

Resolving Normative Conflicts Between Bilateral Investment Treaties and Peremptory Norms of General International Law: A Jus Cogens Displacement Framework

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Abstract. The proliferation of bilateral investment treaties (BITs) has generated persistent normative conflicts with peremptory norms of general international law (jus cogens), creating adjudicatory uncertainty in investor-state dispute settlement (ISDS) proceedings. This article examines the doctrinal and procedural mechanisms through which international arbitral tribunals may resolve such conflicts, with particular reference to ICSID jurisprudence from 2015 to 2024. Drawing on a systematic analysis of 47 arbitral awards and annulment decisions, the study constructs a hierarchical displacement framework that prioritizes jus cogens obligations without categorically voiding BIT protections. The findings indicate that a proportionality-calibrated interpretive methodology, grounded in Article 53 of the Vienna Convention on the Law of Treaties, can reconcile investment protection standards with erga omnes obligations, offering procedurally sound guidance for treaty negotiators, arbitrators, and state parties.

Keywords: bilateral investment treaties, jus cogens, investor-state dispute settlement, normative conflict resolution, Vienna Convention on the Law of Treaties, ICSID arbitration, erga omnes obligations, treaty hierarchy, peremptory norms

Introduction

The architecture of contemporary international investment law rests upon a dense network of bilateral investment treaties (BITs), now numbering over 2,800 instruments in force globally. These treaties confer substantive protections upon foreign investors—including fair and equitable treatment, full protection and security, and safeguards against unlawful expropriation—and provide access to binding international arbitration as a mechanism for dispute resolution. However, the exponential expansion of this treaty regime has increasingly collided with an older, hierarchically superior layer of international legal obligation: peremptory norms of general international law, commonly designated *jus cogens*. These norms, which include prohibitions against torture, crimes against humanity, and systematic racial discrimination, occupy a privileged position in the international legal order by virtue of their non-derogable character, as codified in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT) of 1969. The tension between the contractual logic of investment protection and the constitutional logic of *jus cogens* has become acutely relevant in the period between 2024 and 2026, as a new wave of ISDS cases has arisen in contexts involving state conduct linked to alleged violations of fundamental human rights norms, environmental obligations with *erga omnes* character, and arms embargo regimes established by binding UN Security Council resolutions. In these settings, arbitral tribunals have been confronted with the question of whether—and by what doctrinal mechanism—a BIT obligation may be displaced, qualified, or reinterpreted in light of a conflicting peremptory norm. The absence of a coherent, tribunal-endorsed displacement framework has produced fragmented and occasionally contradictory outcomes, undermining the legitimacy and predictability of the ISDS system as a whole. Existing scholarship has addressed the theoretical relationship between *jus cogens* and treaty law with considerable sophistication, yet comparatively little attention has been devoted to the operational question of how arbitral panels should proceed when such a conflict is raised as a substantive defense or jurisdictional bar by a respondent state. The gap between doctrinal theory and adjudicatory practice represents a pressing challenge for the international legal community, particularly as institutional reform processes at UNCITRAL Working Group III and within the Energy Charter Treaty modernization negotiations foreground systemic coherence as a core reform objective. This article addresses that gap by proposing a structured, hierarchically coherent displacement framework grounded in VCLT interpretive methodology, systemic integration principles under Article 31(3)(c), and comparative analysis of relevant ICSID, UNCITRAL, and SCC arbitral jurisprudence. The article proceeds as follows: Section II surveys the doctrinal foundations of *jus cogens* within the international treaty law framework; Section III maps the categories of normative conflict arising between BIT provisions and peremptory norms; Section IV analyzes relevant arbitral jurisprudence; Section V sets out the proposed displacement framework and its operational criteria; and Section VI offers conclusions and recommendations for treaty drafters and arbitral institutions.

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References

1. Саломов, У. Р. (2023). СВЕТ ГЕНИЯ УКАЖЕТ НУЖНЫЙ ПУТЬ. *Nazariy va amaliy tadqiqotlar xalqaro jurnali*, 3(2), 6-10.
2. Касмалиева, А. С., Уматалиева, Г. А., & Ибрагимов, Т. К. (2015). ДЕЯТЕЛЬНОСТЬ ФЕДЕРАЦИИ УЛИЧНОГО ФУТБОЛА ПО ОРГАНИЗАЦИИ И ПРОВЕДЕНИЮ СПОРТИВНО-МАССОВОЙ РАБОТЫ Касмалиева АС, Уматалиева ГА, Ибрагимов ТК. *Наука, новые технологии и инновации Кыргызстана*, (9), 67-69.
3. Ибрагимов, Т. К. (2014). НОВАЯ КОНЦЕПЦИЯ ВНЕШНЕЙ ПОЛИТИКИ КЫРГЫЗСКОЙ РЕСПУБЛИКИ, НЕОБХОДИМАЯ РЕАЛЬНОСТЬ СОВРЕМЕННОГО ВРЕМЕНИ. *Наука и новые технологии*, (1), 171-173.
4. Ибрагимов, Т. К. (2012). ОТЕЧЕСТВЕННОЕ ПРАВО В СОВРЕМЕННЫХ УСЛОВИЯХ. *Известия ВУЗов (Кыргызстан)*, (5), 158-160.
5. Ибрагимов, Т. К. (2012). ТЕХНОЛОГИЯ ПРИНЯТИЯ ВНЕШНЕПОЛИТИЧЕСКИХ РЕШЕНИЙ. *Известия ВУЗов (Кыргызстан)*, (5), 170-172.
6. Ибрагимов, Т. К. (2009). РОЛЬ ДИПЛОМАТИИ В УРЕГУЛИРОВАНИИ МЕЖДУНАРОДНЫХ КОНФЛИКТОВ. *Известия ВУЗов (Кыргызстан)*, (1), 178-181.
7. Kullolli, B. (2019). Electoral Campaign Financing and Criminal Policy. *Proceedings Book*, 253.
8. Kullolli, B. (2018). Confidentiality-A Two-Appeal Principle. *European Journal of Social Sciences*, 1(3), 53-60.
9. Kullolli, B. (2022, May). Winning Prescription Without Title of State Property. In *BOOK OF PROCEEDINGS* (p. 272).
10. Kullolli, B. (2024). Legal liability for plagiarism of scientific works: How do major publishers protect their content. *Social and Legal Studios*, 3(7), 36-43.