The Jurisdiction of Investment Treaty Tribunals over Investors’ Human Rights Claims: The Case Against *Roussalis v. Romania*

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*The interactions between international human rights law and investor-State arbitration have attracted much attention in the last two decades. In particular, investors have sought to bolster their position in investor-State arbitration by invoking international human rights law. Some have argued that the broad wording of an arbitration clause could provide a tribunal with jurisdiction to hear their human rights claims, while others have encouraged arbitrators—based on choice of law clauses—to interpret BIT standards in light of the human rights jurisprudence. It is against this backdrop that the claimant in Roussalis v. Romania\(^1\) put forward a novel argument. The claimant argued that Article 10 of the Greece-Romania BIT, a preservation of rights provision, could provide arbitrators with jurisdiction over his ECHR claims, as the relevant ECHR provisions were more protective of his investments than the relevant BIT provisions. The arbitrators, while they dismissed the argument as irrelevant on the facts at hand, nevertheless left open the possibility that preservation of rights provisions may under certain circumstances*

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provide the basis for a tribunal's jurisdiction over investors' human rights claims. This Note provides a critique of this argument, based on international rules of treaty interpretation and public policy reasons.

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A. The Roussalis Interpretation of Article 10 Triggers a
INTRODUCTION

International human rights law and international investment law have much in common: they address a similar structural challenge—the asymmetric legal relationship between sovereign States and private actors operating within their boundaries. Both international human rights law and international investment law seek to compensate for the inferior legal position of individuals and investors under the domestic law of the State in which they operate by enhancing legal protection at the international level.² It is therefore not surprising that these two areas of international law would interact and to some extent influence each other.³

Yet, international human rights law and international investment law can sometimes point in opposite directions. Investors may, before a tribunal composed of arbitrators they have for the most part chosen, call into question the public policy decisions of democratically-elected governments, on the basis of a treaty under which the investor has assumed no reciprocal duties or obligations. Public policy decisions driven by a government’s legitimate concern for the human


rights and welfare of its citizens sometimes become the object of an investor-State arbitration. This, in addition to the limited scope of review over arbitral awards and the confidentiality of some proceedings, has led to controversy over investor-State arbitration among government, lawyers and civil society.

The interactions between international human rights law and investor-State arbitration have attracted much commentary in the last two decades. Moreover, investors and host States alike have made arguments inspired by or derived from human rights law in the course of investment arbitration proceedings. This Note focuses on the human rights arguments that investors have made in investor-State arbitration proceedings. Such arguments have typically taken one of two forms. First, investors have (unsuccessfully) sought to establish the jurisdiction of arbitrators over their independent human rights claims based on a broad reading of the arbitration clause in the governing contract and/or treaty. Second, investors have invoked choice of law provisions in applicable contracts or treaties in order to refer to international human rights law. The latter argument has been more successful, and arbitrators have sometimes looked to international human rights law as a guide or an analogy when interpreting investment treaty protections.


7. See PETERSON, supra note 6, at 7.


9. PETERSON, supra note 6, at 22–23.

10. Id. See also Channel Tunnel Group, Partial Award, ¶ 151.
It is against this backdrop that Roussalis, the Greek claimant-investor in *Roussalis v. Romania*, raised a novel argument. The claimant argued, based on Article 10 of the 1997 Greece-Romania bilateral investment treaty (BIT), that the arbitrators had subject-matter jurisdiction over his claim that Romania had breached its obligations under the European Convention on Human Rights (ECHR). Article 10 of the Greece-Romania BIT (Article 10) provides that if the two contracting parties to the BIT enter or have entered into other international law commitments which grant "investments by investors" more favorable treatment than the BIT provisions, these other commitments shall, "to the extent that [they are] more favourable," prevail over the BIT provisions. The theory underlying Roussalis’s argument is that extra-BIT international law obligations in force between the two contracting parties can be incorporated into the BIT via its Article 10 to the extent that they afford “investments by investors” a higher level of protection. As a result of this process of incorporation, the reasoning goes, the tribunal can exercise its jurisdiction over claims based on extra-BIT international obligations, including ECHR claims and other international human rights claims. The arbitrators found that the issue was moot on the specific facts of the case, because the ECHR provisions did not provide a greater level of protection than did the BIT provisions. Surprisingly, however, they did not reject the argument as a matter of law, and left open the possibility that Article 10 could provide a pathway for the introduction of human rights claims in investment treaty arbitration under certain circumstances.


13. *Id.* (“If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall, to the extent that it is more favourable, prevail over this Agreement.”).

14. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 312 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2431_End&caseId=C70 ("Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the
This novel argument and its reception by the Roussalis tribunal are significant for three reasons. First, provisions with the same or similar language as Article 10 can be found in a large number of BITs that are currently in force. They have been referred to as “preservation of rights provisions,” “non-derogation provisions” or “more favorable treatment provisions.” Second, while there is no formal doctrine of precedent in international arbitration, arbitrators in investor-State arbitration—much like the judges on the International Court of Justice—indeed refer to prior awards and decisions as persuasive authority. In the absence of a formal system of precedent, the distinction between holding and obiter dicta has diminished relevance, and even comments made in passing in a decision may influence the way the law develops. Third, because the same individuals tend to be appointed as arbitrators in investment treaty cases over and over again, the opinion of a few prominent arbitrators can greatly contribute to shaping the law in this area.

The arbitrators in Roussalis v. Romania are indeed prominent in the field and have been appointed in a large number of investor-State arbitrations. Therefore,

15. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 317 (2009). This Note will adopt the “preservation of rights” terminology.


17. See Shabtai Rosenne, The Perplexities of Modern International Law: General Course on Public International Law, 291 RECUEIL DES COURS 9, 69 (2001) (“The absence from international law of any rule of stare decisis means that the lawyer should be careful before relying on its ancillary doctrine of the distinction between the ratio decidendi and any obiter dicta . . . [E]very word is part of the reasoning.”); see also ANDRES RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY 127–30 (2012).


19. The arbitrators appointed in Roussalis v. Romania were Andrea Giardina, Michael Reisman and Bernard Hanotiau, who acted as President of the Tribunal. Both Michael Reisman and Bernard Hanotiau were listed in Jeffery Commission’s 2009 list of the “top 36 arbitrators presently serving as party-appointed arbitrator in pending ICSID cases . . . .” Id.
the Roussalis tribunal’s treatment of the claimant’s human rights argument may have a significant impact on the way preservation of rights provisions are interpreted in the future.

This Note assesses the argument made by the claimant in Roussalis v. Romania concerning the role of these provisions. As such, it differs from other commentaries on Roussalis v. Romania, which have focused on the issue of host State counterclaims in investment arbitration. This Note argues that arbitrators should reject the Roussalis line of argument and clarify the unavailability of this avenue for the introduction of human rights claims in investment treaty arbitration, as it is both erroneous and undesirable as a matter of public policy. Part I describes the legal landscape of investor-State arbitration and conducts a brief survey of the human rights arguments that investors have made in investor-State proceedings to date. Part II summarizes the novel argument that the claimant made in Roussalis v. Romania, the tribunal’s reception of this argument, and its significance and potential impact on the decisions of other tribunals in the future. Parts III and IV argue that arbitrators should decline jurisdiction ratione materiae (i.e., subject-matter jurisdiction) over human rights claims based on the Roussalis line of argument. Part III maintains that the Roussalis interpretation of preservation of rights provisions is erroneous, while Part IV asserts that this interpretation is undesirable as a matter of public policy.

I. THE MODERN INVESTOR-STATE ARBITRATION SYSTEM AND ITS INTERACTIONS WITH INTERNATIONAL HUMAN RIGHTS LAW

In an effort to move away from “gunboat diplomacy” in the resolution of investment protection disputes and promote cross-border investment flows, States have since the 1950s entered into bilateral investment treaties (BITs) and other international investment

agreements (IIAs).\textsuperscript{21} As Section A describes, these BITs at a minimum clarify the obligations owed to foreign investors by host States, and provide for investor-State dispute resolution mechanisms. On many occasions, investment treaty law overlaps with international human rights law: both legal regimes will be relevant to the same factual situation. Section B describes how investors have sought to bolster their position in investor-State arbitration by making references to international human rights law, and how tribunals have received these arguments. Because arbitrators generally have limited subject-matter jurisdiction over investment disputes, arbitral tribunals have declined to rule on investors’ independent human rights claims in the course of investment arbitration proceedings. Yet, arbitrators have not ignored international human rights law altogether. Rather, they have referred to it anecdotally, as a tool to guide their interpretation of BIT protection standards.

\textit{A. The Modern Investor-State Arbitration System}

The number of investor-State arbitrations involving claims under IIAs has exploded since the 1990s.\textsuperscript{22} Given the international community’s continuing failure to adopt a single multilateral agreement on international investment,\textsuperscript{23} the majority of these disputes arises out of a global network of over 2,800 BITs.\textsuperscript{24} These BITs are the result of efforts by States to address the limitations of the traditional investment dispute settlement system,\textsuperscript{25} and to promote cross-border investment flows by guaranteeing a certain level of protection to investments made by foreign investors.\textsuperscript{26} BITs typically provide

\begin{enumerate}
\item \textsuperscript{21} \textit{Christopher F. Dugan et al., Investor-State Arbitration} 45–48 (2008).
\item \textsuperscript{23} \textit{Dugan et al., supra} note 21, at 48–50, 54, 74–75.
\item \textsuperscript{25} \textit{See, e.g.}, Franck, \textit{supra} note 22, at 1524–45 (providing a historical account of the development of the modern system of investment treaties and investor-State arbitration). \textit{See also Dugan et al., supra} note 21, at 11–43.
\item \textsuperscript{26} \textit{See Peterson, supra} note 6, at 12. Whether BITs do in fact promote FDI has been the subject of much controversy. \textit{See, e.g.}, Kenneth J. Vandevelde, \textit{The Economics of}
for the resolution of investor-State disputes through binding and final arbitration in a neutral forum, and define the standards of protection that host States owe to investments of investors covered by the treaty. The underlying premise of such agreements is that foreign direct investment (FDI) will contribute to the host State’s economic development, which may also result in increased social welfare.\(^\text{27}\) For this reason, BITs are generally single-purpose instruments protecting foreign investments, and do not impose corresponding duties or responsibilities on foreign investors.\(^\text{28}\)

BITs, like other IIAs, clarify the substantive standards of protection that contracting States guarantee to investments made by nationals of the other contracting party in their territory. At least some of these standards typically provide for a greater level of investor protection than existed at customary international law. Three types of obligations are common to nearly all IIAs: (i) protection of foreign investors and their investments against discriminatory treatment ("national treatment" provisions); (ii) protection against direct or indirect nationalization or expropriation without compensation ("expropriation" provisions); and (iii) protection of foreign investors against fundamentally unfair or arbitrary government actions ("fair and equitable treatment" provisions).\(^\text{29}\) In addition, many BITs contain a "full protection and security" provision ensuring basic police protection of foreign-owned property falling under the treaty; a "most-favored nation (MFN) treatment" provision ensuring that investors and their investments from the contracting States are treated

\footnotesize{Bilateral Investment Treaties, 41 Harv. Int’l L.J. 469, 489, 498 (2000) ("BITs appear to have positively affected investment flows."). But see Patricia M. Robin, The BIT Won’t Bite: The American Bilateral Investment Treaty Program, 33 Am. U. L. Rev. 931, 941–43 (1984) (describing the lack of evidence substantiating a relationship between BITs and capital flows); Deborah L. Swenson, Why Do Developing Countries Sign BITs?, 12 U.C. Davis J. Int’l L. & Pol’y 131 (2005) (arguing that the signing of BITs did not increase the investment flows into host States but may have allowed such countries to retain previous investments that might have otherwise relocated to another country).

