

International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration

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Executive Summary

A key innovation in many Bilateral Investment Treaties (BITs) has been the inclusion of provisions for investor-state dispute settlement. In recent years, the number of investor-state disputes has risen sharply, as investors are recognizing that a wide variety of host state measures may be subjected to arbitral scrutiny. Recent cases under the investment chapter of the North American Free Trade Agreement (NAFTA) first raised the specter that sensitive regulations related to human health, environmental protection or public safety might be challenged in this manner. Investors are also increasingly using BITs to challenge host state treatment of investments throughout the developing world. Emerging cases include disputes over: the regulation of water & sewage concessions; tax treatment of investors in the natural resources sector; and challenges to environmental regulation.

Although dispute settlement under these BITs is less transparent and more diffuse than under the NAFTA, available evidence suggests that investors have not yet sought to formally challenge government regulations which are explicitly human-rights-inspired. However, there is evidence that investment treaty arbitration has been *threatened* against the South African Government in relation to its policy efforts to promote greater racial diversity in management and ownership positions in the South African economy. Certainly, there is significant scope for foreign investors to challenge human rights inspired measures imposed by host states. Host states which face such disputes should note that the arbitration process will often permit them to advert to their other international legal obligations, notably international human rights treaties, in an effort to defend against investor claims. Investment treaty arbitrators will often enjoy the legal ability to take these human rights obligations of host states into account, as they interpret the host state's obligations to foreign investors. The area where these issues could first be examined by Tribunals may be in relation to disputes in the water services sector. As is explained in section 5, host states may enjoy the ability to justify certain non-discriminatory treatment of foreign investors, by pointing to the host state's obligations to ensure that its citizens enjoy an internationally recognized right to water.

In a different vein, the extent to which investment treaty arbitration permits obligations to be placed upon investors in the realm of human rights and human security is much less clear. BITs do not include substantive human rights which might be claimed by citizens of the host state; nor do these treaties impose any responsibilities upon investors to respect minimum human rights standards. Because investment tribunals have a limited jurisdiction – i.e. to arbitrate *investment* disputes – they will have slim powers to consider the human rights record of an investor. However, it is clear, that if the investor's conduct rose to the level where it violated (or was complicit in the host state violation) of certain core human rights, then tribunals would need to consider such violations of so-called peremptory norms of international law.

The ability to monitor the full human rights impacts of emerging investment treaty arbitration is hindered by various shortcomings of this process. Some reform of these treaties, including greater transparency, is necessary at a minimum, as disputes are now implicating a broad range of public policy measures in host states. As is noted in section 6, if investment tribunals will be expected to take account of a broader range of human right and human security externalities related to investment, this might require further changes to the substantive and procedural rules of existing (and future) investment treaties.

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1. Introduction¹

Despite periodic efforts to codify the international rules governing flows of foreign direct investment in a single multilateral instrument, these rules continue to exist in a bewildering patchwork of bilateral and regional treaties which have proliferated since the late 1950s. As flows of FDI have increased markedly over time, and most nations have hastened to devise strategies for attracting such investment, these investment treaties have been signed with ever-greater frequency in recent years.

However, it has only been in the past two decades that foreign investors have begun to make use of these treaties: by invoking the dispute settlement mechanisms contained within the treaties. By using the treaties to challenge a wide range of measures and policies put into place by host state authorities, these emerging investor-state arbitrations may also raise unanticipated and sometimes sensitive questions to be resolved. While a number of the most controversial disputes initiated by investors have challenged environmental or public health measures which harm investor interests, scenarios can also be seen where human rights and human security issues may be implicated in investment treaty disputes between investors and host states.

At times, host states may wish to regulate the economy, including foreign investors embedded therein, in a manner which seeks to *promote or protect* certain human rights interests. Examples could range from a state's efforts to use its police powers to protect citizens from having their right to free speech interfered with by foreign investors, to policy measures designed to operationalize the progressive realization of economic & social rights, such as the right to food, the right to health, or the right to water. Where bilateral investment treaties are in place, foreign investors will often enjoy the ability to challenge these human-rights inspired measures through international arbitration.

