Chapter 12
Jus Cogens in International Investment Law and Arbitration

Valentina Vadi

The mystery of jus cogens remains a mystery
(Sinclair 1984), at 224.

Abstract Despite growing reference to *jus cogens* in the jurisprudence of international courts and scholarly writings, the concept remains vague. What is *jus cogens*? Why does it matter? What are its effects? These questions remain unsettled, and the time is ripe for further in-depth investigation. This chapter aims at addressing this set of questions, focusing on the role of *jus cogens* in international investment law and arbitration. *Jus cogens* has played an important role in the evolution of international investment law, and illuminating the trajectory of this concept is important for the future of the field. In fact, not only can the study contribute to further clarifying the concept of *jus cogens* but it can also reinforce the perceived legitimacy of the international investment law system. These developments can be significant for international investment lawyers, international law scholars and other interested audiences.

Keywords *Jus cogens* · International investment law · Investment treaty arbitration · Transnational public order · Peremptory norms

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Contents

12.1 Introduction

Despite the wealth of scholarly writings on various aspects of *jus cogens*,[1] *jus cogens* remains an elusive, ambiguous and contested concept. *Jus cogens*, a Latin expression which can be translated as 'compelling law', refers to peremptory norms of general international law from which no derogation is possible. *Jus cogens* is grounded in and guards the most fundamental and highly valued interests of the whole international community. Peremptory norms 'do not exist to satisfy the needs of the individual states but the higher interest of the whole international community'.[2]

While *jus cogens* belongs to the modern fabric of international law, it remains an elusive concept. Very few international law instruments embrace this notion, and the jurisprudence of international courts and tribunals have not used it extensively at least until recently. Article 53 of the Vienna Convention on the Law of Treaties (VCLT)[3] defines *jus cogens* as

> a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[4]

The same Article provides that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.[5] While this

[1] There is considerable literature on *jus cogens* in international law. See, *inter alia*, Verdross 1937, at 571–577; Rolin 1960, at 441–462; Schwarzenberger 1964–1965, at 455–78; Schwarzenberger 1965, at 191–214; Verdross 1966, at 55–63; Ronzitti 1984, at 209–272; Saulle 1987, at 385–396; Janis 1987a–1988 1987–1988a; Orakhelashvili 2006; Bianchi 2008, at 491–508.

[2] Verdross 1966, at 58.

[3] Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (VCLT).

[4] Ibid.

[5] Ibid.

provision sets a legal framework as to how peremptory norms work, it does not specify which norms constitute *jus cogens*.

Jus cogens remains ambiguous because its precise nature, contours and consequences remain unclear. The problem of identifying these norms has always been a vivid one in international legal literature, and the VCLT has by no means ended the scholarly debate.[6] There is no consensus on which norms are part of *jus cogens*, nor on how a norm reaches or loses that status.

Jus cogens has been contested because it recalls the idea of natural law (*jus naturalis*)—a body of law, which is common to mankind, pre-exists and trumps other laws that have been set out or posited by the lawmakers within given communities (*jus positum*). Historically, *jus cogens* was seen as a non-consensual type of law deriving from natural law.[7] Like natural law, *jus cogens* emphasises the importance of human beings rather than necessarily conforming with the consolidated positivist and state-centric Westphalian understanding of international law. Like natural law, *jus cogens* seems to override the idea that public international law is purely based on the consent of states. In this sense, it can restrict state sovereignty, viewing individuals as emerging subjects of international law and contributing to the humanisation of the same. Yet, even though the notion of peremptory norms can be traced back to ancient times and is conceptually linked to the idea of natural justice, it became part of positive international law since the end of World War II.[8]

Some authors contend that *jus cogens* is not a scientific reality,[9] but an absurdity,[10] and that 'the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power'.[11] In this vein, Koskenniemi contends that '[*jus cogens* and obligations *erga omnes*] have no clear reference in this world but … [i]nstead of meaning, they invoke a nostalgia for having such a meaning'.[12] Other scholars have highlighted the risk of political misuse of *jus cogens*, 'leav[ing] everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law'.[13] Accordingly, the differentiation between higher and lower norms would 'devalue ordinary law' and 'ideologize international law'.[14]

However, the notion of peremptory norms is now firmly rooted in international law and has an ascertainable basis. Although there is no simple criterion by which

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6 Sztucki 1974, at 4.

7 Verdross 1937.

8 See generally Kadelbach 2016.

9 Janis 1987a–1988 1987–1988b.

10 Glennon 2006, at 529.

11 D'Amato 1990–1991, at 1.

12 Koskenniemi 2005, at 113.

13 Schwarzenberger 1965, at 213.

14 Paulus 2005, at 309.

to identify a general rule of international law as having the character of *jus cogens*, the concept of *jus cogens* is positive law.[15] Generally accepted examples are the prohibition of: apartheid, the use of force, slavery, torture, piracy and genocide.[16]

Norms of *jus cogens* can appear in the form of customary law, treaty law and even general principles of law.[17] It is the content rather than the form of a given norm that makes it belong to the *jus cogens* regime.[18] The fact that *jus cogens* norms can appear in different forms, i.e. as treaty and/or customary law and/or general principles of law, is confirmed by the relevant jurisprudence. The ICJ has upheld the *jus cogens* status of given norms irrespective of whether they were based on treaties or customary law. For instance, in its *Congo v. Rwanda* judgment, the ICJ affirmed that *jus cogens* is part of international law and that the prohibition of genocide belongs to this category of norms.[19] In doing so, the Court did not refer to the specific form of the *jus cogens* norm, whether customary or treaty law. A year later, the Court restated its recognition of *jus cogens* in the *Genocide* case.[20] In the *Genocide* case, Bosnia and Herzegovina alleged, *inter alia*, that the Serbian forces' attempt 'to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property' amounted to a form of genocide under the Genocide Convention.[21] The Court considered that there was 'conclusive evidence of the deliberate destruction of the cultural and religious heritage of the protected group'.[22] However, in the Court's view, the destruction of cultural heritage 'd[id] not fall within the categories of acts of genocide set out in Article II of the [Genocide] Convention'.[23] In the ruling, the Court recognised the prohibition on genocide as a *jus cogens* norm arising

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15 Dupuy 2005, at 136.

16 Criddle and Fox-Decent 2009, at 331; Brownlie 1998, at 517.

17 *Case Concerning the Delimitation of Maritime Boundary Between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, vol. XX UNRIAA, 119 at para 44 (highlighting that a *jus cogens* norm can develop as either custom or general principle of law); Kadelbach 2016, at 167 (noting that *jus cogens* norms can be 'found in many if not all sources of international law'); Weil 1983, at 425 (noting that 'peremptory norms may originate in any of the formal sources of international law: conventions, customs and general principles of law').

18 International Law Commission, Reports on the second part of its 17th session and on its 18th session, 17th and 18th session of the ILC, UN Doc. A/6309/Rev.1, 1966, at 248. The report states that '[i]t is not the form of a general rule of international law, but the particular nature of the subject matter with which it deals that … may give it the character of *jus cogens*'.

19 *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, ICJ, Judgment of 3 February 2006, para 64.

20 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007, para 161.

21 Ibid., para 320.

22 Ibid., para 344.

23 Ibid.

from the Genocide Convention and customary law.[24] In *Questions Relating to the Obligation to Prosecute or Extradite*, the Court held that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[25] The ICJ noted that the prohibition was 'grounded in a widespread international practice and on the *opinio juris* of States', and that it appeared 'in numerous international instruments of universal application'.[26]

Jus cogens permeates different fields of international law. Despite growing reference to *jus cogens* in the jurisprudence of arbitral tribunals and scholarly writings, no study has been devoted to the specific interplay between *jus cogens* and international investment law. The time is ripe for in-depth investigation. This article aims at filling this gap, addressing two fundamental questions: What role does *jus cogens* play in international investment law? Have arbitral tribunals paid due attention to peremptory norms of international law? The chapter aims at addressing these questions focusing on the role of *jus cogens* in international investment law and arbitration.