\(^\text{27}\) See, e.g., Franck, supra note 22, at 1524.

\(^\text{28}\) Peterson, supra note 6, at 12, 14. Some commentators, however, have argued that certain baseline investor responsibilities are implicit in standard investment protection treaties. See, e.g., Peter Muchlinski, “Caveat Investor”? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard, 55 Int’l & Comp. L.Q. 567 (2006), cited in Peterson, supra note 6, at 14, n. 21.

comparably to foreign investors or investments from third States; and a provision for the “free transfer of funds” guaranteeing foreign investors the right to repatriate investment-related funds, including profits, interest, fees and other earnings.30

In addition, despite being State-to-State treaties, BITs pave the way for investor-State dispute settlement mechanisms before independent and neutral international arbitration tribunals. Under BITs’ dispute settlement provisions, foreign investors can directly petition for damages incurred as a result of a treaty breach by their host State, without having to rely on their home government to espouse their claim.31 This is a significant departure from the traditional customary international law approach to investment disputes, which relied entirely on diplomatic espousal of claims, i.e., intervention by the foreign investor’s home government in the form of diplomatic correspondence.32 Most BITs also do away with the “exhaustion of local remedies” requirement enshrined in customary international law,33 which remains a prerequisite for admissibility before international human rights courts such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).34 Private investors may therefore bring a claim before an international arbitral tribunal without first seeking to resolve

30. Peterson, supra note 6, at 13.

31. Id.

32. Dugan et al., supra note 21, at 27.


34. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 222, amended by Protocols 11 and 14, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm [hereinafter ECHR] (“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”); Organization of American States, American Convention on Human Rights art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“Admission by the Commission of a petition or communication . . . shall be subject to the following requirements: a. That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law . . .”).
the dispute before their host State’s local courts and tribunals.

The International Center for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also referred to as the Washington Convention),\(^3\) is “considered the leading international arbitration institution devoted to investor-State dispute settlement.”\(^3\) However, many investor-State arbitration proceedings take place outside the self-contained Washington Convention system.\(^3\) The majority of these non-ICSID investor-State arbitrations proceed on an *ad hoc* basis (i.e., not under the auspices of any institution), usually pursuant to the ICSID Additional Facility Rules or the United Nations Commission on International Trade Law (UNCITRAL) Rules.\(^3\) A few others are conducted under the auspices of arbitral institutions other than ICSID, such as the International Court of Arbitration of the International Chamber of Commerce in Paris (ICC) or the Stockholm Chamber of Commerce (SCC).\(^3\) Typically, the arbitral tribunal assembled to hear an investor’s claim against a host State will be composed of three arbitrators, “one arbitrator appointed by each party and the third, who shall be president of the Tribunal, appointed by agreement of the parties”\(^4\) or, failing that, by some supervising body.


37. It is said that the Washington Convention system is “self-contained” because, unlike arbitral awards rendered in non-ICSID arbitrations, an ICSID award may not be set aside by the courts of any contracting State, and is only subject to the post-award remedies provided for in the Washington Convention. See *About ICSID: ICSID Dispute Settlement Facilities*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Disp_settl_facilities&pageName=Disp_settl_facilities (last visited July 25, 2012).


39. U.N. Conference on Trade and Development, *supra* note 38, at 2 (“Other venues are used only marginally, with 21 cases at the Stockholm Chamber of Commerce (SCC) and seven with the International Chamber of Commerce (ICC). The Cairo Regional Centre for International Commercial Arbitration and the London Court of International Arbitration received one case each.”).

Unless the claim is settled, these arbitrators will eventually issue a final and binding award subject to limited, if any, review in domestic courts. The scope of this review is generally determined by the *situs* of the arbitration, i.e., the seat where the arbitration took place. The ICSID annulment procedure controls all ICSID awards, and the national arbitration law of the *situs* controls non-ICSID awards. Virtually all annulment procedures, however, have a much narrower scope than the appeals process for a national court judgment. They tend to focus on asserted procedural deficiencies of the award rather than substantive issues of law and facts.

The recognition and enforcement of the award by national courts is generally governed by either the Washington Convention or the New York Convention. Governing the majority of non-ICSID awards, the New York Convention provides that the domestic courts of the State where enforcement or recognition is sought shall enforce and recognize the award unless one of seven limited grounds listed in Article V applies. Governing all ICSID awards, the Washington Convention provides that domestic courts shall recognize and enforce any ICSID award “as if it were a final judgment of a court in that State.” Unlike the New York Convention, the Washington Convention does not provide for any defenses to the enforcement and

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41. The Washington Convention, to which 147 States were contracting States as of June 30, 2011, provides that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.” Washington Convention, *supra* note 33, art. 53(1).

42. DUGAN *ET AL.*, *supra* note 21, at 629.

43. *Id.*


45. *Id.*, art. V. The seven grounds for refusal to enforce or recognize an award are: incapacity of a party or invalidity of arbitration agreement (art. V(1)(a)); lack of due process (art. V(1)(b)); award, or a non-severable part of it, exceeds submission to arbitration (art. V(1)(c)); improper arbitral procedure or composition of arbitral tribunal (art. V(1)(d)); award is not yet binding or has been set aside or suspended by a court (art. V(1)(e)); non-arbitrability (art. V(2)(a)); public policy (art. V(2)(b)).

46. Washington Convention, *supra* note 33, art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”). *See generally, ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS* (R. Doak Bishop ed., 2009) (providing an overview of the various issues raised by the enforcement of an arbitral award against a sovereign).
recognition of an ICSID award, which has recently led States to resort more frequently to the ICSID annulment procedure.\textsuperscript{47} However, for ICSID and non-ICSID awards alike, the execution of the award will be subject to any applicable sovereign immunity defenses available to the respondent State under the national laws of the place of execution.\textsuperscript{48} This sovereign immunity issue is often the single most important barrier to the execution of an award rendered against a State.

The current system of investment treaty arbitration thus provides investors with meaningful avenues to collect financial compensation for breaches of applicable BITs by their host States. Admittedly, Argentina’s resistance to comply with the ICSID awards entered against it in relation to disputes arising out of its 2000–2001 financial crisis, and the difficulties foreign investors have faced when seeking execution of these awards abroad, have put the current investment treaty regime to test.\textsuperscript{49} Yet, such reactions by host States remain the exception rather than the rule. Indeed, one practitioner has estimated that up to ninety-five percent of all arbitration awards (commercial and otherwise) are satisfied without recourse to any enforcement mechanism,\textsuperscript{50} and most national courts are supportive of...
attains to enforce arbitral awards.\textsuperscript{51}

\textbf{B. Investor-State Arbitration and International Human Rights Law}

Investment treaty tribunals have limited jurisdiction over specific disputes and specific parties (i.e., they have limited personal jurisdiction and subject-matter jurisdiction), and may not decide any and all disputes arising between a State and an investor. This Section first addresses the scope of the subject-matter jurisdiction of investment treaty tribunals. Because this scope is limited, arbitrators have been reluctant to rule on investors’ independent human rights claims in the course of investor-State arbitration. Second, this Section explores another, and more successful, avenue for the introduction of arguments derived from or inspired by international human rights law in investor-State arbitration: the law applicable to the dispute. While references to international human rights law in investor-State arbitration have fallen short of establishing jurisdiction over independent human rights claims, they have provided guidance in the interpretation of BIT protection standards.

1. The limited scope of the subject-matter jurisdiction of investment treaty tribunals

Consent of the parties is the cornerstone of investor-State arbitration. Arbitrators derive their authority to make binding rulings on a dispute from the consent of the parties to submit such dispute to arbitration.\textsuperscript{52} Consent can take many forms. It can be expressed in an arbitration clause contained in an investment contract (signed by both parties before any specific dispute arises), a \textit{compromis} (signed by both parties after the specific dispute has arisen) or, in the case of host State consent, an investment protection treaty or a national investment law.\textsuperscript{53}

When the dispute is based on an alleged breach of a BIT, the consent of the State is generally expressed in a dispute resolution


\textsuperscript{52} DUGAN ET AL., \textit{supra} note 21, at 220–21. See generally id. at 219–46.
clause within the BIT, while the consent of the investor party is generally expressed through the filing of a written request for arbitration. Once it has given its consent, a party cannot unilaterally withdraw it. The formulation of the dispute resolution clause in the treaty reveals the breadth of the tribunal’s subject-matter jurisdiction and often specifies the forum for the arbitration. In the great majority of cases, jurisdiction has been restricted to “investment disputes” or to alleged violations of the substantive rights in the investment treaties.