While the arbitration of investment disputes has surged over the past few years, as yet, there are no *known* investment treaty arbitrations which have seen Tribunals explicitly grapple with the role of human rights which a host state may have international obligations to respect.² A first opportunity may present itself as a series of controversial disputes centered upon the privatization of water and sewage concessions are arbitrated pursuant to BITs in Latin America. Section five of this paper illustrates how these cases could pit investor rights against the efforts of developing countries to promote the right to water. It will be suggested

¹ This paper was prepared for IISD by Luke Eric Peterson, with legal consultancy provided by Kevin R. Gray, Fellow in Human Rights Law and International Law, British Institute for International and Comparative Law. Special gratitude is owed to several reviewers of earlier versions of this paper: Simon Walker, Office of the United Nations High Commissioner for Human Rights; Diana Bronson, International Centre for Human Rights and Democratic Development; Antonio Parra, Deputy-Secretary General, International Centre for Settlement of Investment Disputes (ICSID); Howard Mann, Senior International Law Advisor, IISD. Institutional affiliations are for identification purposes only. All comments were provided in the personal capacities of these individuals, and they bear no responsibility for the contents of the final product. Personal thanks are also owed to Marie-Andrée Somers for support and advice related to this research project.

² Although states will often have domestic human rights obligations (for instance in constitutions and bills of rights), these are not the focus of this paper. Such domestic obligations will obviously differ from country-to-country, whereas the international human rights treaties discussed here will often have been adhered to by numerous nations.

that the scope for host governments to defend their treatment of foreign investors on human-rights inspired grounds may be significant in cases such as these. As will be seen, the applicable law for such arbitrations will often include rules of international law, and although states have yet to test whether this includes international human rights treaties, section 5 argues that it is almost certainly the case. Indeed, further research is urgently needed in order to explore the full scope for international human rights-based arguments to be used as a *defence* to, or in mitigation of, certain investment treaty claims.

It is less clear what role human rights may play in an arbitration where host governments exhibit no desire to regulate investors in a manner which furthers human rights policy objectives. Because foreign direct investment presupposes a much deeper and temporally significant relationship with the host state, investor activity (and host state activity in support of it) will often have significant implications for the enjoyment of various human rights at the local level, including the rights to free assembly, free expression, religious freedom, guarantees against arbitrary detention or against cruel and inhuman treatment.

At times, these impacts might be contrary to human rights enunciated in regional or international human treaties. In some rare instances, investment activity (and host state tolerance or support for it) may be so egregious that it comes into collision with a category of human rights which are universally recognized under international law as being peremptory in nature. In such cases, these peremptory norms might well override provisions of other treaties, including the relevant investment treaty, or they might cause a tribunal to rule that it has no jurisdiction under the treaty to hear the investor's claims where the investor is enmeshed in this egregious conduct.

Notwithstanding this latter possibility, however, there appears to be less scope for human rights issues to play a determinative role in investment treaty disputes, where investors and host states have opted to show them little regard. This is not to dismiss the obvious possibility that investors and host states may be liable for breaches of applicable domestic and international human rights standards, but merely to note that these will be resolved through other forums. As a rule, BITs do not introduce their own human rights obligations, nor do they accord the ability to citizens who have been the victim of human rights abuses to appeal to investment Tribunals for redress. Investment Tribunals have a limited jurisdiction to arbitrate investment disputes, as defined under the relevant treaty. All of which tends to indicate that, where an investor and a host state which may have ignored, or even been complicit, in human rights violations, enter into an investment treaty arbitration, this form of dispute resolution will provide uncertain footing for human rights considerations.

The policy implications of this are discussed more squarely in the concluding section, where it is observed that governments may wish to redress the absence of human rights considerations in future investment treaties. States would not necessarily add substantive human rights for citizens to these BITs, but might wish to condition existing investor rights upon certain responsibilities of those investors to meet minimum human rights standards. This would not necessarily introduce the possibility for direct claims by citizens of human rights violations to these tribunals (thereby usurping the role of existing human rights mechanisms). Rather, this would simply condition the ability of investors to claim investor rights, upon certain minimum responsibilities. However, any such move in this direction will

reinforce the already strong case for reform of the procedural rules for investor-state dispute settlement, so as to render investment treaty arbitration a more legitimate vehicle for considering certain human rights issues.