Although international investment law is of more recent pedigree than other fields of international law, and at first sight its main focus—the protection of foreign direct investment—seems far outside the traditional scope of *jus cogens* norms (such as the prohibition of torture, slavery, etc.), the chapter will show that *jus cogens* has played an important role in the evolution of international investment law. Illuminating the trajectory of *jus cogens* in international investment law and arbitration is important for the future of the field, as it can reinforce the perceived legitimacy of international investment law and arbitration. Moreover, the study can also contribute to further clarifying the concept not only in international investment governance but also in other areas of international law. In fact, ideas can cross-pollinate among fields of law. Therefore, this discussion can be significant for international investment lawyers, international law scholars and other interested audiences.

This chapter will proceed as follows. First, it will examine the interplay between *jus cogens* and international investment law in theory. Second, it will explore the relevant jurisprudence of arbitral tribunals. There are several arbitrations in which peremptory norms have been at stake.[27] Third, the study will address the question as to whether and, if so, how, arbitral tribunals have considered the arguments of the parties concerning *jus cogens*. How have arbitral tribunals dealt with this concept? Is there a dialectical interaction between *jus cogens* and *ordre public*? Finally, the conclusions will sum up the key findings of the study.

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[24] Ibid., para 161.

[25] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Judgment of 20 July 2012, para 99.

[26] Ibid.

[27] See sect. 12.4 below.

12.2 The Interplay Between *Jus Cogens* and International Investment Law in Theory

The interplay between *jus cogens* and international investment law can be scrutinised from, at least, three different perspectives. First, one can investigate the interplay between *jus cogens* and international investment law in terms of possible conflicts of norms. What happens if a norm of international investment law conflicts with a norm of *jus cogens*? *Jus cogens* invalidates *ab initio* any violating provision. However, genuine conflicts between investment law provisions and peremptory norms are difficult to conceive. In most cases, the good faith interpretation of international investment law will lead to the avoidance of such a violation. Second, are arbitrators bound to apply relevant peremptory norms of international law *ex officio* (i.e. whether or not such approach is pleaded by the parties)? This matter relates to the troublesome question as to whether the principle of *jura novit curia* (i.e. the court knows the law) applies to investment treaty arbitration. Arguably, because of its very nature, *jus cogens* would have direct effect in international investment law. Third, one can analyse the linkage between *jus cogens* and international investment law by focusing on the interaction between *jus cogens* and transnational public policy. This section examines the interplay between *jus cogens* and international investment law from these three different perspectives.

12.2.1 Conflict of Norms

The Vienna Convention on the Law of Treaties establishes a framework which governs the interplay between different international law rules.[28] In particular, it addresses three different relationships: 1) the relationship between two or more treaties relating to the same subject matter; 2) that between a treaty and *jus cogens* norms; and 3) that between a treaty and other relevant rules of international law. Given their relevance for the chapter, this section will concentrate on the second and third relationships only.

With regard to the relationship between a treaty and *jus cogens* norms, Article 53 VCLT states that a treaty shall be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. In parallel, Article 64 VCLT provides that 'if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. The necessary consequence would be the nullity of investment treaties that conflict with a peremptory norm because in no case may an investment law obligation be allowed to conflict with a *jus cogens* norm.[29] Alternatively, some

[28] The literature on the VCLT is extensive. See, e.g., Cannizzaro 2011; Villiger 2009; Dörr and Schmalenbach 2012.

[29] Article 53 VCLT.

argue that any violation of peremptory norms would automatically annul any contrary treaty provisions.[30] However, this conclusion is not supported by the VCLT which provides that '[i]n cases falling under article[…] … 53, no separation of the provisions of the treaty is permitted'.[31]

However, the hypothesis that investment treaties or that some of their norms are incompatible *tout court* with *jus cogens* proves to be overstated. International investment treaties generally include vague and open-ended provisions, giving states parties flexibility in the implementation of their investment law obligations. Because of the character of investment treaty provisions and the subject matter they cover, it is difficult if not impossible to envisage a direct conflict between international investment law and peremptory norms. Rather, some interpretations of investment treaties may be incompatible with peremptory norms. Therefore, where such interpretation would lead to the incompatibility of the investment treaty with a *jus cogens* norm, it should be avoided. In most cases, the good faith interpretation of international investment law will lead to the avoidance of such a violation, resolving all or most apparent and direct conflicts with peremptory norms. In other words, arbitral tribunals should read investment law provisions so as to avoid conflicts with peremptory norms.

With regard to the relationship between a treaty obligation and other international law sources, international law comes into play under any investment treaty pursuant to Article 31(3)(c) VCLT, which provides that the treaty interpreter shall take into account 'any relevant rules of international law applicable in the relations between the parties'.[32] This interpretive rule applies by virtue of the norm being a rule of international law even if the *jus cogens* nature of the norm is still uncertain. As stated by Sinclair, pursuant to Article 31(3)(c) VCLT, '[e]very treaty provision must be read not only in its own context, but in the broader context of general international law, whether conventional or customary'.[33] International law serves as a relevant context and colours the interpretation of the investment treaties. Accordingly, Article 31(3)(c) VCLT reflects a 'principle of integration', emphasising the 'unity of international law' and requiring that 'rules should not be considered in isolation of general international law'.[34]

12.2.2 Jura Novit Curia

Arbitral tribunals are not courts of general jurisdiction like the ICJ; rather they have a limited mandate: to interpret and apply the applicable law as well as to

[30] Marceau 2002, at 778.

[31] Article 44(5) VCLT.

[32] The literature on treaty interpretation is extensive. See, for instance, Gardiner 2008; Orakhelashvili 2008; MacLachlan 2005.

[33] Sinclair 1984, at 139.

[34] Sands 1999, at 49.

ascertain whether an investment treaty provision has been violated. Arbitral tribunals cannot, thus, reach any legal conclusion on the eventual violations of or compliance with other international law norms, for example environmental law norms. However, international investment law cannot be read in 'clinical isolation from public international law'.[35] As mentioned, customary rules of treaty interpretation, as restated in the VCLT, require systematic interpretation. Arbitral tribunals should presume that states must comply with their international law obligations and therefore they should interpret and apply international investment law accordingly. Moreover, Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[36] provides that in the absence of an agreement of the parties on the applicable law, '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'. In parallel, Article 1131 of the North American Free Trade Agreement (NAFTA)[37] provides that the Tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. In such cases, it is quite evident that the applicability of *jus cogens* raises no difficulty. *Jus cogens* is part of international law and thus also of international investment law. An international law scholar and arbitrator, Pierre-Marie Dupuy, suggests that 'arbitrators can, at their own initiative, invoke an issue of blatant violation of fundamental human rights deemed to be incompatible with the "transnational public policy"'.[38] The questions as to whether these 'fundamental human rights' are *jus cogens* norms or a broader category, who determines what 'transnational public policy' is, and whether *jus cogens* norms can be conceptualised as 'transnational public policy' will be addressed in the next subsection.

Are arbitrators bound to apply relevant peremptory norms of international law whether or not such approach is pleaded by the parties? According to some scholars, this question must be answered in the affirmative. The question is not whether to add new claims to those articulated by the parties, but to determine which law is applicable to the dispute.[39] The applicable law and the principle of *nec ultra petita* ('not beyond the request') are two different issues. The applicable law concerns the bodies of law that may apply to the dispute. The principle of *nec ultra petita* concerns the claims raised by the parties but does not infringe on or supersede the mandatory rules possibly applicable to the dispute. As Jan Paulsson puts it, 'a tribunal in an investment dispute cannot content itself with inept pleadings, and

[35] This expression is borrowed from *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*), Appellate Body Report, WT/DS2/AB/R, 20 May 1996, at 18.