In the case of an ICSID arbitration, the Washington Convention operates as an additional limit on the subject-matter jurisdiction of the tribunal. Specifically, Article 25(1) of the Washington Convention limits the Centre’s jurisdiction to “any legal dispute arising directly out of an investment[] between a Contracting State . . . and a national of another Contracting State . . . .” ICSID tribunals have differed in their interpretation of the term “investment” in Article 25(1). However, tribunals seem to agree that BIT definitions of “investment” may narrow but not expand the scope of jurisdiction granted by Article 25(1) of the ICSID Convention. In this respect, consent is a necessary, but not a sufficient, condition to establishing

54. Id. at 236.

55. Id. at 221.

56. Washington Convention, supra note 33, art. 25(1).

57. Reiner & Schreuer, supra note 52, at 83.

58. Id.

59. Id.

60. Washington Convention, supra note 33, art. 25(1) (emphasis added).


the jurisdiction of an ICSID tribunal.63

These restrictions, in addition to the fact that investment treaties virtually never contain any express references to substantive human rights standards, have understandably convinced tribunals that they lack jurisdiction to adjudicate independent human rights claims. This is even if certain human rights violations, such as those related to the protection of property, may at the same time constitute a breach of a particular investment treaty obligation.64

In *Biloune v. Ghana*, for instance, the tribunal assembled under the UNCITRAL Rules held that, “while the acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration,” its competence was limited to disputes “in respect of” Biloune’s “foreign investment” so that it “lack[ed] jurisdiction to address, as an independent cause of action, a claim of violation of human rights.”65 This was because the tribunal’s competence was “limited to commercial disputes arising under a contract entered into in the context of Ghana’s Investment Code” and based on the consent of the parties to submit these specific disputes to its jurisdiction.66

Similarly, in *Channel Tunnel v. France and the United Kingdom*, the claimants, who operated the Eurostar rail link between France and the U.K., claimed that the French and U.K. governments had failed to protect the tunnel from incursions by clandestine migrants, in breach of their obligations under the concession agreement and the applicable BIT.67 The tribunal, when encouraged by the claimants to read the 1986 Channel Tunnel concession agreement in conjunction with the European Convention on Human Rights and its First Protocol regarding peaceful enjoyment of possessions,68 clarified:

In discussions on the competence of international tri-


64. Reiner & Schreuer, supra note 52, at 83–84, 88.


66. Id.


68. Id. ¶¶ 101–10.
bunals, distinctions are made between jurisdiction in its different aspects (personal, subject-matter and temporal), admissibility and the scope of the applicable law . . . . A[s to jurisdiction, a] great deal depends on the specific language of the instruments from which the tribunal derives its authority, and the source of the rights and obligations in issue . . . .

As to jurisdiction, a great deal depends on the specific language of the instruments from which the tribunal derives its authority, and the source of the rights and obligations in issue . . . . 69

Asking, in the case before it, “whether the breaches pleaded by the Claimants did or did not fall within the provisions of the Concession Agreement from which alone the Tribunal’s jurisdiction derives,” 70 the tribunal concluded:

[T]he Tribunal’s jurisdiction is limited to claims which implicate the rights and obligations of the Parties under the Concession Agreement . . . . Thus, the source and the only source of the Parties’ respective rights and obligations with which the Tribunal is concerned is (a) the Treaty (but only insofar as it is given effect to by the Concession Agreement) and (b) the Concession Agreement (whether or not it goes beyond merely giving effect to the Treaty). 71

Thus, while arguments have been made that certain human rights claims can fall under the jurisdiction of investment treaty tribunals, these tribunals have generally refused—based on the specific language of the dispute resolution clause of the applicable contract and/or treaty—to find that their competence extends to such claims. 72

To date, arbitrators have simply declined to rule on the merits of independent human rights law claims.

2. The law applicable to the dispute

A more successful avenue for introducing human rights arguments (albeit not human rights claims) before a BIT tribunal is to view international human rights law as law applicable to the investment dispute. The Vienna Convention on the Law of Treaties (VCLT), applicable to the interpretation of BITs like any other treaties, provides that “[t]here shall be taken into account . . . any relevant rules of international law applicable in the relations between the

69. Id. ¶ 134.
70. Id. ¶ 135.
71. Id. ¶ 153.
72. Reiner & Schreuer, supra note 52, at 83–84.
Furthermore, many investment treaties include a provision to the effect that tribunals should consider “international law as applicable,” and Article 42(1) of the Washington Convention refers to “such rules of international law as may be applicable.”

Under Article 42(1), the Washington Convention grants parties the freedom to choose the law applicable to their disputes. The Convention also provides a mechanism for the tribunal to select the appropriate rules when the parties fail to make that choice. In such a situation, Article 42(1) of the Convention provides that “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

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75. Washington Convention, supra note 33, art. 42(1).

76. Id. (“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.”).

77. “This mechanism combines flexibility with certainty. Flexibility is provided by granting the parties the freedom to choose the applicable law. Certainty is provided by ensuring that, if the parties fail to make that choice, the tribunal will find appropriate rules in order to solve the dispute (the host State’s law in conjunction with international law). A finding of non liquet by the tribunal is prohibited.” See UNCTAD Publication prepared by Guido Tawil, Dispute Settlement, Course Module 2.6. ICSID Applicable Law (2003) at 5, available at www.unctad.org/en/docs/edmmisc232add5_en.pdf.

78. Washington Convention, supra note 33, art. 42(1). Whether international law only has a “complementary role” vis-à-vis domestic investment law or also whether it also has a “corrective role” vis-à-vis domestic rules that are inconsistent with international law has been the subject of debate. See Emmanuel Gaillard & Yas Banifatemi, The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, 18 ICSID Rev. 375 (2003); Eastern Sugar B.V. v. Czech Republic, SCC Case No. 088/2004, Partial Award, ¶ 196 (Mar. 27, 2007), http://italaw.com/sites/default/files/case-documents/ita0259_0.pdf (“This does not mean that international law applies only when it is in conflict with national law. On the contrary, it means that international law generally applies. It is not just a gap-filling law. It is only where international law is silent that the Arbitral Tribunal should consider before
As the Report of the Executive Directors to the Washington Convention explains, “[t]he term ‘international law’ as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice (ICJ), allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.” 79 Arbitral tribunals have therefore frequently looked to the full range of sources of international law, including international treaties and conventions, 80 customary international law, general principles of law, judicial decisions, scholarly writings and—on occasion—resolutions and guidelines adopted by international bodies. 81

The applicability of public international law—including non-investment law—to investment disputes opens a pathway for arbitrators to consider human rights law in the course of interpreting investment treaties, even if it does not provide them with subject-matter jurisdiction over independent human rights claims. 82 In the words of the tribunal in Channel Tunnel:

The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement . . . does not mean that the rules of the applicable law identified in Clause 40.4 [the choice of law provision] are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. 83

In several investment treaty arbitrations, arbitrators have referred to the human rights jurisprudence in the course of interpreting and applying the standards of protection owed to investors under the

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81. Tawil, supra note 77, at 19–22.
82. Peterson, supra note 6, at 22.
applicable investment treaty. In *Tecmed v. Mexico*, for instance, the tribunal referred to the jurisprudence of both the ECtHR and the IACtHR as authority to establish, *inter alia*, the existence of an indirect *de facto* expropriation. Furthermore, in *Saipem v. Bangladesh*, the tribunal found that disruptive interference by the domestic courts of a State with an ICC arbitration and the *de facto* annulment of an ICC award could constitute expropriation. In reaching its conclusion, the tribunal relied on the ECtHR’s "[unequivocal holding that] rights under judicial decisions are protected property that can be the object of an expropriation." Likewise, in *Azurix v. Argentina*, the tribunal found that the principle of proportionality established in the case law of the ECtHR provided “useful guidance for purposes of determining whether regulatory actions [are] expropriatory and give rise to compensation.”

Therefore, tribunals have commonly made references to human rights jurisprudence when interpreting the standards of protection guaranteed by investment treaties. Such references, however, fall far short of an assertion of arbitral jurisdiction over human rights claims. Whether such references are nevertheless objectionable is worth debating, but this issue is beyond the scope of this Note. For our purpose, it is sufficient to note that, at a minimum, arguments inspired by or derived from international human rights law have not clearly determined the outcome of the cases in which they were brought, and attempts to establish the arbitrators’ jurisdiction *ratione materiae* over independent human rights claims have failed.

It is against this backdrop that an ICSID tribunal issued the recent award in *Roussalis v. Romania*, whose language suggests a

84. *See Peterson*, supra note 6, at 23, 25; Reiner & Schreuer, supra note 52, at 94; Hirsch, supra note 2, at 97, 99–105.
86. Id. at 175, ¶ 116. *See also id.* at 177, ¶ 122 (citing to the European Court of Human Rights for the principle of proportionality and the differentiation between treatment of nationals and non-nationals).
88. *Id.* ¶¶ 129–33.
89. *Id.* ¶ 130.
91. *Id.* at 451, ¶ 312.
new and potentially revolutionary pathway for investors to bring their human rights claims under the jurisdiction of arbitral tribunals.

II. ROUSSALIS V. ROMANIA AND THE CLAIMANT’S NOVEL ARGUMENT

The claimant in Roussalis v. Romania put forward a novel argument concerning the way investment treaty tribunals may assert jurisdiction over investors’ human rights claims. As Section A describes, the claimant argued that the tribunal could assert its jurisdiction over certain human rights claims based on the incorporation of the corresponding human rights obligations into the BIT via its preservation of rights provision. While dismissing this argument as moot on the facts of the case, the Roussalis tribunal left open the possibility that a preservation of rights provision might indeed provide arbitrators with jurisdiction over certain human rights claims. This argument differs from previous arguments that sought to establish the jurisdiction of tribunals over human rights claims based on the language of the governing arbitration clause rather than the preservation of rights provision. Because preservation of rights provisions are widespread and refer to a variety of extra-BIT obligations (not only human rights obligations), this argument—if adopted by other tribunals—could have a significant impact on investor-State arbitration. The significance of the Roussalis interpretation of preservation of rights provisions is explored in Section B.

A. Summary of Roussalis’s Human Rights Argument and its Reception by the Tribunal

In Roussalis v. Romania, the Greek investor-claimant entered into a share purchase agreement with Romania’s Authority for State Assets Recovery (AVAS) to acquire a 70% interest in S.C. Malinip S.A., a state-owned company. At the time of the purchase, the parties agreed that the claimant would make a $1.4 million post-purchase investment over a two-year period. As security for this post-purchase investment, they provided that the Romanian govern-

92. See Peterson, supra note 11.
94. Id. ¶¶ 5–7.
95. Id. ¶ 8.
ment could enforce a share pledge and recover the claimant’s shares. The claimant contended that he made the required investment of $1.4 million—a claim Romania disputed—but that Romania nonetheless tried to enforce the pledge. He alleged that Romania’s “actions taken collectively or individually amounted to an indirect expropriation, or at least substantial impairment, of his investments,” in violation of the Greece-Romania BIT of 1997. More specifically, he alleged that “the lack of recognition given to [his] contractual rights and legitimate expectations to sell and/or dispose of his assets amounted to an expropriation.” He further argued that the Romanian authorities had violated Articles 2(2) and 4(4) of the Greece-Romania BIT, as well as Article 6 of the ECHR and Article 1 of the First Additional Protocol to the ECHR, by failing to create a safe environment for the investor and the investment.