Of course, reliance upon these investment Tribunals to interpret investor rights in light of such human rights considerations may still be a controversial step. Even experienced arbitrators have acknowledged that the current system of arbitration (described in section 2.2 below) is proving inadequate for the purposes which are increasingly imposed upon it.³ In the concluding section of this paper, it is suggested that one alternative to a further “mission-creep” of investment treaty arbitration, might be to explore the scope for using purpose-built human rights tribunals and courts to handle both investor and human rights claims.

Before such contentious questions can be taken up, however, we must first introduce the investment treaties themselves, their dispute settlement mechanisms, and the nature of disputes arising under them. Sections 2 and 3 devote themselves to providing this background.

2. Bilateral Investment Treaties: an Overview

2.1 History and Features

From the late 1950s, capital-exporting nations have accelerated their practice of negotiating so-called bilateral investment treaties (BITs), typically with developing countries.⁴ These treaties arose in response to the ongoing failure of diplomatic efforts to conclude a broader multilateral agreement, as well as deep disagreement as to the customary international law standards of treatment owed to foreign investors.⁵ The treaties were often motivated by western fears of nationalization or arbitrary treatment at the hands of governments in the developing world.

Bilateral Investment Treaties enjoyed a remarkable period of growth in the 1980s and 1990s, with the number of treaties quintupling in the latter decade, from 385 to 1,857.⁶ Figures produced at the end of 2001 suggested that there were some 2100 known BITs. Indeed, the number of nations, 173, which have entered into at least one of these treaties, far outnumbers the current membership of the World Trade Organization.⁷

³ See Charles N. Brower, “A Crisis of Legitimacy”, National Law Journal, Oct.7, 2002, available at: http://www.whitecase.com/article_international_adr_10_7_2002.pdf

⁴ Increasingly it is also the case that developing countries are signing these treaties among themselves, often with the assistance of UNCTAD. See Press Release of UNCTAD, May 18, 2001, at: <http://www.unctad.org/templates/webflyer.asp?docid=2914&intItemID=2022&lang=1>

⁵ M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 1994, 231-6; United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s*, New York and Geneva, 1998, 1-9

⁶ UNCTAD (2000), Bilateral Investment Treaties 1959-1999, UNCTAD/TTE/IIA/2.

⁷ UNCTAD (2000)

Thus, to the extent that flows of foreign direct investment can be said to be governed at the global level, it is this quilt-work of bilateral treaties - and a handful of broader trade agreements with investment rules embedded in them – which will set the rules of the game.⁸

Often these treaties purport to have two related objectives: to protect foreign direct investment (FDI) flows by elaborating a series of rights and guarantees, and to encourage further economic cooperation, including the promotion of enhanced flows of FDI into developing states.⁹ In their substantive provisions, the treaties offered a form of *lex specialis* to supplement the under-developed rules of customary international law related to the treatment of aliens and alien property. While the BITs have evolved over time, modern treaties (i.e. those negotiated from the 1980s onward) tend to include most of the following rights, albeit with various formulations and qualifications:

- National Treatment (investors enjoy similar treatment to nationals of host state)
- Most-Favored Nation Treatment (treatment similar to that accorded to most favored third-nation)
- Absolute Standards of Treatment (for eg “fair and equitable treatment” and “protection & security”)
- Provisions guaranteeing transfers and repatriation of profits
- Guarantees Against Expropriation or Nationalization without Compensation and due process

In terms of human rights language, the BITs are typically bereft of references to other international commitments made by the contracting parties in the area of human rights (such as multilateral and regional human rights treaties). Such treaties might include UN Covenants such as those on Civil and Political Rights or Economic, Social and Cultural Rights, or regional instruments such as the European or (Inter) American Conventions on Human Rights.¹⁰ It is also unheard of for BITs to contain substantive clauses on human rights or to condition investor rights or access to dispute settlement, upon responsibilities of the investor (for example to respect human rights in its operations). Some South African BITs do contain *exceptions* which shelter certain forms of human rights-inspired legislation which might affect foreign investors. However, these provisions are very limited in scope – providing an

⁸ Obviously national and sub-national rules will play a critical role in governing FDI; however the focus here is upon those international treaties which add to these national and sub-national rules.