[36] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159 (the ICSID or Washington Convention).

[37] 1992 North American Free Trade Agreement, 32 ILM 289 (NAFTA).

[38] Dupuy 2009, at 60.

[39] See, for instance, Cordero Moss 2006, at 13.

simply uphold the least implausible of the two. Furthermore, as the PCIJ put it in *Brazilian Loans*, an international tribunal is "deemed itself to know what [international law] is"'.[40] Such an approach would not amount to arbitral lawmaking, but to the recognition that arbitrations do not take place in a *vacuum*, rather they contribute to the development of international law and must be in conformity with its basic rules.

For instance, authors have criticised the approach adopted by the ICJ in the *Gabcikovo-Nagymaros* case, where the Court stated that since none of the parties invoked *jus cogens* norms of environmental law, it would not examine the effects and scope of Article 64 VCLT.[41] The Court left the issue open as to whether or not certain environmental law rules may be considered as peremptory.[42] However, the Court should have adjudicated the issue on its own initiative or '*motu proprio* since it involved the question of objective invalidity' of a treaty.[43]

Certainly, the problem of the vagueness of the concept of *jus cogens* and the risk of judicial activism seem to run against the question of whether adjudicators/arbitrators should consider *jus cogens* norms as applicable law of their own motion. Some have cautioned that peremptory norms 'can readily be made to serve hidden sectional interests, … leav[ing] everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law'.[44]

While one can agree that there is a need to prevent free decision-making,[45] the difficulties in identifying norms of *jus cogens* and the necessity to avoid judicial activism should not lead adjudicators to dismiss *jus cogens tout court*, given that *jus cogens* constitutes 'an important structural element of international law as a legal system'.[46] By considering *jus cogens* arguments, adjudicators can contribute to the development of international law. By not considering it, they adopt an overly positivist approach to international law and risk cristallising the same in a shape that may no longer be adequate to evolving needs. In conclusion, it seems correct to consider *jus cogens* as a legal concept, to be considered applicable by relevant judges and arbitrators.[47]

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[40] Paulsson 2006, at 888–889.

[41] *Case Concerning the Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*), ICJ, Judgment of 25 September 1997, para 76.

[42] Orakhelashvili 2006, at 498.

[43] Ibid.

[44] Schwarzenberger 1964–1965, at 477 (internal citations omitted).

[45] Verdross 1966, at 62.

[46] Casanovas 2001, at 77.

[47] In his separate opinion to the ruling on jurisdiction in the case *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*, Judge Dugard affirmed: 'norms of *jus cogens* advance both principles and policy … they must inevitably play a dominant role in the process of judicial choice'. *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda)*, ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, Separate Opinion of Judge ad hoc Dugard, para 10.

12.2.3 Jus Cogens and Transnational Public Policy

According to some scholars, peremptory norms constitute the 'international public order': 'International *jus cogens* and international public policy are synonyms, conveying the idea of rules of international law which may not be changed by consent between individual subjects of international law'.[48] The concept of 'transnational public policy', or 'truly international public policy' (*ordre public vraiment international*) is said to comprise principles of universal justice possessing an absolute value covering fundamental laws with a status higher than the ordinary rules of international law.[49] According to these scholars, while national public policy 'refers to a body of legal standards which protects the essential interests or values of the legal system',[50] transnational public policy reflects the fundamental 'principles that are commonly recognised by political and legal systems around the world'.[51] Transnational public policy would refer to those principles that receive an international consensus as to universal standards and accepted norms that must always apply.[52]

This view is not uncontroversial. In fact, other scholars contend that 'the characterisation of *jus cogens* as international public policy remains … vague', 'add[ing] a further layer of obscurity (and complexity) to an area of law—*jus cogens*—that is already shrouded in darkness'.[53] Critics contend that analogising *jus cogens* to transnational public order does not unravel the mystery of *jus cogens*.[54] Rather, according to some critics, the equation or analogy would presuppose a non-consensualist theory of *jus cogens*, i.e. it would favour the notion that like public order (or *ordre public*), peremptory norms operate as a matter of necessity rather than being based on state consent. According to other critics, the two concepts of *jus cogens* and *ordre public* are *notions voisines* or neighbouring concepts,[55] but remain conceptually different: while *jus cogens* belongs to the international sphere, *ordre public* belongs to the domestic plane.[56]

Yet, as was shown in section one, rather than being an autonomous source of international law, *jus cogens* expresses a type of norm of superior quality that can be endorsed in any of the typical sources of international law, be they customary, treaty or general principles of law. The dichotomy between consent-based and

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48 Schwarzenberger 1964–1965, at 455.

49 Zemanek 2011, 383 (noting that '[t]his public order explanation has attracted the widest following amongst scholars'). See also Meyer 1994, at 140; Lalive 1986, at 329–373; Schwelb 1967, at 949.

50 Hameed 2014, at 66.

51 Hunter and Conde e Silva 2003, at 367.

52 Sheppard 2004, at 1.

53 Hameed 2014, at 67.

54 Virally 1966, at 7.

55 Ibid., at 7.

56 Ibid., at 8.

non-consent-based approaches to *jus cogens* may in fact have become moot. Substantively, the fact that *jus cogens* and transnational public policy are complex notions should not lead adjudicators and interpreters to dismiss the challenge of confronting them. The risks and opportunities of analogising, juxtaposing and eventually merging the two concepts are also shown by the fact that, like *jus cogens*, transnational public policy is not an autonomous source of law, but may be embodied in customary, treaty or general principles of law. Public order does not merely belong to the national plane; rather, it also presents a truly international dimension when a large majority of states share the same principles. As is known, transnational or truly international public policy has priority over purely national public policy.[57] In turn, *jus cogens* does not merely belong to the international plane, but has a pervasive effect on the national plane.

Even assuming that *jus cogens* protects the international public order, one has to ascertain what the international public order actually stands for.[58] Arbitral tribunals have stressed that '[t]ribunals must be very cautious … and must check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards'.[59] Like *jus cogens*, transnational public policy (or *ordre public international*) aims at maintaining the integrity of the fundamental norms of international law and must always apply.[60] Transnational public policy is a flexible and dynamic concept that can be used as a corrective mechanism or as a tool to balance complex and often conflicting goals.

Transnational public policy imposes *positive* duties on arbitrators, by requiring a minimum level of quality for international awards.[61] Therefore, authors have highlighted that '[a]ny tribunal owes an obligation to the international community to apply international public policy' and that 'the faithful application of public order would acquit a tribunal of its obligations to the parties to apply the law chosen by them through compromise or otherwise, but nothing can acquit a tribunal of its mandate to apply public policy'.[62] In other words, arbitrators 'have the right—and even the obligation—to themselves raise the issue of whether disputed contracts or legal provisions before them satisfy the requirements of international public policy'.[63] Kreindler also highlights that '[t]he arbitrator need not apply the agreed or determined governing law if doing so would cause him to violate

[57] Lalive 1987, at 266 (noting that 'the international public policy of the forum has no reason to intervene, properly speaking, whenever public international law applies by reason of its priority').

[58] Linderfalk 2012, at 11.

[59] *World Duty Free v. Republic of Kenya*, ICSID, Award, Case No. ARB/00/7, 4 October 2006, para 141.

[60] Orakhelashvili 2006, at 492; and Dupuy 2009, at 25.

[61] Rubino-Sammartano 2001, at 507; and Arfazadeh 2005, at 178.

[62] Orakhelashvili 2006, at 493; and Gaillard and Savage 1999, at 861.