The claimant contended that, “in view of Article 10 of the BIT, the international obligations that Respondent has assumed in Article 6 of the [ECHR] and Article 1 of the First Additional Protocol to the [ECHR] are . . . to be taken into consideration in the instant case.” Article 10 of the Greece-Romania BIT provides:

[i]f the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement.

Therefore, comparing Article 4(1) of the BIT with Article 1 of the First Additional Protocol to the ECHR, which concerns expropriation, and Article 2(2) of the BIT with Article 6 of the ECHR,

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96. Id.  
97. Id. ¶¶ 9–10.  
98. Id. ¶ 10.  
99. Id. ¶ 66.  
100. Id. ¶¶ 10, 64, 66.  
101. Id. ¶ 309.  
102. Greece-Romania BIT, supra note 12, art. 10 (emphasis added).  
103. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 115–18 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2431_En&caseId=C70 (“Since Article 1 of the First Additional Protocol to the European Convention creates far better treatment than Article 4 of the Treaty, Article
which deals with full protection and security and the right to a fair hearing,\(^\text{104}\) the claimant argued that the tribunal had jurisdiction to find that the respondent had breached the applicable ECHR protections.

The respondent countered that Article 1 of the First Additional Protocol to the ECHR “is not applicable to ‘investments’ and, even assuming it is, the European Convention does not provide a jurisdictional platform for the work of the Tribunal.”\(^\text{105}\) It continued: “Claimant’s personal rights do not arise ‘directly out of an investment’ within the meaning of Article 25(1) of the ICSID Convention and fall outside the provisions of the Treaty, which protect ‘investments’ not ‘investors.’”\(^\text{106}\)

In addition to insisting that the tribunal did not have jurisdiction \textit{ratione materiae} to decide human rights claims,\(^\text{107}\) Romania went on to observe, \textit{arguendo}, that:

the right to no deprivation of property granted under Article 1 of the First Additional Protocol is coextensive with the same rights accorded under Article 4(1) of the Treaty. Consequently, Article 1 of the First Additional Protocol \textit{does not create any additional obligations and therefore does not come within the jurisdiction of the Tribunal} under Articles 2(6) or 10 of the Treaty, which commit the Contracting Parties to honor certain obligations they have made beyond the Treaty.\(^\text{108}\)

Romania also argued that the “Claimant’s reliance on Article 6 of the European Convention was misplaced,” as Article 6 of the ECHR “protects persons with respect to judicial determinations regarding their civil rights and criminal charges brought against them,” and was thus inapposite on the facts of the case.\(^\text{109}\)

The tribunal did not dismiss the claimant’s argument as a

\(^{1}\) of the First Additional Protocol comes within the jurisdiction of the Tribunal.”). \textit{See also id. ¶ 405.}

104. \textit{Id.} ¶¶ 147–57, 407.

105. \textit{Id.} ¶ 463.

106. \textit{Id.} ¶ 466.

107. \textit{Id.} ¶ 463 ("[T]he European Court of Human Rights was established to enforce Convention rights, and thus the Contracting Parties to the Treaty did not intend for ICSID tribunals to exercise jurisdiction over such claims.").

108. \textit{Id.} ¶ 463 (emphasis added).

109. \textit{Id.} ¶ 466.
matter of law. Rather, after clarifying that the reference in Article 10 to international obligations established between the parties encompasses only the international obligations in force between Greece and Romania, the tribunal did “not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No. 1.”

However, the tribunal held that the issue was “moot in the present case” and did “not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above.” Without explaining how it compared the levels of protection offered by the BIT, on the one hand, and the ECHR and its First Protocol, on the other, the tribunal concluded: “Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT.”

While the tribunal fell short of fully embracing Roussalis’s argument, its language suggests that on the facts of another case it might be willing to find that Article 10 of the Greece-Romania BIT (and, in all likelihood, preservation of rights clauses generally) provides it with jurisdiction over certain human rights claims.

B. The Significance of Roussalis’s Novel Human Rights Argument

The Roussalis interpretation of preservation of rights provisions constitutes a novel pathway for the introduction of human rights claims before arbitrators in investor-State arbitrations. Alt-
though BIT tribunals have sometimes referred to human rights jurisprudence as constituting useful guidance in interpreting treaty protections, they have consistently declined jurisdiction \textit{ratione materiae} over human rights claims.\textsuperscript{116} By contrast, the tribunal in \textit{Roussalis v. Romania} seemed to agree that arbitrators may, under specific circumstances, exercise jurisdiction over certain human rights claims based on Article 10 of the Greece-Romania BIT, a preservation of rights provision.

Although there is no formal doctrine of precedent in international arbitration, arbitrators in investor-State arbitration routinely refer to previous awards and decisions as persuasive authority.\textsuperscript{117} Many commentators have also argued that there is a need for more consistency in investor-State arbitration,\textsuperscript{118} and have proposed a number of solutions to achieve this goal.\textsuperscript{119} Moreover, in a niche area of legal practice like investment treaty arbitration, the opinion of a few well-established and regularly-appointed arbitrators like those sitting on the \textit{Roussalis} tribunal can be very influential.\textsuperscript{120} Therefore, the adoption of the \textit{Roussalis} interpretation of preservation of rights provisions by other tribunals in the future is more than a mere theoretical possibility.

\textsuperscript{116} See supra Part I.


\textsuperscript{119} See, e.g., Gabrielle Kaufmann-Kohler, \textit{Is Consistency a Myth?}, in \textsc{Precedent in International Arbitration} 137, 146–47 (Yas Banifatemi ed., 2007) (arguing in favor of the adoption of a doctrine of \textit{jurisprudence constante}). Other authors have called for the adoption of a doctrine of “persuasive precedent” as a way to limit the incidence of inconsistent decisions in investor-State arbitration. See, e.g., Vadi, supra note 118 (arguing in favor of a doctrine of “persuasive precedent”).

\textsuperscript{120} See generally Commission, supra note 18.
This could have far-reaching consequences on investor-State arbitration. First, preservation of rights clauses like Article 10 of the Greece-Romania BIT are widespread among BITs currently in force. They must be distinguished from “umbrella” clauses and “most-favored-nation treatment” provisions. Second, if taken to its logical conclusion, the Roussalis interpretation could incorporate a wide variety of international law obligations into BITs, and bring these extra-BIT obligations under the jurisdiction of arbitrators.

1. Preservation of rights clauses can be found in numerous BITs and must be distinguished from other common BIT provisions

Preservation of rights provisions are common among BITs currently in force, as well as major model BITs. They had already

121. See, e.g., German Model Bilateral Investment Treaties, art. 7(1), 2008, World Arb. Rep. (Loukas Mistelis et al. eds., 2nd ed. 2011) (“If the legislation of either Contracting State or international obligations existing at present or established hereafter between the Contracting States in addition to this Treaty contain any provisions, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favourable than is provided for by this Treaty, such provisions shall prevail over this Treaty to the extent that they are more favourable.”); Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and __________, art. XI, 2007, available at www.iisd.org/pdf/2007/inv_model_bit_colombia.pdf [The Colombian Model BIT] (“If, from legal provisions of a Contracting Party or from current or future obligations derived from international law different from those contained in this Agreement, a general or particular regulation results between the Contracting Parties thereby providing a more favourable treatment to the investment of investors than that foreseen in the present Agreement, the aforementioned regulation shall prevail over this Agreement, to the extent that it is more favourable.”); U.S. Model BIT, supra note 74, art. 16 (“This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty: 1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party; 2. international legal obligations of a Party; or 3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.”); Agreement Concerning the Promotion and Reciprocal Protection of Investments, Ger.-Russ., art. 7(1), Jun. 13, 1989, 1707 U.N.T.S. 194 (“(1) If another international agreement to which both Contracting Parties are parties or may become parties in future or if the legislation of one Contracting Party includes a provision whereby investments made by investors of the other Contracting Party enjoy more favourable treatment than under this Agreement, such provision shall have priority over the corresponding provisions of this Agreement. (2) Each Contracting Party shall comply with any other obligation it assumes in respect of investments made by investors of the other Contracting Party in its territory.”); Agreement Concerning the Promotion and the Reciprocal Protection of Investments, Belg.-Lux.-U.S.S.R., art. 8(1), Feb. 9, 1989, 29 I.L.M. 299 (“Le présent Accord ne peut empêcher les investisseurs de se prévaloir de dispositions plus favorables contenues dans la législation qui leur est applicable sur le territoire de la Partie contractante où les investissements ont été
appeared in early investment protection instruments, including the Abs-Shawcross Draft Convention\(^\text{122}\) and the 1967 Draft OECD Convention.\(^\text{123}\) Such provisions must be distinguished from two other types of clauses also commonly found in BITs: umbrella clauses and most-favored-nation clauses.

Most investment treaties provide investors with a relatively standard set of protections, including the right to national treatment, most-favored-nation treatment, and compensation for expropriation.\(^\text{124}\) In addition, some treaties contain an “umbrella” clause arguably providing investors with an additional layer of protection by requiring host States to observe the obligations and honor the commitments they have undertaken vis-à-vis foreign investments.\(^\text{125}\) For instance, Article 2(6) of the Greece-Romania BIT provides that “[e]ach Contracting Party shall observe any other obligation it may have entered into with regard to investments by investors of the Contracting Party.”\(^\text{126}\) The rationale for these clauses is to clarify that the principle of *pacta sunt servanda* (“agreements must be kept”), which applies to state-to-state relationships, also applies to relation-

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\(^{122}\) Abs-Shawcross Draft Convention, art. VI, in *The Proposed Convention to Protect Private Foreign Investment: A Roundtable*, 9 J. PUB. L. 115, 117 (1960) (“The provisions of this Convention shall not prejudice the application of any present or future treaty or municipal law under which more favourable treatment is accorded to nationals of any of the Parties.”).

