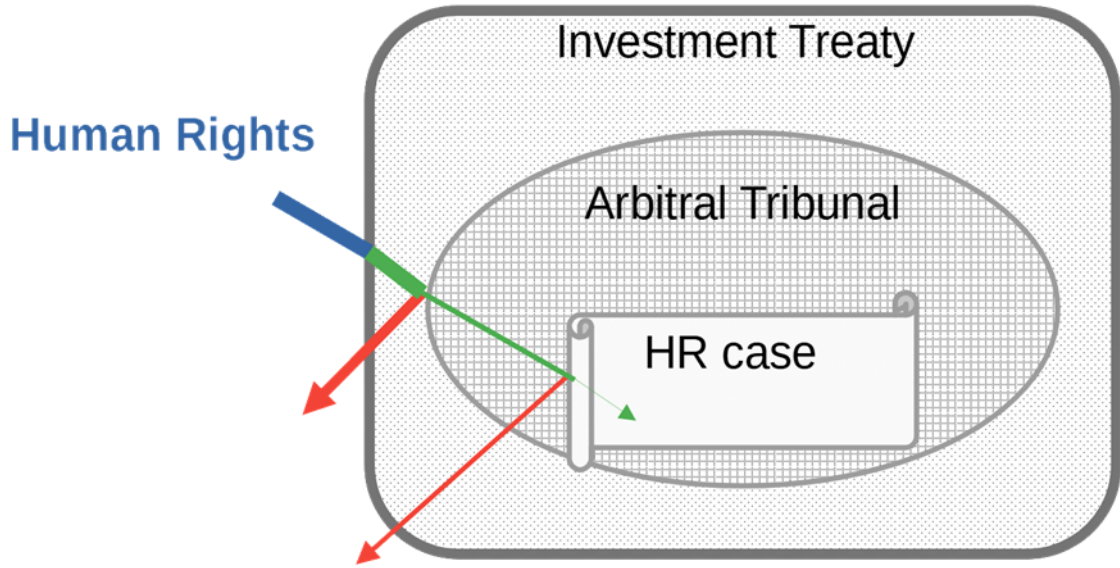
入力してください...


- a. Legitimate (...)
- b. Accessible (...)
- c. Predictable (...)
- d. Equitable (...)
- e. Transparent (...)
- f. Eights-compatible (...)
- g. A source of continuous learning (...)
- h. Based on engagement and dialogue (...)

- 仲裁規則

-  ICSID Arbitration Rules (2006)
-  UNCITRAL Rules on Transparency (2014)

② 仲裁判断における人権に基づく主張・申立 (human rights claim) の in/ex-clusion 分析



- 要件の解釈が仲裁人の中で割れた判断
  - ▼  *Odyssey v. Mexico* (2021)

**Majority**      **Sands**  
(Dissenting Opinion)

• **Significant Interest**

<i>Local fishing cooperative</i>	×	○
<i>CIEL</i>	×	○

• **Assistance to the Tribunal**

<i>Local fishing cooperative</i>	×	○
<i>CIEL</i>	×	○

Sands反対意見

implying that only if the Claimant was seeking restitution would the Majority have found that the *Cooperativa* had a significant interest in the arbitration. This is an extraordinarily narrow reading of the ‘significant interest’ requirement, and the Majority has offered no justification in support. It is now well-recognised that investment treaty arbitration can have a significant impact on domestic regulatory regimes, even where compensation is the only remedy awarded. It is therefore entirely possible that a finding that the Respondent has breached the treaty could lead to regulatory changes which directly affect the interests of the *Cooperativa*, either immediately or in the future. The Majority’s decision fails to recognise or take account of the broader impacts of investment treaty arbitration.