[63] Gaillard and Savage 1999, at 861.

international public policy'.[64] Finally, Lew and Mistelis pinpoint that '[t]o the extent that human rights protection constitutes a core part of international or national public policy, human rights aspects must be considered by the tribunal'.[65]

Traditionally, both national and truly international public policy have played a *negative* role, acting as a limit to the recognition of arbitral awards.[66] Arbitral tribunals have an obligation to the parties to render an enforceable award.[67] Such obligation 'encourag[es] arbitral tribunal[s] to take into account transnational public policy—the public policy that is applicable in all jurisdictions' to facilitate enforcement and protect the award against review by national courts.[68]

In particular, if an arbitral award contravenes public policy, national courts can deny its enforcement.[69] In this context, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[70] expressly provides for a limited judicial review on the merits of an award for public policy reasons.[71] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law,[72] which has formed the basis for arbitration laws adopted by many countries throughout the world, provides that a court shall refuse recognition or enforcement of an award if it finds that the award is in conflict with the public policy of its state.[73] Indeed, some commentators deem public policy as the ultimate and necessary limit to the autonomy of international arbitration.[74]

With regard to investment arbitration, ICSID awards are considered truly delocalised. Indeed, the ICSID Convention[75] excludes any attack on the award in the national courts, and ICSID awards are deemed to be final and self-executing.[76]

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64 Kreindler 2003, at 244.

65 Lew, Mistelis and Kröll 2003, at 93–94.

66 Rubino-Sammartano 2001, at 504.

67 See, for instance, Article 35 of the 1997 International Chamber of Commerce (ICC) Rules of Arbitration, 36 ILM 1604: 'the Arbitral Tribunal shall act in the spirit of these rules and shall make every effort to make sure that the Award is enforceable at law.'

68 Menaker 2010, at 72.

69 The grounds for setting aside arbitral awards are set out in the *lex loci arbitri* or the law of the seat which establishes the link between an arbitration procedure and a certain legal order. See Giovannini 2001, at 115.

70 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (New York Convention).

71 Article V.2 New York Convention.

72 United Nations Commission on International Trade Law (UNCITRAL), Model law on international commercial arbitration, UN Doc. A/40/17 Annex 1 and A/61/17 Annex I, 21 June 1985, amended on 7 July 2006 (UNCITRAL Model Law on International Commercial Arbitration).

73 Article 36(1)(b)(ii) UNCITRAL Model Law on International Commercial Arbitration.

74 Arfazadeh 2002, at 1–10.

75 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 (ICSID Convention).

76 Article 54(1) of the ICSID Convention requires Contracting States to enforce an ICSID award 'as if it were a final judgment of a court in that State'.

In fact, the ICSID Convention provides an internal system of remedies,[77] including an internal annulment mechanism and excluding appeals or any other remedies at the national level.[78] In its quest for finality and enforceability of its awards, the Convention has created an autonomous regime for recognition and execution, which excludes the applicability of relevant national arbitration laws. Crucially, public policy is not a ground for annulment of the arbitral award under the ICSID Convention. As Schreuer highlights, '[t]he finality of awards would also exclude any examination of their compliance with international public policy or international law in general'.[79]

However, this does not mean that arbitrators should not respect international law and public policy. The arbitral tribunal must observe international law under Article 42 of the ICSID Convention.[80] Giardina rightly points out that the fact that ICSID awards are recognised and enforced as binding on all states that are parties to the relevant agreements requires their necessary compliance with international law. Thus, respect for public international law and, *a fortiori*, international public policy, would be an implicit requisite of ICSID awards.[81]

Also, national courts have shown some resistance to the detachment of ICSID awards from every form of judicial supervision and have elaborated a distinction between enforcement and execution. Thus, while ICSID rules would cover enforcement, the law governing execution would be national law.[82] Furthermore, arbitral awards under the so-called ICSID Additional Facility, as well as those rendered under commercial arbitration rules (e.g. UNCITRAL, International Chamber of Commerce (ICC), etc.) may be reviewed in local courts.

The enforceability of arbitral awards constitutes a pillar of investment treaty arbitration as the system relies on the finality of arbitral awards and legal certainty. Furthermore, according to Article 27 VCLT, a state cannot rely on its national law to justify non-compliance with its treaty obligations.[83] Yet, public policy is not a mere national concept as the existence of a proper international public order common to all nations is widely recognised. The international community as a whole requires arbitral justice to respect the general interests protected by transnational public policy.[84] Thus, there would be a difference between public order, as such, and transnational public order or truly international public order (*ordre public vraiment international*) as the former concerns the fundamental values of a given

[77] The ICSID Convention provides for the following remedies: interpretation of the award (Article 50), rectification of the award (Article 51), and annulment of the award (Article 52).

[78] Article 53(1), ICSID Convention.

[79] Schreuer 2001, at 1129.

[80] Ibid.

[81] Giardina 2007, at 29–39.

[82] Baldwin, Kantor and Nolan 2006, at 8.

[83] *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ, Merits, Judgment of 25 May 1926, at 167.

[84] Seraglini 2001, at 533.

state, while the latter refers to the fundamental values of the international community of states.[85] In this sense, if an ICSID award were contrary to peremptory norms of public international law, the national court would be obliged not to execute it because of its non-compliance with the transnational public order.

If an international award did not comply with transnational public order, such an award would be unlikely to be executed at the national level. If a contracting state failed to abide by and comply with the award rendered, the state of the foreign investor could decide to bring an international claim on behalf of the investor before the International Court of Justice. However, diplomatic protection would be an unlikely discretionary move on the side of the state in practice. Therefore, this possibility does not constitute a strong disincentive to refuse execution due to international public order concerns.

In general terms, in order to avoid subsequent challenges in terms of annulment proceedings and non-enforcement of arbitral awards, arbitrators should take public policy considerations into account in the course of the arbitral proceedings. Not only does public policy protect the compelling public interests of single states, but it also protects the fundamental interests of the international community at large. Above all, public policy compels arbitrators to integrate these eclectic, diverse and often conflicting interests into one coherent conception of international justice. In conclusion, the link between truly international public policy and *jus cogens* deserves further scrutiny as the former may already encapsulate much of the content of the latter.

12.3 The Interplay Between *Jus Cogens* and International Investment Law in Investment Treaty Arbitration

After having examined the forms, content and boundaries of *jus cogens* in the previous sections, this chapter now examines and critically assesses the interplay between *jus cogens* and international investment law in investment treaty arbitration. While the former sections necessarily have a theoretical approach, this section sheds light on the *jus cogens*-related arbitrations. Arbitral tribunals have settled disputes carrying *jus cogens* arguments in support of either the complaint or the defence. In this context, arbitral tribunals have been called upon to answer the following questions. Can foreign investors claim that a host state has violated *jus cogens* norms before arbitral tribunals? Can a host state invoke *jus cogens* to refuse to comply with international investment treaties? Can arbitral tribunals consider *jus cogens* as part of the applicable law even when there is no reference to the same in the text of investment treaties? Does *jus cogens* have direct application in international investment arbitration? In order to address these questions, this section discusses the interplay between *jus cogens* and international investment law in international investment treaty arbitration focusing on three dimensions

[85] Orakhelashvili 2006, at 27.

of this interaction: 1) *jus cogens* arguments put forward by the investors; 2) *jus cogens* arguments put forward by the host states; and 3) the interplay between *jus cogens* and international public order.

12.3.1 Jus Cogens Arguments Put Forward by the Investors

A number of investors have sought to bolster their claims before arbitral tribunals by invoking *jus cogens* arguments. For instance, in the *Methanex* case,[86] Methanex, a Canadian investor, initiated arbitration against the United States of America, claiming compensation for losses caused by a ban on the use of a gasoline additive. As scientific evidence showed that MTBE (methyl tertiary-butyl ether) contaminated groundwater and was difficult and expensive to clean up, the State of California enacted legislation to prevent the commercialisation and use of MTBE. Methanex submitted that the Californian regulation was tantamount to expropriation within Article 1110 NAFTA as the US measures were enacted to seize the company's market share to favour the domestic ethanol industry. Since no compensation was paid, Methanex argued that this violated due process of law, non-discrimination and the minimum standard of treatment in violation of *jus cogens* norms.