\(^{123}\) The Organisation for Economic Co-operation and Development (OECD), *Draft Convention on the Protection of Foreign Property*, art. 8, Oct. 12, 1967, 7 I.L.M. 117 (1968). (“Where a matter is covered both by the provisions of this Convention and any other international agreement nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party from benefiting by the provisions that are most favourable to him.”).

\(^{124}\) DUGAN ET AL., *supra* note 21, at 541.

\(^{125}\) Id.

ships between investors and States. They have been interpreted to effectively create a cause of action under international law for simple contractual breaches. This position represents a departure from customary international law, under which a breach of a contract by a State does not by itself amount to a breach of international law.

Preservation of rights clauses, like Article 10 of the Greece-Romania BIT, differ from umbrella clauses in important respects. Umbrella clauses refer to specific obligations of a contractual nature, which relate directly to the legal relationship between the parties to the investor-State arbitration (i.e., a host State and an investor), and under their broad interpretation elevate them to the level of treaty obligations (i.e., international law obligations). By contrast, preservation of rights clauses refer to general public international law obligations in force between the contracting parties to the BIT (i.e., two

127. DUGAN ET AL., supra note 21, at 542.
128. Id. at 544-45. Arbitral tribunals have taken one of two views when called upon to interpret an umbrella clause. The restrictive view limits the application of these clauses to, “perhaps, sovereign acts, and refus[es] to extend treaty protection to ‘mere’ contractual treaty breaches.” Id. at 544. See, e.g., Société Générale de Surveillance S.A. v. Islamic Republic of Pak., ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶¶ 163–73 (Aug. 6, 2003), 8 ICSID Rep. 442 (2004). By contrast, proponents of the broad view insist that umbrella clauses “mean what they say, and will read them to elevat[e] contractual breaches into treaty breaches.” Id. See also Eureko B.V. v. Republic of Pol., Partial Award and Dissenting Opinion, ¶¶ 244–60 (Aug. 19, 2005), 12 ICSID Rep. 384 (UNCITRAL Arb. Trib. 2007).
129. DUGAN ET AL., supra note 21, at 542, 544–561.
131. See NEWCOMBE & PARADELL, supra note 15, at 478; see also Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 114–15 (Jan. 24, 2004), 8 ICSID Rep. 518 (2005) (“Article X(1) is a kind of ‘without prejudice’ clause . . . . It does not appear to impose any additional obligation on the host State in the framework of the BIT . . . . Article X(2) [the umbrella clause] is different.”).
States), from which investors can benefit but which they have not ne-
gotiated themselves. Nevertheless, as will be explored in Part IV,
several of the policy issues raised by umbrella clauses carry over to
the analysis of Article 10 of the Greece-Romania BIT.

Preservation of rights clauses must also be distinguished from
most-favored-nation (MFN) treatment clauses. MFN treatment
clauses are usually included in a single provision with the “national
treatment” clause.132 They link investment agreements by ensuring
that the parties to one treaty provide investors of the other contracting
State treatment no less favorable than the treatment they provide in-
vestors of third States.133 Such treatment “may result from the im-
plementation of treaties, legislative or administrative acts of the
country and also by mere practice.”134 MFN treatment provisions
have two significant legal features: (i) the MFN treatment standard is
a relative standard and must be applied to similar objective situations,
and (ii) it is governed by the *ejusdem generis* principle,135 i.e., “it
may only apply to issues belonging to the same subject matter or the
same category of subjects to which the clause relates.”136 Like um-
brella clauses, MFN treatment clauses have given rise to differing
and conflicting interpretations. While it is well established that MFN
treatment includes the substantive standards for the protection of in-
vestments, a thorny issue concerns the use of the MFN treatment
provision to import more favorable procedural provisions from other
investment treaties. More specifically, the issue has often revolved
around provisions in other treaties relating to admissibility and juris-
diction, such as the elimination of a preliminary requirement to arbi-
tration or the extension of the scope of jurisdiction.137

132. U.N. Conference on Trade and Development (UNCTAD), *Most-Favoured-Nation
Treatment*, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II,
overwhelming majority of IIAs have a MFN provision that goes alongside [national
treatment], mostly in a single provision.”).

133. Organization for Economic Cooperation and Development (OECD), *Most-
Favoured-Nation Treatment in International Investment Law* 2, (Working Papers on
.pdf.

134. Id.

135. On the effect of this principle on the interpretation of MFN clauses, see Stephan W.
Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27

136. UNCTAD, *supra* note 132, at xiii.

137. Id. at xiv. See, e.g., Mafezini v. Kingdom of Spain, ICSID Case No. ARB/97/7,
Although both involve relative standards, MFN treatment provisions differ from preservation of rights clauses like Article 10. MFN treatment clauses require that an arbitral tribunal compare the treatment granted by a host State to investments of the other contracting State with that granted by the host State to investments of a third State. By contrast, provisions like Article 10 involve a comparison between the protections granted to “investments by investors” by the BIT provisions, on the one hand, and those granted by other sources of international obligations in force between the same two contracting States, on the other hand. However, these two types of provisions may bring up common issues, such as how to compare levels of protections granted in different international instruments, the applicability of the ejusdem generis principle and whether these provisions also cover procedural guarantees.

2. Preservation of rights clauses refer to a variety of extra-BIT obligations

Roussalis v. Romania is also a significant decision because Roussalis’s reasoning can be expanded to cover international law obligations other than those falling under the ECHR system. Because the ECHR and its Additional Protocols are the only international hu-

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Argentine Republic, ICSID Case No. ARB/07/17, Award (June 21, 2011), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C2171_E&caseId=C109 (finding that MFN clauses should be interpreted broadly and that the term “treatment” covers procedural matters such as dispute settlement). But see, e.g., Salini Construttori S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004) 14 ICSID Rep. 303 (2009); Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 13 ICSID Rep. 268 (2008); Impregilo S.p.A., ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (June 21, 2011) (finding that MFN clauses relate to the substantive protections afforded to investors and investments and that their reach should not extend to procedural issues, which affect how protections in the relevant BIT operate and are enforced and not whether investors receive most favorable treatment). See also Zachary Douglas, The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, 2 J. INT’L DISP. SETTLEMENT 97 (2011) (arguing that the jurisdiction of an international tribunal, established in terms of the basic treaty, cannot be expanded by reference to terms of a third treaty through the investor’s reliance upon the MFN clause in the basic treaty). But see Stephan W. Schill, Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas, 2 J. INT’L DISP. SETTLEMENT 353 (2011) (arguing that MFN clauses in investment treaties can have the effect of allocating adjudicatory authority and thus serve as a basis for the jurisdiction of an investment tribunal).

138. NEWCOMBE & PARADELL, supra note 15, at 318.
man rights instruments under which corporations, as opposed to individuals, have standing to bring a claim before a specialized court (the ECtHR), it is a particularly good candidate. However, it is not entirely clear what are the outer limits of the universe of international law obligations that could be incorporated into a BIT using this reasoning.

If correct, Roussalis’s interpretation of preservation of rights provisions would provide BIT tribunals with jurisdiction over breaches of international law obligations in force between the two contracting parties that fall outside the field of human rights protection. The only limits to this process of incorporation would be that these “regulations” be in force between the contracting parties and provide “investments by investors” of the other contracting party treatment more favorable than is provided by the BIT. Depending on the circumstances and the exact language of the relevant BIT, this would mean that investors could seek damages for, say, a breach of a State’s World Trade Organization (WTO) obligations before a BIT tribunal.

The uneasy question of the outer limits of the body of law that could be incorporated into a BIT via a preservation of rights clause under the Roussalis interpretation is addressed below, in Part IV.A. This issue forms only part of the case against the Roussalis interpretation of preservation of rights clauses, to which Parts III and IV now turn. Part III argues that the Roussalis interpretation is erroneous,

139. Reiner & Schreuer, supra note 52, at 88 (“Only the European Convention for Human Rights provides protection for the property of juridical persons.”). See also MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION 3 (2006) (“The ECHR differs from other regional and global arrangements such as the closely related International Covenant on Civil and Political Rights and the American Convention on Human Rights, part of what is commonly known as the international law of human rights, in that it offers wide-ranging protections for business entities such as companies in addition to not-for-profit organizations and natural persons. This fact can be derived directly from the Convention’s text. Thus, the Convention right to the protection of private property, an important right for companies, applies expressly to ‘every natural and legal person’ a term naturally inclusive of corporate entities.”) (citations omitted); PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 509–14 (2d ed. 2007) (analyzing the debate concerning the extension of human rights to juridical persons).

140. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 311 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc &docId=DC2431_En&caseId=C70. This means that a claimant in a NAFTA arbitration could not claim a breach of the ECHR before a BIT tribunal, for instance.

141. While the Greece-Romania BIT does not contain such limitations, some preservation of rights clauses restrain their own application to international law obligations not relating to tax or tariff agreements. See Greece-Romania BIT, supra note 12.
and Part IV highlights the negative consequences that this interpretation could have on investor-State arbitration and international human rights law.

III. THE ROUSSALIS INTERPRETATION OF PRESERVATION OF RIGHTS PROVISIONS IS ERRONEOUS

Article 31 of the VCLT provides as a general rule that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Appling the prescribed methodology to the interpretation of Article 10 of the Greece-Romania BIT, it becomes clear that Roussalis’s interpretation of Article 10 is incorrect. Article 10 cannot provide an arbitral tribunal with subject-matter jurisdiction over investors’ human rights claims. Since the language of Article 10 is similar to the language used in the preservation of rights provisions of other BITs, and since the object and purpose of the Greece-Romania BIT is similar to the object and purpose of other BITs, it is unlikely that preservation of rights provisions generally provide a plausible pathway for the introduction of human rights claims before a BIT tribunal.

Section A argues that the text of Article 10, viewed in its context, does not grant arbitrators jurisdiction over the human rights claims of investors. Section B contends that the Roussalis interpretation of Article 10 is not consistent with the object and purpose of the Greece-Romania BIT and BITs generally, which is to “intensify . . . economic cooperation [between the contracting state parties] to the mutual benefit of both countries on a long term basis.”