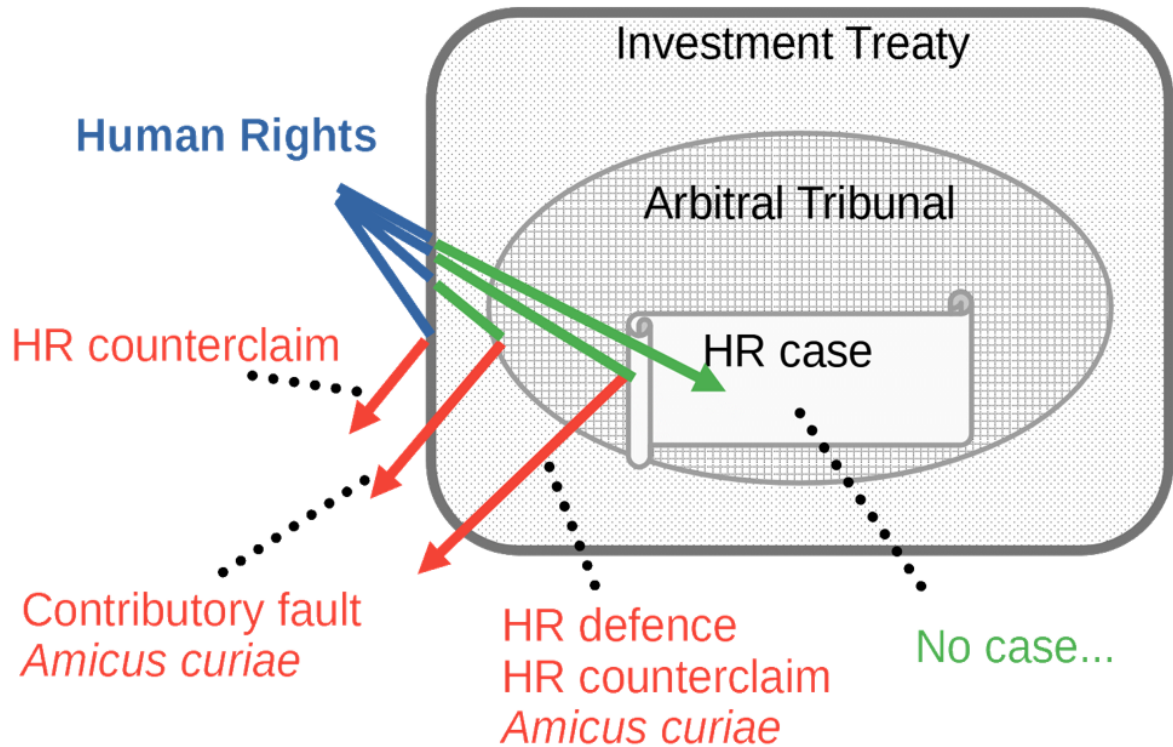
- In my view, *CIEL* is able to offer a unique perspective due to its ability to place this dispute in the context of broader debates and developments in international law. The focus of the Parties has naturally been on the legal standards of the treaty and the relevant factual evidence. In my view, these broader debates are highly relevant to the Tribunal’s task in this case, given the potential interplay of investment, environmental and human rights issues in this case. Given

③ 国際人権法の行為規範としての機能

- 金銭賠償が国内公共政策実施に「委縮効果 (chilling effect)」を与えることについての見解の不一致
- 正統性・透明性の調達 (久保田、2011) ; インクルージョン (Perrone, 2019)  
BUT 仲裁廷を法形成に開くことは、脱政治化させた制度の再政治化にならないか？
- ホスト国が十分に人権に基づく主張を代弁し得ない場合とは？  
→ ローカルな状況 → 「社会的操業許可 (Social License to Operate)」の認定？

3. おわりに





### 明確性

- 基本的には、国内法に落とし込むことが必要
- 「社会的操業許可（Social License to Operate）」：先住民族の権利？

### 実効性

- 国家：国家が人権を参照する戦略（対投資家の民意醸成）と、人権規範による規律のギャップ（例：水道民営化紛争）
- 投資家：人権デュー・ディリジェンスを果たすことが、紛争のリスク回避のみならず、紛争解決時に不利に作用することを防ぐことに？

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