The Tribunal held that there was no expropriation. With regard to the *jus cogens* arguments of the claimant, the Arbitral Tribunal asserted that 'as a matter of international constitutional law, a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to the parties' choice of law that is inconsistent with such principles'.[87] Yet, it found that in the present case, 'even assuming that the USA errs in its argument for an approach to minimum standards that does not prohibit discrimination, this is not a situation in which there is a violation of a *jus cogens* rule'.[88] In fact, the Tribunal noted that the restrictive approach to the minimum standard of treatment 'does not exclude non-discrimination from NAFTA Chapter 11, an initiative which would, arguably, violate a jus cogens and thus be void under Article 53 of the Vienna Convention on the Law of Treaties'. Rather, such a restrictive interpretation 'confine[s] claims based on alleged discrimination to Article 1102 [of NAFTA Chapter 11], which offers full play for a principle of non-discrimination'.[89]

In *Biloune* v. *Ghana*,[90] a Syrian investor, Mr. Biloune, was arrested, held in custody for thirteen days without charge and finally deported from Ghana to Togo. In the ensuing arbitration, the claimant sought redress for the alleged violations of his

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[86] *Methanex v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, 44 ILM 1345, Part IV, ch. C, para 24.

[87] Ibid., Part IV, ch. C, para 24.

[88] Ibid.

[89] Ibid.

[90] *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

human rights, including torture. The Arbitral Tribunal held that customary international law requires states to accord foreign nationals a minimum standard of treatment and that international law endows all individuals with inviolable human rights. However, it held that its competence is limited to disputes 'in respect of' the foreign investment and that it 'lack[ed] jurisdiction to address, as an independent cause of action, a claim of violation of human rights'.[91] So far, the *jus cogens* claims of investors have not been taken into account by arbitral tribunals; this ruling is typical of the outcomes of these disputes. One is left wondering what would happen if the specific *jus cogens* claim was within the jurisdiction of the relevant tribunal.

In *Roussalis v. Romania*,[92] the investor argued that a preservation of rights provision in the Greece-Romania Bilateral Investment Treaty (BIT)[93] provided the Arbitral Tribunal with the jurisdiction to hear his human rights claims as the relevant human rights provisions[94] were more protective of his investment than the pertinent investment treaty provisions. The Arbitral Tribunal dismissed the argument as moot in the present case, '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'.[95] The Tribunal did not exclude, however, that the relevant provision 'could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights (ECHR) and its Additional Protocol No.1'.[96] While in this specific case, the investor had not invoked the violation of *jus cogens* norms, relevant international law instruments such as the ECHR include norms which have attained *jus cogens* status.

12.3.2 Jus Cogens Arguments Put Forward by the Host States

A number of host states have sought to bolster their defence before arbitral tribunals by invoking *jus cogens* arguments. In a seminal case, the 1875 *Maria Luz*

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[91] Ibid., at 203.

[92] *Spyridon Roussalis v. Romania*, ICSID, Award, Case No. ARB/06/1, 7 December 2011.

[93] Article 10 of the Greece-Romania BIT provided: '[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'. *Spyridon Roussalis v. Romania*, para 310.

[94] *In casu* the claimant referred to the right to property and the right to fair proceedings as protected under Article 6 of the European Convention on Human Rights and of Article 1 of the First Additional Protocol to the European Convention. Ibid., para 10.

[95] Ibid., para 312.

[96] Ibid.

arbitration, the Czar of Russia, sitting as the sole arbitrator, declared that Japan 'had not breached the general rules of the Law of the Nations' in freeing the slaves carried on the Peruvian vessel *Maria Luz* and denying the subsequent demands for indemnity of the Peruvian citizens.[97] The vessel was carrying Chinese workers to Peruvian plantations.[98] After suffering damage during a severe storm, it called at the port of Yokohama, Japan for repairs.[99] While anchored there, a Chinese worker escaped and complained before Japanese authorities about severe mistreatment analogous to slavery asking for protection and the rescue of the other Chinese workers aboard.[100] The Japanese authorities prevented the *María Luz* from leaving port and found that its cargo of illiterate workers had been deceived in Macao into signing contracts, the contents of which they could not read or understand, and were being confined against their will under inhumane conditions. A domestic court held that the shipping company owning the *María Luz* was guilty of wrongdoing and that the workers were freed of their contract.[101] For the purposes of our discussion, it is interesting to note that the captain argued that involuntary servitude did not run against Japanese law, as it was then practised in Japan in the form of the sale of prostitutes.[102] However, the court ruled that the conduct of the captain breached the law of nations rather than Japanese law. The Chinese workers were then sent back to China.

While the Chinese government officially thanked the Japanese government for the assistance rendered to Chinese subjects, the Peruvian government protested against the irregularity of the proceedings and requested compensation. At the time, most nations supported the protests of the Peruvian Government, contending that Japan had overcome the provisions of various treaties to rule against a foreign company. As Japan declined to pay compensation, the two states agreed to nominate a third neutral to settle the dispute. As a matter of law, a number of 'unequal treaties', which were imposed on Japan in the 1850s, ensured that foreigners in Japanese ports were not subject to Japanese laws and tribunals.[103] However, such treaties only covered the citizens of countries that had actually signed treaties with Japan—and because Peru had not done so, the *Maria Luz* had come under Japanese jurisdiction as it entered Japanese territorial sea. Tsar Alexander II of Russia arbitrated the issue, and in 1875 he upheld Japan's position.

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[97] *Maria Luz* Arbitration, award rendered by the Czar of Russia, 17–19 May 1875, quoted by Lalive 1986, at 49.

[98] For a detailed account of the case, see Botsman 2006.

[99] Saveliev 2002, at 75–78.

[100] Ibid.

[101] Keene 2002, at 216–218.

[102] Saveliev 2002, at 75–78.

[103] 'Unequal treaties' refer to a series of treaties signed during the 19th and early 20th centuries by European countries on the one hand and China, Korea and Japan on the other hand, after the latter suffered military defeat or a threat of military action by the former. See, generally, Auslin 2006.

In the *Aminoil* arbitration,[104] the Arbitral Tribunal affirmed the existence of *jus cogens*, albeit excluding that the invoked norm had peremptory character. In 1948, the Sheikh of Kuwait granted to Aminoil, a US company, a 60-year oil concession. The concession agreement contained a stabilisation clause that prevented Kuwait from unilaterally changing or terminating the agreement. When Kuwait subsequently demanded an increase in its royalty for every ton of oil recovered, Aminoil did not consent and in 1977 Kuwait nationalised the investment with payment of compensation. Aminoil initiated arbitration proceedings, contending that the nationalisation was contrary to the stabilisation clause. The Arbitral Tribunal held that the nationalisation was lawful and that it did not breach the stabilisation clause, as the latter prevented only confiscatory nationalisations. In particular, the Arbitral Tribunal stated that permanent sovereignty over natural resources did not prevent states from subscribing to stabilisation clauses. The Tribunal held: 'on the public international law plane, it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting states from affording by contract or by treaty, guarantees of any kind against the exercise of the public authority … This contention lacks all foundation'.[105]

In the *Texaco* case,[106] arising out of the nationalisation of the Lybian government of certain assets held by Texaco and related to oil concessions, the sole arbitrator, Professor René-Jean Dupuy, adopted a more subtle solution. He did not deny the *jus cogens* nature of permanent sovereignty. However, he rejected the Libyan arguments based either on *jus cogens* relating to permanent sovereignty over natural resources or on the assimilation of the concession contract to an 'administrative contract' that would have justified the existence of a unilateral power of amendment in favour of the government. Rather, he stated that the contested contract between the host state and the foreign investor was in the exercise of sovereignty over natural resources.[107] While the award refers to a political context that is now obsolete, it remains 'a keystone in the construction of the modern international law of foreign investment'.[108]

In several arbitrations brought against Argentina in the aftermath of its financial crisis, the host state raised human rights and *jus cogens*-related arguments to justify the measures it had adopted to cope with the crisis. In a nutshell, the argument, far from being new to international law scholars, is that there are state duties

[104] See *The Government of Kuwait v. The American Independent Oil Co (Kuwait v. Aminoil)*, Ad Hoc Arbitral Tribunal, 24 March 1982, 21 ILM 976.