A. The Text of Article 10, Viewed in its Context, Does Not Grant the Tribunal Jurisdiction over Human Rights Claims

Article 10 of the Greece-Romania BIT reads:

If . . . obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party

142. VCLT, supra note 73, art. 31(1) (emphasis added).
143. Greece-Romania BIT, supra note 12, pmbl.
to a treatment more favourable than is provided for by this Agreement, such regulation shall, to the extent that it is more favourable, prevail over this Agreement. 144

It is tempting to confuse this clause with an umbrella clause or a MFN treatment provision, and to argue for an expansion of the arbitral tribunal’s jurisdiction on this basis. Admittedly, Article 10 uses language that is somewhat similar to the language of these clauses, referring to obligations extraneous to the BIT. Yet, the scope of arbitral jurisdiction cannot exceed the scope of the parties’ consent to arbitrate specific disputes. 145 Moreover, the proof of such consent—which cannot be presumed—can only be found in the specific language of Article 10. As argued above in Part II.B.1, the text of Article 10—a typical preservation of rights provision—differs in important respect from the text of umbrella clauses and that of MFN treatment clauses. It therefore has a different legal effect. In particular, it cannot be read to expand the tribunal’s jurisdiction over independent human rights claims.

First, as Romania pointed out in Roussalis v. Romania, Article 10 of the Greece-Romania BIT refers to “obligations under international law between the Contracting Parties . . . entitling investments by investors of the other Contracting Party to a treatment more favourable . . . ” 146 The text itself does not refer to the additional rights of investors (as natural or legal persons), who are the only potential bearers of human rights. Instead, it refers to “investments.” “Investments” may be entitled to protection, but they simply cannot be the bearers of human rights in the way natural or legal persons can. 147

Moreover, Article 10 of the Greece-Romania BIT must be read in conjunction with other provisions of the BIT. Article 9 of the Greece-Romania BIT contains its arbitration clause and is the basis for the tribunal’s authority to arbitrate investor-State disputes. It covers “[d]isputes between an investor of a Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former.” 148 Article 10, entitled “Application of

144. Id. art. 10.
146. Greece-Romania BIT, supra note 12, art. 10 (emphasis added).
147. See Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 466 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2431_En&caseId=C70.
148. Greece-Romania BIT, supra note 12, art. 9 (emphasis added).
other Rules,” draws a distinction between obligations falling “under this Agreement,” and “obligations under international law existing... between the Contracting Parties in addition to this Agreement.” The plain language of Article 9, read in the context of Article 10, therefore suggests that the tribunal’s jurisdiction is limited to claims related to obligations established by the BIT itself, and does not cover the other “obligations under international law existing... between the Contracting Parties...” This reflects the distinction that arbitral tribunals have made between the substantive obligations of investment protection and the provisions of the treaty conferring adjudicative power upon the international tribunal.

Article 10 must also be read in conjunction with, and distinguished from, the choice of law provision of the Greece-Romania BIT. Choice of law clauses provide for the substantive law to be applied in the resolution of treaty disputes. Such clauses typically start with the language “[t]he arbitral tribunal shall decide the dispute in accordance with” or “[t]he arbitral tribunal shall decide the dispute on the basis of the law, taking into account in particular though not exclusively,” and then call for the application of a variety of legal sources including, for instance, the treaty itself, the municipal law of the host State and international law. In the Greece-Romania BIT, Article 12, entitled “Application,” contains the choice of law provision. Article 12(5) reads: “The arbitration tribunal shall decide on the basis of respect of the law, including particularly this Agreement and other relevant agreements between the Contracting Parties, as well as the generally acknowledged rules and principles of international law.”

This provision mandates the tribunal to reach a decision “on the basis of respect of the law,” and grants the tribunal authority to consider, as it deems applicable, “other relevant agreements between the Contracting Parties,” whether or not they provide for more favorable treatment to foreign investors and investments. Even though the

149. Id. art. 10.
150. Id.
151. See Douglas, supra note 137, at 103 (“The jurisprudence of investment treaty tribunals... reflects a distinction between the substantive obligations of investment protection and the provisions of the treaty conferring adjudicative power upon an international tribunal.”).
152. NEWCOMBE & PARADELL, supra note 15, at 84–85.
153. Id.
154. Id. at 79–83.
155. Greece-Romania BIT, supra note 12, art. 12(5) (emphasis added).
tribunal may look at the broader context in adjudicating treaty disputes, the primary source of law is the treaty itself, from which the tribunal derives its authority. By contrast, Article 10 does not mention “the tribunal” and does not mandate it to decide disputes in a prescribed way. It does not contain a choice of law clause. Reading Article 10 as mandating the tribunal to import extra-BIT provisions into the terms of the BIT would amount to requesting the tribunal to do something inconsistent with Article 12(5). Nevertheless, Article 10 may be taken into consideration by the tribunal when determining the applicable law in accordance with Article 12(5). Article 10 thus provides the tribunal with a criterion (primacy of the rule more favorable to the investor) to articulate the different legal sources that may be applicable as a result of Article 12(5), which contains the choice of law rule.

This position is consistent with Article 42(1) of the Washington Convention, as well as with the rule of interpretation prescribed by Article 31(2) of the VCLT. Article 31(2) of the VCLT provides: “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty . . . .” Article 10 simply reiterates and gives more specificity to this rule of interpretation. This reading of Article 10 of the Greece-Romania BIT is also supported by the arbitral jurisprudence. It is indeed consistent with the interpretation given by the tribunal in *Siemens v. Argentina*158 of the preservation of rights provision in the Germany-Argentina BIT.159 The provision at issue in *Siemens v. Argentina* contained language very similar to that of Article 10 of the Greece-Romania BIT.160 In addition, the tribunal in *SGS v. Philippines*161

156. NEWCOMBE & PARADELL, supra note 15, at 84–85.
157. VCLT, supra note 73, art. 31(2).
159. Id. ¶ 71 (“If the laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favorable than is provided for by the Treaty, such regulation shall to the extent that it is more favorable prevail over this Treaty.”).
160. Id. ¶¶ 71, 76–80.
forcefully stated that the preservation of rights provision of the Philippines-Switzerland BIT “deal[t] with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It [did] not appear to impose any additional obligation on the host State in the framework of the BIT.”

The text of the provision which the SGS v. Philippines tribunal interpreted was also very similar to the text of Article 10 of the Greece-Romania BIT.

It follows that preservation of rights clauses do not incorporate other international law obligations in force between the contracting parties into the BIT so as to confer on the tribunal the authority to adjudicate alleged breaches of these obligations. Rather, as a commentary of the Abs-Shawcross Draft Convention suggests, the purpose of these provisions is to clarify that the BIT standards of protection are not to be “interpreted as constituting an upper ceiling for the treatment of foreign nationals.”

The Roussalis interpretation is therefore inconsistent with the plain meaning of the text of Article 10, viewed in its context. In addition, the Roussalis approach goes against the “object and purpose” of the Greece-Romania BIT and virtually all BITs.

B. Roussalis’s Interpretation of Article 10 is Inconsistent with the “Object and Purpose” of the Greece-Romania BIT

The general object and purpose of the Greece-Romania BIT, like virtually all other BITs, is to “create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party” so as to “intensify their economic cooperation to the mutual benefit of both countries on a long term basis.” To that end, BITs have been adopted to redress the structural

162. Id. at 550, ¶ 114. Article X(1) of the Philippines-Switzerland BIT (1997/99) provided: “If the provisions in the legislation of either Contracting Party or rules of international law entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.” Agreement Between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, reprinted in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT PROMOTION AND PROTECTION TREATIES (Oceana, 2000).


164. Id. at 161. See also NEWCOMBE & PARADELL, supra note 15, at 317.

165. Greece-Romania BIT, supra note 12, pmbl.
imbalances in the relationship between host States and investors resulting from the host States’ ability to influence the content of both domestic and international law.\textsuperscript{166} This objective has led many tribunals to interpret BIT provisions in a way that greatly favors investors, and could be seen to support a broad interpretation of preservation of rights provisions such as the \textit{Roussalis} interpretation.\textsuperscript{167}

However, exaggerating the protections afforded by BITs may dissuade the admission of foreign investments into host States, thus undermining the broad objectives of BITs.\textsuperscript{168} Therefore, finding a balance between the competing interests of investors, on the one hand, and those of host States and the citizens they represent, on the other, is consistent with the object and purpose of BITs.\textsuperscript{169} Some recent BITs also specify that economic objectives should be achieved “in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”\textsuperscript{170} Although the Greece-Romania BIT does not expressly mention these objectives in its preamble, they are arguably implied in the preamble’s reference to “the mutual benefit of both countries on a long term basis.”

Because the \textit{Roussalis} interpretation of Article 10 significantly exaggerates the protections afforded to investors, it works against the object and purpose of the Greece-Romania BIT, i.e., the promotion of economic cooperation. The \textit{Roussalis} interpretation of Article 10 allows investors to bring before BIT tribunals claims that are based on a much wider body of law than the drafters must have initially anticipated.\textsuperscript{171} It gives investors the option of bringing those

\begin{footnotesize}
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\item \textsuperscript{166} Hirsch, \textit{supra} note 2, at 98.
\item \textsuperscript{167} See Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 52 (Oct. 12, 2005), http://italaw.com/documents/Noble.pdf (“[I]t is not permissible, as is too often done regarding BIT’s, to interpret clauses exclusively in favour of investors.”).
\item \textsuperscript{170} U.S. Model BIT, \textit{supra} note 74, pmbl. \textit{See also} Agreement Between Canada and ________ for the Promotion and Protection of Investments (2004), pmbl., \textit{reprinted in} \textit{UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INTERNATIONAL INVESTMENTS: A COMPRENDIUM} (United Nations, 2005); Agreement Between The Kingdom of Norway and ________ for the Promotion and Protection of Investments (2007), pmbl., \textit{available at} http://www.asil.org/ilib080421.cfm?t1.
\item \textsuperscript{171} \textit{See supra} Part II.B.
\end{itemize}
\end{footnotesize}
claims directly before a BIT tribunal rather than a local court or an international adjudicatory body requiring the exhaustion of local remedies as a pre-requisite for admissibility. Meanwhile, tribunals—including the Roussalis tribunal itself—have often denied host States the right to bring counterclaims against investors in investor-State arbitration, despite both the ICSID Convention and the UNCITRAL Rules providing for it in principle. While investor-State arbitration was created to address the structural power imbalance that existed in customary international law between investors and host States, the Roussalis interpretation goes beyond correcting this structural imbalance and in fact creates a new imbalance in the investment arbitration system—one that favors investors over States. This goes against the purpose of the Greece-Romania BIT, and BITs generally, i.e., the promotion of economic cooperation in the long-term interest of both countries.