⁹ It should be noted that the promotional efficacy of these treaties is increasingly questioned. See for e.g. the World Bank’s Report on Global Economic Prospects and the Developing Countries 2003, <http://www.worldbank.org/prospects/gep2003/index.htm>

¹⁰ International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, Gen Assem Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967); Optional Protocol to the ICCPR, adopted Dec.16, 1966, entered into force arch 23, 1976, 999 UNTS 171, reprinted in 6 ILM 383 (1967); International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, entered into force Jan.3 1976, Gen. Assem. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967); European Convention for the Protection of Human Rights and fundamental Freedoms, signed Nov.4, 1950, entered into force Sept.3, 1953, 213 UNTS 221, ETS 5; American Convention on Human Rights (Pact of San José), signed Nov.22, 1969, entered into force July 18, 1978, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev.6 (1979), reprinted in 9 ILM 673 (1970)

exception only to one of more than a dozen investment treaty provisions. Nor has this exception been included in all of South Africa's BITs.¹¹

In addition to the substantive rights, which are focused very narrowly upon investment protection and liberalization, BITs typically provide provisions for dispute settlement. Most BITs provide for the possibility of binding state-to-state arbitration.¹² In addition, it has become increasingly common, particularly over the past twenty years, for BITs to offer investors the ability to pursue their own claims through so-called investor-state arbitration.¹³ This important innovation distinguishes these treaties from the broader-run of international economic agreements - particularly the 1994 World Trade Organization Agreements and the earlier GATT - which contain only state-to-state dispute resolution procedures.¹⁴ It is this investor-state dispute settlement avenue which has opened the door to considerable litigation under these treaties. In contrast to the process under major human rights instruments, access to international dispute settlement under these BITs is increasingly not conditioned upon any need to exhaust domestic legal remedies.

2.2 Interpreting the Meaning of Treaty Provisions

On the whole, the substantive provisions of these treaties are characterized by "ambiguity, open-endedness and need for substantial (unpredictable) interpretation of the treaty".¹⁵ Arbitration lawyers have cautioned that the provisions "are maddeningly imprecise as to the substantive legal standard to be applied by the tribunal."¹⁶ Thus, the full import of key substantive provisions - such as the requirement that Contracting Parties provide investments with treatment which is no less favorable than that provided to their own nationals or to third parties - will only be elucidated through their concrete application in actual legal disputes.¹⁷ For this reason, great attention will need to be paid to the actual application of these treaties in dispute settlement contexts. This is not a straightforward task, however, as the treaties open up several avenues for dispute settlement, some of which display a startling lack of transparency.

2.2.1 Transparency of Dispute Settlement

As with the NAFTA, one of the major arbitration avenues mentioned in BITs, is the International Centre for Settlement of Investment Disputes (ICSID), which is a purpose-built facility of the World Bank Group dedicated to the resolution of investment disputes. ICSID does provide that any disputes registered with the Centre will be publicly notified on

¹¹ Institute for Global Dialogue, "International Investment Agreements in South Africa", June 1, 2000, pg.33

¹² UNCTAD (1998), pg.99

¹³ Horacio A. Grigera Naon, "The Settlement of Investment Disputes Between States and Private Parties: An Overview from the Perspective of the ICC", 1 *Journal of World Investment* No. 1, July 2000

¹⁴ On the WTO system see Bernard M. Hoekman and Michael M. Kostecki, *The Political Economy of the World Trading System*, 2nd edition, Oxford University Press, 2001, 74-99