[105] Ibid., para 90.2.

[106] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, International Arbitral Tribunal, Award on the Merits, 19 January 1977, 17 ILM 11.

[107] Ibid., para 78.

[108] Cantegreil 2011, at 441.

of status higher than other duties.[109] For instance, in *EDF v. Argentina*,[110] the respondent argued that the measures it had adopted to cope with its financial crisis were justified by human rights concerns.[111] In particular, Argentina argued that those fundamental human rights should prevail over other treaty obligations because of their peremptory character.[112] While the Tribunal did not contest the existence of human rights and peremptory norms, it questioned the content of such norms[113] and the relevance of the contested state measures for their enjoyment. The Tribunals held that 'no showing has been made that Argentina was not able to comply with the relevant treaty provision'.[114] In *Suez v. Argentina*, the Tribunal rejected the argument that 'Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs … Argentina is subject to both international obligations, i.e. human rights and treaty obligations, and must respect both of them equally'.[115]

In some cases, the arbitral tribunals did not substantively address *jus cogens* arguments finding that they had not been fully argued. For instance, in *Azurix* v. *Argentina*, an ICSID case concerning water and sewage systems, Argentina raised the issue of the compatibility of the BIT with human rights treaties, arguing that 'a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of service provider'.[116] The Tribunal dismissed this argument finding that it had not been fully argued.[117] In *Siemens* v. *Argentina*, Argentina claimed that given its financial crisis, the full protection of the property rights of investors would jeopardise its compliance with human rights obligations.[118] The Tribunal, however, held that the argument had not been developed and that 'without the benefit of further elaboration and substantiation by the parties, it [wa]s not an argument that, *prima*

[109] Verdross 1937, at 575 (arguing that 'a state cannot be bound to close its schools, universities or courts, to abolish its police or to reduce its public services in such a way as to expose the population to the dangers of disorder and anarchy, in order to obtain the necessary funds for the satisfaction of foreign creditors').

[110] *EDF International, SAUR international, and Léon Participationes Argentinas v. Argentina*, ICSID, Award, Case No. ARB/03/23, 11 June 2012.

[111] Ibid., para 192 (quoting the Respondent's Rejoinder: 'it was necessary to enact the Emergency Tariff measures in order to guarantee the free enjoyment of certain basic human rights such as, *inter alia*, the right to life, health, personal integrity, education, the rights of children and political rights which were directly threatened by the socio-economic institutional collapse suffered by the Argentine Republic').

[112] Ibid., para 193 (stating that 'the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to *jus cogens*').

[113] Ibid., paras 909–911.

[114] Ibid., paras 912–914.

[115] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID, Decision on Liability, Case No. ARB/03/19, 30 July 2010, para 262.

[116] *Azurix v. Argentine Republic,* ICSID, Award, Case No. ARB/01/12, 14 July 2006, para 254.

[117] Ibid., para 261.

[118] *Siemens v. Argentina*, ICSID, Award, Case No. ARB/02/8, 6 February 2007, para 75.

facie, bears any relationship to the merits of this case'.[119] Analogously, in *CMS Gas v. Argentina*, despite Argentina's arguments that given the country's economic and social crisis, the performance of specific investment treaty obligations 'would be in violation of … constitutionally recognised rights',[120] the Arbitral Tribunal held that 'there [wa]s no question of affecting fundamental human rights'.[121]

As Reiner and Schreuer point out, '[t]hese awards seem to indicate the tribunals' reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves'.[122] Admittedly, some of these arbitrations involved human rights the *jus cogens* status of which is uncertain. In some arbitrations, the host states have preferred to make reference only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful in invoking *jus cogens* as the same arguments could be used against them in other contexts. For instance, with regard to indigenous peoples' rights, including the right to be consulted in matters affecting them, states have referred to domestic constitutional provisions.[123] Yet, even in such cases, *jus cogens* has played an indirect role: when states invoke public order to justify the breach of relevant investment treaty provisions, an argument can be made that there is a link and/or partial overlap between public order and *jus cogens*. Undoubtedly, states have to guarantee certain human rights 'as the primary custodians of the general interest within their jurisdiction but also as primary guardians of the public order on their territory'.[124]

Other tribunals, however, have adopted a more sensitive approach to human rights issues. For instance, in *Sempra v. Argentina,* the Tribunal acknowledged that the dispute 'raise[d] the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'. Regardless, it found that

> the real issue in the instant case [wa]s whether the constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation.

It concluded that 'the constitutional order was not on the verge of collapse' and that 'legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation'.[125]

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[119] Ibid., para 79.

[120] Ibid., para 114.

[121] *CMS Gas Transmission Co. v. Argentina*, ICSID, Award, Case No. ARB/01/08, 12 May 2005, at para 121.

[122] Reiner and Schreuer 2009, at 90.

[123] *Glamis Gold, Ltd. v. United States of America*, ICSID/UNCITRAL, Award, 8 June 2009, 48 ILM 1038, para 654.

[124] Boisson de Chazournes 2010, at 310.

[125] *Sempra Energy International* v. *The Argentine Republic,* ICSID, Award, Case No. ARB/02/16, 28 September 2007, para 332.

In *Continental Casualty v. Argentine Republic*, concerning an insurance business,[126] the Arbitral Tribunal showed a sensitive approach to human rights issues. In particular, the Arbitral Tribunal considered that the Government's efforts struck an appropriate balance between the protection of investor's rights and the responsibility of any government towards the country's population:

> it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much.[127]

12.3.3 The Interplay Between Jus Cogens and International Public Order

A third type of claim, which so far has produced copious jurisprudence, relates to the analogy and/or equation between *jus cogens* and transnational public order. This type of cases is characterised by the fact that third parties are adversely affected by given investments as investors and/or host state authorities circumvented human rights and/or *jus cogens* obligations. For instance, bribery causes an adverse effect on third parties including business competitors and the population of the host state. In fact, the negative effects of corruption on the protection of human rights are widely acknowledged. Corruption may affect the enjoyment of both civil and political rights on the one hand and economic, social and cultural rights on the other, weakening democratic institutions and compromising the government's ability to deliver an array of services, including health, educational and welfare services.[128] Scholars have identified the norm against public corruption as an emerging norm that is not widely recognised as *jus cogens* today 'but nonetheless merit[s] peremptory force'.[129]

In an ICC arbitration, parties who had entered into an 'agency agreement' by which one party paid bribes to government officials on behalf of the other, were deemed to have forfeited any right to file arbitration claims to settle their dispute.[130] Mr. Lagergreen acting as a sole arbitrator affirmed that

> it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.[131]

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[126] *Continental Casualty v. Argentine Republic*, ICSID, Award, Case No. ARB/03/9, 5 September 2008, para 192.

[127] Ibid., para 227.

[128] See, generally, Boersma 2012.

[129] Criddle and Fox-Decent 2009 at 327.

[130] *Argentine Engineer v. British Company*, ICC, Award, Case No. 1110, Yearbook of Commercial Arbitration 47, at 61.

[131] Ibid. For commentary, see Tirado, Page and Meagher 2014, at 495.