Part III has argued that the Roussalis interpretation of preservation of rights clauses is erroneous. Not only does the text of Article 10, viewed in its context, not support the Roussalis interpretation, the latter goes against the object and purpose of the Greece-Romania BIT and BITs generally. Part IV now turns to the public policy arguments against the Roussalis interpretation.

IV. The Roussalis Interpretation of Preservation of Rights

172. See supra Part I.A.

173. Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 866–69 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docld=DC2431-En&caseId=C70 (holding that Article 9 of the BIT “undoubtedly limits jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligation of the investor. The meaning of the ‘dispute’ is the issue of compliance by the State with the BIT.”). But see id. (Declaration by W. Michael Reisman) (“I cannot join my colleagues in that part of our decision which rejects jurisdiction over counterclaims ‘arising directly out of the subject-matter of the dispute . . . .’”). As Professor Reisman noted, the majority’s decision in Roussalis marks the first time that jurisdiction over counterclaims has been rejected based on lack of consent.

174. See Pierre Lalive & Laura Halonen, On the Availability of Counterclaims in Investment Treaty Arbitration, 2 CZECH Y.B. INT’L L. 141 (2011) (arguing that it is near-impossible for States to succeed in having their counterclaims heard and that this is regrettable); Kryvói, supra note 20 (arguing that States should be able to bring certain counterclaims in investor-State arbitration).

175. See Moshe Hirsch, Interactions Between Investment and Non-Investment Obligations, in The Oxford Handbook of International Investment Law, supra note 48, at 154, 173; see also Hirsch, supra note 2, at 97–98.
Besides being inconsistent with the prescriptions of Article 31 of the VCLT, the Roussalis interpretation of preservation of rights provisions is undesirable as a matter of public policy. First, even if assumed arguendo not to be incorrect, the Roussalis interpretation of Article 10 triggers a number of unresolved issues. A tribunal adopting the Roussalis interpretation of a preservation of rights provision would be faced with a number of interpretative issues concerning the universe of international obligations that can be incorporated into the BIT via this mechanism, and how damages for breach of extra-BIT obligations should be calculated. Although difficult issues of interpretation always arise in investment treaty arbitration, which relies on broad standards of protection, the interpretation of a clause that dramatically complicates the task of arbitrators has limited persuasive value. Second, the Roussalis approach does not provide a solution to the problem of duplicate proceedings in international dispute resolution, and may instead increase the occurrence of inconsistent judgments and awards. Finally, the interpretation proposed by Roussalis raises important legitimacy issues with regard to both investment treaty arbitration and human rights adjudication.

A. The Roussalis Interpretation of Article 10 Triggers a Large Number of Unresolved Issues

The Roussalis approach triggers a number of difficult interpretative issues concerning the nature and scope of the international obligations that could be imported into the BIT using the proposed mechanism. It also leaves open the important question of what compensation standard should apply where a breach of an external obligation is found.

First, the language of Article 10 refers to obligations “contain[ing] a regulation, whether general or specific.” 176 The term “regulation,” however, is ambiguous. It can refer to a “[p]rinciple or rule (with or without the coercive power of law) employed in controlling, directing, or managing an activity, organization, or system.” 177 It is thus unclear whether the provision of an international

176. Greece-Romania BIT, supra note 12, art. 10 (emphasis added).
human rights instrument must have the force of law and be enforceable to the same degree as the ECHR before it can be incorporated into a BIT under the Roussalis reasoning.\footnote{See EMBERLAND, supra note 139, at 18–19 ("The Convention has a stronger obligatory nature than the majority of other international human rights law regimes. Acceptance of the jurisdiction of the [European Court of Human Rights] is compulsory for all member States.... Yet, such inroads into the legally binding effect of the Convention cannot outweigh the political effectiveness of the treaty, whose importance for the work of the Court should not be underestimated.").} For instance, the language appears broad enough to enable an investor to claim damages for the breach of an extra-BIT instrument which does not normally provide individuals with a direct cause of action. In such a situation, giving the claimant the right to bring a claim directly before an international tribunal might defeat the intention of the drafters of the external instrument. Yet, this is what the language of Article 10 suggests.

Second, it is not clear how tribunals would go about deciding whether an extra-BIT “regulation” provides for “more favourable treatment” than the BIT. In what seems to be an application of the \textit{ejusdem generis} principle, Article 10 provides that the extra-BIT obligations, in order to “prevail” over the BIT, must relate to the treatment of “investments by investors.”\footnote{Greece-Romania BIT, supra note 12, art. 10.} Whether external obligations must have an obvious BIT analogue against which they can be benchmarked before an investor can invoke them before a BIT tribunal is a further issue which tribunals following the Roussalis interpretation would have to resolve.\footnote{Peterson, supra note 11. As to the latter issue, Peterson observes: “In this context, due process rights in a BIT might have an obvious counterpart in the due process provisions of a human rights treaty. However, states might protest that novel human rights protections with no obvious analogue in a given BIT—for example a right to privacy or to free expression—should lie beyond the reach of arbitrators.” \textit{Id.}}

In addition, neither the tribunal nor the claimant in \textit{Roussalis v. Romania} clarified how they reached their respective conclusions that the BIT provided a “higher and more specific level of protection”\footnote{See \textit{Roussalis v. Romania}, ICSID Case No. ARB/06/1, Award, ¶ 312 (Dec. 7, 2011), http://icsid.worldbank.org/ICSID/CustomServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2431_En&caseId=C70.} than the ECHR and its Additional Protocol No. 1 or, to the contrary, provided for an inferior level of protection.\footnote{See \textit{id.} ¶ 117.} For instance, the claimant argued that Article 1 of the First Additional Protocol to \textit{Com/definition/regulation.html#ixzz1oBb3fYIK} (last visited Mar. 4, 2012) (emphasis added).
the ECHR created “far better treatment than Article 4 of the Treaty,”
which is the expropriation provision of the Greece-Romania BIT,
thus concluding that “Article 1 of the First Additional Protocol
came within the jurisdiction of the Tribunal.” 183 Article 4(1) of the
BIT provides that expropriation will only be lawful if: “a) the
measures are taken in the public interest and under due process of
law; b) the measures are clear and on a non discriminatory basis;
and c) the measures are taken against payment of prompt, adequate
and effective compensation . . . .” 184 By contrast, Article 1 of the
First Additional Protocol to the ECHR provides that “[e]very natural
or legal person is entitled to the peaceful enjoyment of his posses-
sions. No one shall be deprived of his possessions except in the pub-
lic interest and subject to the conditions provided for by law and by
the general principles of international law.” 185 Although it is not ob-
vious from the text of these two provisions alone that one provision
provides for better treatment than the other, both the claimant and the
tribunal in *Roussalis v. Romania* reached opposite conclusions with-
out closely analyzing the relevant ECtHR case law or fully explain-
ing their reasoning. 186

As this example suggests, one difficulty for tribunals follow-
ing the *Roussalis* approach will be to make a detailed comparison of
the levels of protection afforded to investors by different sources of
international obligations. In the context of MFN treatment provi-
sions, tribunals frequently compare the *actual treatment* granted to a
claimant with that granted to nationals of other States in “like cir-
cumstances.” 187 However, this is different from comparing *stand-
ards of protection* in the abstract. Whether MFN treatment clauses
can also serve to “import” more favorable substantive provisions in-
to the basic treaty is controversial, 188 and the methodology used by
tribunals to compare different standards of protection (as opposed to
different standards of actual treatment) remains to be fully elaborat-

183. *Id.*

184. *Greece-Romania BIT, supra* note 12, art. 4(1).

185. *ECtHR, supra* note 34, Protocol No. 1, art. 1.

186. *Roussalis, ICSID Case No. ARB/06/1,* ¶¶ 117, 312.


188. *Id.* See, e.g., *Douglas, supra* note 137, at 105 (“The MFN clause does not, in truth,
operate automatically to ‘incorporate’ provisions of a third treaty so that all that remains for
a tribunal to do is to interpret the amended text of the basic treaty. . . . The MFN clause
operates to secure more favourable treatment for the claiming party; it does not operate to
rewrite the terms of a treaty in respect of which the claimant is not even a signatory.”) (emph
phasis added).
While Article 10 refers to “treatment more favourable,” it does not call for a comparison of the way two different investors are actually treated. Rather, it invites a comparison of different standards of protection existing in different international instruments. Therefore, the same interpretative issues that come up in the context of MFN treatment regarding the importation of substantive standards of protection are likely to arise in the context of Article 10.

A related issue—also hotly debated in the context of MFN treatment provisions—is whether only substantive “regulations” or both substantive and procedural “regulations” should be capable of incorporation through the Roussalis mechanism. Within the category of “procedural” regulations, tribunals have, in the context of MFN treatment analysis, made a distinction between admissibility conditions and jurisdictional requirements. In the case of human rights obligations, and with regard to admissibility conditions, the requirements of the relevant human rights treaty are likely to be more cumbersome, and therefore less protective of “investments by investors,” than those of the BIT. Indeed, the requirement of exhaustion of local remedies found in virtually all international human rights treaties is less “protective” of “investments by investors” than the provisions of BITs concerning conditions for admissibility, even if these sometimes provide for a “cooling-off” period. However, this issue may have more practical consequences in other contexts.

Finally, it is unclear which standards of compensation tribunals would apply when finding a breach of an applicable extra-BIT provision. There may be situations where the standard of protection provided by the extra-BIT instrument is higher than the BIT standard, but its standard of compensation in the event of a breach lower.

For instance, most BITs require that the amount of compensation for expropriation be equal to the fair-market value of the property at the time of expropriation. By contrast, when ruling on a

189. UNCTAD, supra note 132, at 32–33, 37–38, 63–66.
190. Greece-Romania BIT, supra note 12, art. 10 (emphasis added).
191. UNCTAD, supra note 132, at xiv. See supra note 137.
192. UNCTAD, supra note 132, at 83–84. See also Schill, supra note 135, at 506 (criticizing that “arbitral jurisprudence regularly applies MFN clauses to circumvent admissibility-related restrictions regarding investor-State dispute settlement, while declining to apply them as a basis of jurisdiction by incorporating the host State’s more favorable consent from third-country investment treaties”).
193. See supra note 34.
194. SERGEY RIPINSKI & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 66, 79 (2008); PETERSON, supra note 6, at 37.
claim under Article 1 of the First Additional Protocol, the European Court of Human Rights tends to focus on whether a fair balance has been struck between the public and private interests involved, and whether the applicant has been left with a disproportionate burden. Therefore, ECtHR jurisprudence does not require full compensation at fair market value, and may even justify a lack of compensation in exceptional circumstances.

