

NORMATIVE AND OPERATIONAL LINKAGES BETWEEN HUMAN RIGHTS LAW AND BITS – BUILDING A FIRMER STATUS OF HUMAN RIGHTS IN INVESTOR-STATE ARBITRATION

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ABSTRACT

Human rights law and BITS are different treaty systems. Most BITS do not include any human rights clauses. However, more and more “normative” and “operational” linkages can be identified between the human rights law and BITS nowadays as a result of the practices of BITS. One normative linkage is the human rights law’s role to protect foreign investors. Another normative linkage is its role to regulate foreign investors, especially multinational enterprises, through including human rights protection in their corporate social responsibility under certain internationally recognized guiding principles. Yet another normative linkage is for the host States to rely on human rights law to defend themselves from being considered violating BITS or from being required making compensation to foreign investors. There are two legal methods to effectuate these various roles played by the human rights law in the operation of BITS and to help build the “operational linkages” between the human rights law and BITS. The first method is to consider human rights law as the applicable law to decide arbitration cases for investment disputes. The second one is for arbitral tribunals to rely on treaty interpretation so as to incorporate the principles embodied in international human rights law into the provisions in BITS.

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Although these methods are useful, there are still uncertainties concerning human rights law being fully incorporated into the operation of BITs. The paper argues that human rights law should be further built into the main body of BITs to guide the normative and operational relationships between human rights law and BITs.

KEYWORDS: *BIT, human rights, Investor-State arbitration, normative linkage, operational linkage*