Similarly, in *World Duty Free Company Limited v. The Republic of Kenya*,[132] the ICSID Tribunal referred to both national and international public policy and did not allow claims based on bribes or on contracts obtained by corruption.[133] The Arbitral Tribunal stated that

> in light of domestic laws and international conventions relating to corruption, and in light of decisions taken in the matter by courts and international tribunals, this tribunal is convinced that bribery is contrary to the international public policy of most, if not all states or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[134]

The Tribunal concluded that '[t]he claimant [wa]s not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of ordre public international and public policy under the contract's applicable laws',[135] pointing out that public policy 'protects not the litigating parties but the public'.[136]

In *Inceysa v. El Salvador*, the Tribunal found that the claimant had made fraudulent misrepresentations concerning its financial condition in its bid for a government contract and concluded that it did not have jurisdiction over the claim brought before it by the investor, as the respondent had not consented to the protection of investments procured by fraud, forgery or corruption.[137] In *Phoenix Action Ltd v. the Czech Republic*, an ICSID Tribunal held that

> nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'.[138]

The prohibitions of torture, genocide and slavery relate to public order and coincide with established elements of *jus cogens*. In fact, these specific items exemplify the type of norms which have acquired *jus cogens* status. Analogously, in *Metal-Tech Ltd. v. The Republic of Uzbekistan*,[139] the Arbitral Tribunal dismissed all of the claims brought by an Israeli company for lack of jurisdiction because 'the investment was tainted by illegal activities, specifically corruption'.[140]

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[132] *World Duty Free v. Republic of Kenya*, ICSID, Award, Case No ARB/00/7, 4 October 2006, para 157.

[133] Ibid., para 157.

[134] Ibid.

[135] Ibid., para 188.

[136] Ibid., para 181.

[137] *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID, Award, Case No. ARB/03/26, 2 August 2006, paras 263–4.

[138] *Phoenix Action Ltd. v. The Czech Republic*, ICSID, Award, Case No. ARB/06/5, 15 April 2009, para 78.

[139] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID, Award, Case No. ARB/10/3, 4 October 2013.

[140] Ibid., para 422.

In other cases, as Professor Martin Hunter points out, notwithstanding arbitrators 'would claim that they have never applied transnational public policy principles in formulating their awards', they have applied such principles, in particular with regard to environmental goods.[141] Indeed, public policy is 'a flexible and dynamic concept' that can be used as a 'a tool to balance complex and often conflicting goals such as protection of the environment while assuring the rights of foreign investor'.[142] If arbitrators keep public policy concerns into account when adjudicating investment disputes, this can contribute to the unity and the harmonious development of international law.

This section discussed the interplay between *jus cogens* and international investment law in international investment treaty arbitration focusing on three dimensions of this interaction: 1) *jus cogens* arguments put forward by the investors; 2) *jus cogens* arguments put forward by the host states; and 3) the interplay between *jus cogens* and international public order. First, foreign investors cannot claim that a host state has violated *jus cogens* norms as an independent cause of action before arbitral tribunals, as the latter have limited jurisdiction. This does not mean, however, that *jus cogens* arguments cannot and have not been made in the context of arbitral proceedings, or that they have not played any role in the same. Second, host states have invoked *jus cogens* to avoid compliance with given investment treaty obligations, especially in the context of severe economic crisis. The mere reference to *jus cogens*, however, is not enough to lead arbitral tribunals to accept such arguments; in fact some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded.

The third type of case remains the most promising venue for the insertion by default (i.e. the direct applicability) of *jus cogens* and/or international public policy in international investment law and arbitration. As noted by Douglas,

> [t]he concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties.[143]

If an arbitral tribunal finds a breach of international public policy, the claims will be inadmissible.[144] In fact, 'no legal effect can be given to a transaction involving the transgression of a peremptory norm of international law'.[145] While the relationship between *jus cogens* and transnational public policy remains to be fully explored, certainly the two notions overlap to a certain extent. Certain norms of international public policy have acquired *jus cogens* status.[146] For instance, if

141 Hunter and Conde e Silva 2003, at 372.

142 Ibid., at 374.

143 Douglas 2014, at 180.

144 Ibid., at 181.

145 Ibid.

146 Trari-Tani 2011, at 89.

an investment violated a *jus cogens* norm, such as a private military company committing genocide, or a business using slave labour, or a factory with a policy of torturing workers who attempt to organise, or a pharmaceutical company conducting medical experiments without free prior informed consent, an arbitral tribunal would not have jurisdiction to hear a case dealing with such illegal investments.[147] Reportedly, arbitrators have considered that legally sanctioned boycotts of companies with business in Israel, as contained in the domestic law of an Arab country and chosen as the applicable law by the host state and the foreign investor, are contrary to international public policy, implicating, according to the tribunal, religious and racial discrimination.[148]

12.4 Critical Assessment

What role does *jus cogens* play in the field of international investment law? Growing jurisprudence and scholarly writings attest to the emergence of *jus cogens* as an inspiring, useful and fruitful legal concept, which can evolve through time.[149] *Jus cogens* constitutes a mixture of legal positivism and legal idealism,[150] which goes beyond the traditional physics of international law. Not only are some norms 'of greater specific gravity than others',[151] but they seem to include a metaphysical component, the idea that certain norms are so fundamental to the common weal so as to pre-exist and trump contrary norms.

Jus cogens has a destabilising, transformative and revolutionary potential,[152] as it envisages an evolution of international law from interstate law to transnational law in which both individuals and nations matter. Peremptory norms insert a hierarchy in the sources of international law, prioritising fundamental values and adopting a humanist conception of law according to which international law is at the service of human beings. This development is a 'factor of progress'. *Jus cogens* 'help[s] to ensure the primacy of ethics over the aridity of positive law',[153] 'opening … the imagination of international lawyers', shaping 'a new world of ideas where creative and moral thinking seem credible again', and projecting the

147 Vadi 2012, at 42–43; Madalena and Pereira 2012, at 5; and Douglas 2014, at 181.

148 Trari-Tani 2011, at 96.

149 This dynamism is acknowledged by the VCLT which admits that new peremptory norms may emerge, causing the voidness or termination of any treaty which is in conflict with that norm (Article 64) and that newly arisen peremptory norms can modify previous norms having the same character (Article 53).

150 Linderfalk 2016.

151 Weil 1983, at 421.

152 Virally 1966, at 6 (noting that 'Son admission sur une large échelle aurait des conséquences qu'il n'est pas exagéré de qualifier révolutionnaires').

153 Weil 1983, at 422.

parallel images of a 'systemic … international law' as well as 'a … morally cohesive international society'.[154]

Yet, the *jus cogens* paradigm is not neutral.[155] It presupposes the existence of a scale of values and the abandonment of the apparent neutrality of law. *Jus cogens* found its way into positive international law in the aftermath of World War II.[156] It was introduced to international law at that particular point in time as a response to the devastations of two world wars, and as a reminder of the vulnerability of human beings and the importance of peaceful relations among nations.[157] The inclusion of peremptory norms in the VCLT implied the condemnation of 'imperialism, slavery, forced labour, and all practices that violated the principles of the equality of all human beings and of the sovereign equality of states'.[158] *Jus cogens* reflects the aspiration of the international community to 'a greater unity', overcoming 'juxtaposed egoisms' as well as political and economic differences in the pursuit of the common good.[159] During the Cold War, *jus cogens* became a tool for crystallising the 'peaceful coexistence between East and West … between States having different economic and social structures'.[160] The freedom of states was thus limited 'to safeguard the interests of all'.[161] *Jus cogens* protects human or collective interests, rather than state interests, thus limiting the autonomy of states, their contractual freedom and their sovereignty.[162] It constitutes

> an instrument against power, to bring the powerful into legal constraints they would otherwise reject, and an instrument of and for power, allowing for intervention where otherwise state sovereignty prevents interference of any kind.[163]

International courts and tribunals have adopted a restrictive approach to the interpretation and application of this concept to avoid its political misuse. The revolutionary nature of *jus cogens* has been 'domesticated' by the positivist and voluntarist orthodoxy. While the conceptual vocabulary of *jus cogens* has found its way in international law, state practice and international judicial practice remain dominated by positivism and voluntarism, especially when state prerogatives are at stake.[164]

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154 d'Aspremont 2016, at 94.