Similarly, it is common in human rights adjudication to award a form of moral damages to the victims of human rights violations. This practice is much less frequent in the context of investment treaty claims, even though it has been embraced by some tribunals. On the other hand, BIT tribunals that have awarded moral damages have awarded sums far exceeding the symbolic amounts typically granted by human rights courts.

What level of compensation will be appropriate in such situations is likely to be debated. If the tribunal’s primary concern is to provide the most favorable treatment to investors, it is likely to use the standard of compensation providing for the highest possible amount of damages. On the other hand, if the tribunal is concerned about cherry-picking, treaty-shopping and forum-shopping, it might instead award the same level of compensation as would normally be available under the applicable instrument, considering each instrument as a package.


197. Peterson, supra note 6, at 44.

198. Id. See also Desert Line Properties LLC v. Yemen, ICSID Case No. ARB/05/17, Award, ¶ 291 (Feb. 6, 2008) (awarding the claimant USD one million in moral damages); Benvenuti & Bonfant S.R.L. v. Gov’t of the People’s Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶ 4.96 (Aug. 15, 1980), 1 ICSID Rep. 330 (1993) (awarding the claimant CFA five million in moral damages).

199. See generally Lise Johnson, UK Firm Victorious in Dispute with Russia, but Damages Much Less than Claimed: RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005, INVESTMENT TREATY NEWS (Apr. 7, 2011), http://www.iisd.org/itn/2011/04/07/awards-and-decisions-2 (“The award is particularly notable for its treatment of the most-favored nation (MFN) provision, and specifically the degree to which that provision allows investors to ‘cherry-pick’ favorable clauses from bilateral investment treaties (BITs) while disregarding provisions that might narrow the rights granted in those clauses . . . . Arguably, the approach effectively . . . converts the MFN provision from a tool to prevent discrimination between foreign investors from different countries, to one that
The examples above show that the adoption of Roussalis’s argument would give rise to many difficult issues of interpretation, thus introducing another layer of complexity in investor-State arbitration. Although this does not, by itself, suffice to reject the Roussalis interpretation, it contributes to diminishing its persuasive force and desirability.

B. The Roussalis Interpretation of Article 10 Does Not Provide a Solution to the Problem of Duplicate Proceedings in International Dispute Resolution and Increases the Risk of Inconsistent Decisions

The interpretive uncertainty and complexity introduced by the Roussalis line of argument provides only one public policy reason for tribunals to reject the Roussalis approach in the future. While it could be argued that the Roussalis interpretation provides a mechanism that would reduce the incidence of parallel and duplicate proceedings, this is not so. Roussalis’s interpretation in fact increases the risk of inconsistent judgments and awards by introducing human rights claims before an additional forum.

At times, investment arbitration tribunals and regional human rights courts may be functionally interchangeable, with prospective claimants being able to decide whether to bring a claim before the former, the latter or both.200 Yukos’s battle against Russia is one example of this, as its former management and shareholders have brought four different cases against the Russian Federation in four different international forums.201 Parallel proceedings can sometimes ratchets up treaty protections in a manner beyond the contracting parties’ intentions.”);


turn into wasteful and unfair duplicate proceedings, generate inconsistent substantive outcomes and may result in a windfall for claimants through multiple recovery.\textsuperscript{202} Because the Roussalis interpretation brings extra-BIT claims before BIT tribunals, it may be argued that it helps reduce the incidence of duplicate proceedings. Yet the Roussalis interpretation is unlikely to have such a positive effect and may instead aggravate the risk of inconsistent awards and judgments.

The principle of \textit{res judicata} has been applied in investment arbitration in a sporadic way and essentially only as a confirmation of its positive effect—i.e., that a judgment or award is final and binding between the parties and should be implemented, subject to any available appeals or challenge—but not its negative effect—i.e., that the subject-matter of the judgment or award cannot be relitigated a second time.\textsuperscript{203} Moreover, the applicability of the \textit{lis pendens} doctrine, which provides that domestic courts cannot accept jurisdiction over a case already pending before another court,\textsuperscript{204} is equally uncertain in the context of investment treaty arbitration.\textsuperscript{205}

In any case, four prerequisites must be met before \textit{res judicata} or \textit{lis pendens} will apply: “(i) the proceedings must have been conducted before courts or tribunals in the international legal order; (ii) the proceedings must involve the same relief; (iii) they must involve the same grounds; and (iv) they must be between the same parties.”\textsuperscript{206} Assume the same claimant brings two very similar claims related to the same factual situation, one before a BIT tribunal and one before a regional human rights court like the ECtHR. Even if the BIT tribunal asserts jurisdiction over the human rights claims on the basis of a provision with language similar to Article 10, this is unlikely to prevent the claim before the human rights court from proceeding. The “identity of grounds” requirement will virtually never be met—even if the two proceedings involve very similar arguments—because they will not be based on the same legal instruments.\textsuperscript{207} Indeed, tribunals have generally taken the view that the decisive test for determining whether two claims involve the same

\textsuperscript{202} See Yannaca-Small, \textit{supra} note 200, at 1009–10.
\textsuperscript{203} \textit{Id.} at 1014–15.
\textsuperscript{204} \textit{Id.} at 1021.
\textsuperscript{205} \textit{Id.} at 1022–24.
\textsuperscript{206} \textit{Id.} at 1017.
\textsuperscript{207} \textit{Id.} at 1018.
issues is legal and not factual, as the “application of the international law rules on the interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires.”

Therefore, even if a BIT tribunal asserted jurisdiction over human rights claims, the claimant would not be barred from bringing these same human rights claims before another adjudicatory body. On the other hand, the Roussalis interpretation threatens to increase inefficiencies as well as the risk of inconsistent awards and judgments by allowing essentially the same human rights claims to proceed in one additional forum: the BIT tribunal.

C. The Roussalis Approach May Have a Broader Negative Impact on the Investment Treaty System and the International Human Rights Regime

It is also important to keep in mind the negative consequences that the Roussalis approach, if adopted by tribunals, could have on the legitimacy of investor-State arbitration and the advancement of international human rights.

For instance, the Roussalis line of argument raises the question of the legitimacy of privately-appointed arbitrators deciding issues of human rights law. The Roussalis approach is also relevant to the debate about the need for a “rebalancing” of the investment treaty regime to take into account the interests of both host countries and investors. Indeed, under the Roussalis interpretation, investors would be able to bring certain human rights claims before BIT tribu-


209. On the “legitimacy crisis” in investment treaty arbitration, see generally THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds., 2010). See also Karl P. Sauvant, The Times They Are A-Changin’—Again—in the Relationships Between Governments and Multinational Enterprises: From Control, to Liberalization to Rebalancing, COLUMBIA FDI PERSPECTIVES, No. 69, May 21, 2012 (“Rebalancing the investment regime to take into account the interests of both host countries and investors is a welcome development as it strengthens the regime’s legitimacy and puts the relations between governments and MNEs on a more solid footing. The challenge is to find the right balance between the rights and responsibilities of governments and MNEs—a challenge central to the future of the investment regime.”).
nals, while at the same time these tribunals remain reluctant to accept host States’ defensive human rights arguments. 210

In addition, the Roussalis reasoning would provide investors with a direct pathway to seek remedies for alleged human rights violations without having to satisfy an “exhaustion of local remedies” requirement. While some may see this as a victory in the battle for the enforcement of international human rights, this position overlooks important issues.

First, the rationale for the exhaustion of local remedies rule is to provide the State with an opportunity to remedy its alleged violation of human rights and take corrective action. 211 The idea is that the regional or international body should be an authority of last resort, and that the enforcement of human rights should primarily be the prerogative of sovereign domestic authorities, which are in the best position to take remedial steps. 212 Disregarding the exhaustion of local remedies requirement might upset the careful political compromise that States have arrived at in negotiating the applicable human rights conventions, thus potentially triggering a backlash against the existing international and regional human rights regimes. Second, privileging investors over other human rights claimants by giving them access to additional, and more accessible, forums to bring their human rights claims may be controversial. It is beyond the scope of this Note to provide an in-depth analysis of these broader policy issues. However, these issues are important in that they provide a background against which commentators and practitioners should carefully assess the Roussalis interpretation of preservation of rights provisions.

CONCLUSION

The claimant in Roussalis v. Romania advanced a novel argument, using a common but little commented-upon provision as a pathway for the introduction of independent human rights claims before the arbitral tribunal. While other claimants have typically invoked the choice of law clause or the arbitration clause of a BIT to introduce human rights arguments in investor-State arbitration proceedings, Roussalis relied on a preservation of rights provision—

210. See Reiner & Schreuer, supra note 52, at 90.
211. See Reid, supra note 195, at 29.
212. Id.
Article 10 of the Greece-Romania BIT—to do so. Based on the language of Article 10, Roussalis argued that the BIT tribunal had subject-matter jurisdiction over his ECHR claims so long as the ECHR provisions were more protective of his investments than were the pertinent BIT provisions.

The tribunal found that this argument was moot on the facts of the case. However, it did not reject it as a matter of law. Rather, the Roussalis tribunal left open the possibility that the preservation of rights provision could import into the BIT certain external obligations in force between the contracting parties. This, they appear to have conceded, could provide them with subject-matter jurisdiction over claims based on these external obligations.

This Note calls on tribunals dealing with similar arguments in the future to clarify the unavailability of this avenue for the introduction of independent human rights claims in investor-State arbitration. First, the Roussalis interpretation is inconsistent with the text of Article 10, as well as the object and purpose of the Greece-Romania BIT and of BITs generally. Second, the Roussalis interpretation, if followed by other tribunals, would greatly complicate the task of arbitrators and increase the risk of inconsistent awards and judgments. It could also hurt the legitimacy of international investment arbitration and the advancement of international human rights.

While greater awareness on the part of arbitrators of the human rights context of the disputes they arbitrate would be a positive development, the Roussalis line of argument goes too far. Based, as it is, on an ambiguous provision whose plain meaning does not suggest the extension of arbitral jurisdiction, the Roussalis interpretation should be rejected. The temptation to read so much into a provision that merely clarifies that BIT standards of protection are a floor and not a ceiling should be resisted.

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