155 d'Aspremont 2016.

156 Janis 1987a–1988, at 361; Criddle and Fox-Decent 2009; and Gould 2011, at 271.

157 Gould 2011, at 271.

158 Ibid., at 272 (quoting Mr. Cole, representative from Sierra Leone at the Vienna Conference).

159 Weil 1983, at 422.

160 Cassese, 2005, at 202.

161 Gould 2011, at 272 (quoting Mr. Dons, representative from Norway at the Vienna Conference).

162 Virally 1966, at 10.

163 Paulus 2005, at 299–300.

164 Gould 2011, at 264.

This peculiar iteration of individual-oriented public order norms with the traditionally state-based form of international law is also evident in international investment law and arbitration. On the one hand, this chapter has shown that arbitral tribunals have adopted a particularly restrictive approach when private parties have claimed that a host state has violated *jus cogens* norms. In particular, arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as arbitral tribunals have limited jurisdiction. Analogously, when such *jus cogens* arguments have been raised by third parties, mainly non-governmental organisations (NGOs) intervening in the arbitral proceedings as *amici curiae*, arbitral tribunals have tended to dismiss such arguments as irrelevant.[165] This approach reflects a positivist and voluntarist approach: it is up to the contracting states to eventually consider inserting the violation of *jus cogens* as an independent cause of action under the relevant bilateral investment treaties. In parallel, the arbitral sympathy for voluntarist approaches is also shown by the fact that when host states have invoked *jus cogens* to decline to comply with given investment treaty obligations, arbitral tribunals have not dismissed the argument *tout court*. The mere reference by the host states to *jus cogens*, however, is not enough to lead arbitral tribunals to accept such arguments. In fact, some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely alluded to the *jus cogens* arguments as advanced by the host state without deeming it necessary to take a stance on the matter.

On the other hand, the emergence of individual-oriented public order norms is particularly evident in the interplay between *jus cogens* and international public order in investment treaty arbitration. As mentioned, in a number of cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, *jus cogens*, in its peculiar interaction with, and/or articulation as, international public order, can play a legitimising role in investor-state arbitration, making sure that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicating how future practice might be shaped or reformed in a way that can both promote and protect responsible and legitimate investments.

12.5 Conclusions

While *jus cogens* is an important thread in the fabric of international law, it remains an essentially contested concept[166] and a source of controversy.[167] On the one hand, *jus cogens* 'attempt[s] to forge [the] coherence and unity of the

[165] Due to space limits, this chapter does not discusses *amicus curiae* briefs or third party/NGO *jus cogens* arguments. For an interesting case study, see Vadi 2015.

[166] Linderfalk 2012, at 11.

[167] Bianchi 2008, at 493.

international legal system'.[168] It is based on the assumption that despite divergent interests and values, there is one international community and some common values.[169] The idea of a hierarchy of norms responds to 'the hope that international law can be put in order; that it can be driven by [justice and] values other than the mere satisfaction of selfish … interests'.[170] Substantively, peremptory norms express the idea of safeguarding community interests and 'the common core of human values',[171] clarifying that international law 'is not an aim in itself, but a means for the safeguard of human values and interests'.[172] The indeterminacy of *jus cogens* can be a virtue: as Bassiouni puts it,

> we are left with our imagination to analogize *jus cogens* to a shooting star in the firmament of higher values, without much knowledge of how it got there or why. We do not know how to distinguish between the various trajectories taken by these shooting stars, nor do we know how to compare their relative brilliance.[173]

On the other hand, sceptics contend that *jus cogens* is a dangerous concept with anarchical qualities, raising more questions than it answers, and potentially doing more harm than good.[174] In fact, not only does it delimit state power but it can also be an instrument of power.[175] Without a clear determination of what rules are peremptory there is a risk that *jus cogens* can be used to foster the interests and values that are deemed to be paramount by powerful actors rather than expressing objective community interests.

Adjudicators are in the best position to fulfil the promise of *jus cogens*,[176] interpreting, applying and making concrete the various formal sources of international law embodying peremptory norms. Although no court has specifically been entrusted with the role of adjudicating *jus cogens*[177] and international courts and tribunals lack formal coordination, the proliferation of adjudicative bodies has seen the emergence of a growing cross-pollination of concepts and judicial dialogue. Arbitral tribunals have participated in this dialogue, contributing to the development of international investment law and to the clarification of the role of *jus cogens* within the same. The impact of well-argued awards can extend well beyond the four corners of international investment law and arbitration.

At the same time, because of the vagueness of the concept and the ensuing risk of ideological abuse, the impact of *jus cogens* on concrete cases has remained

168 Paulus 2005, at 297.

169 Ibid., at 299.

170 Ruiz Fabri 2012, at 1050.

171 Ibid.

172 Paulus 2005, at 332.

173 Bassiouni 1990, at 808–809.

174 Ruiz Fabri 2012, at 1052.

175 Paulus 2005, at 332.

176 Cassese 2012, at 166.

177 Zemanek 2011, at 388 (arguing that the closest is the ICJ). See also Ford 1994–1995, at 145.

limited. Arbitrators have been mindful of the perils of *jus cogens*, namely the dangers that 'the powerful players of the system … use international hierarchies for the benefit of their perception of community interests'.[178] Moreover, the particular interplay between individual-oriented public order norms with the traditionally state-based form of international law which characterises the evolution of *jus cogens* is also evident in international investment law and arbitration. Arbitral tribunals have adopted a voluntarist approach when private parties have claimed that a host state has violated *jus cogens* norms. In particular, arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as such tribunals are of limited jurisdiction. Analogously, when such *jus cogens* arguments have been raised by *amici curiae* briefs, arbitral tribunals have tended to dismiss such arguments as irrelevant. This approach reflects the idea that it is up to the contracting states to eventually consider inserting the violation of *jus cogens* as an independent cause of action under the relevant international investment treaties. In parallel, when host states have invoked *jus cogens* to repudiate certain investment treaty obligations, arbitral tribunals have not dismissed the argument out of hand. Yet, most tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely touched upon the *jus cogens* arguments as advanced by the host state without deeming it necessary to take a stance on the matter. Like other judicial bodies, arbitral tribunals 'have demonstrated a willingness to identify *jus cogens* [norms] when the issue has little direct bearing on the case'.[179] *Jus cogens* tends to be relied upon *ad abundantiam*,[180] 'for rhetorical purposes—to confer pathos on legal arguments'.[181] While 'peremptory means absolute; final; decisive; that cannot be denied, changed or opposed',[182] this is far from being the case at least in current international adjudication. Very often arbitral tribunals mention *jus cogens* in passing to dismiss its relevance in the context of a given dispute.

This, however, does not mean that *jus cogens* has not shaped and/or played a significant role in the making of international investment law and arbitration. The emergence of individual-oriented public order norms is particularly evident in the interplay between *jus cogens* and international public order in investment treaty arbitration. As mentioned, in a number of cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, *jus cogens*, in its peculiar interaction with, and/or articulation as, international public order, can play a legitimising role in investor-state arbitration, ensuring that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicating how future practice might be

[178] Paulus 2005, at 331.

[179] Saul 2015, at 28.

[180] Focarelli 2008, at 429.

[181] Linderfalk 2008, at 855.

[182] Ibid., at 868.

shaped or reformed in a way that can both promote and protect responsible and legitimate investments. Especially if *jus cogens* is analogised or equated to international public order, then it plays a prominent role in defining what investments are permissible.

In conclusion, the dialectics between individual-oriented public order norms and the traditionally state-based form of international investment law confirms the hypothesis that *jus cogens* constitutes the outcome of convergence between an emerging individual-oriented normative framework, a traditional state-based legal order, and values common to the international community as a whole.[183]

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