¹⁵ Thomas Walde and Stephen Dow, "Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment," *Journal of World Trade* 34(2), 2000, pg.45

¹⁶ William D. Rogers, "Emergence of the International Center for Settlement of Investment Disputes (ICSID) as the Most Significant Forum for Submission of Bilateral Investment Treaty Disputes", presentation to Inter-American Development Bank Conference, October 26-27, 2000, pg. 4

¹⁷ Ibrahim Shihata and Antonio Parra, "The Experience of ICSID", *ICSID Review*, Vol. 14, No. 2, Fall 1999, pp 319, 336

its docket; however, other arbitral avenues keep no such register. For instance, the arbitration rules of the International Chamber of Commerce, the Stockholm Chamber of Commerce and the United Nations Commission on International Trade Law (UNCITRAL), all of which are incorporated in some number of BITs, provide no such requirement for arbitrations to be made a matter of public record.¹⁸ This feature reflects the fact that such rules were designed for international commercial arbitration, which often occurs between two private parties in relation to a business dispute.

2.2.2 The Law Applicable to Disputes

Where an investor invokes the dispute resolution provisions of a BIT this permits the creation of an Arbitral Tribunal whose jurisdiction is set out in the relevant treaty, and is generally restricted to “investment disputes” (for example arising out of a breach of an investment contract) or to alleged violations of the substantive rights in the investment treaty. The Tribunals will interpret the provisions of the treaty in accordance with the applicable law agreed by the parties, or in default, as specified in the arbitration rules. Some investment treaties will explicitly provide for the application of public international law, in addition to national law, and the provisions of the agreement.¹⁹ At least one expert on investment treaty arbitration has suggested that because the treaties are instruments of international law, it should be implicit that arbitrators “should have recourse to the rules of general international law to supplement those of the treaty.”²⁰

However, where the investment treaty is silent on the applicable law, arbitrators will ordinarily look to ascertain if the parties have reached consensus as to the applicable law. Failing this, the specific arbitral rules (ICSID, UNCITRAL, etc.) will accord guidance or latitude to the Tribunal on the matter. For example, Article 42(1) of the ICSID Convention provides that where the parties can not agree on the applicable law, the Tribunal will apply the law of the host state and such rules of international law as may be applicable.²¹ This reference to rules of international law was elucidated in the Report of the World Bank Executive Directors on the (ICSID) Convention, as being in the sense of Article 38 of the Statute of the *International Court of Justice*.²² These sources include treaties, customary international law and general principles of law recognized by civilised nations, and subsidiary sources which include the opinions of jurists, and judicial decisions. The prospect that international laws might be applicable to an investment dispute will be important, as this opens the door for Tribunals to take account of international human rights commitments which states may have undertaken.

¹⁸ See Antonio Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws Bilateral Investment Treaties and Multilateral Instruments on Investment”, *ICSID Review* Vol.12, No.2, Fall. 1997 and Horacio A. Grigera Naon, “The Settlement of Investment Disputes Between States and Private Parties: An Overview from the Perspective of the ICC”, 1 *Journal of World Investment* No. 1, July 2000

¹⁹ C. H. Schreuer (2001), *The ICSID Convention: A Commentary*, (CUP, Cambridge) at 560-3.

²⁰ Antonio Parra, “Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties”, 16 *ICSID Review* No.1, 2001, at pg.21

²¹ Washington Convention on the Settlement of Disputes Between States and National of other States, 1965: 575 UNTS 159; 4 ILM 524 (1966)

²² *Report of the World Bank Executive Directors on the Convention*, Doc. ICSID/2, 1 ICSID Reports 31, para 40.

2.2.3 Selecting a Tribunal

Each party will ordinarily select an arbitrator for their dispute, and the two parties will agree upon a third arbitrator or delegate this authority to some other appointing authority. In terms of the selection criteria to be used for nominating arbitrators however, most treaties are silent.²³ Nor do the common rules of arbitration provide much guidance. Several sets of these rules simply stipulate that arbitrators be independent and/or impartial, while another set of rules adds that arbitrators ought to be “of high moral character and recognized competence in the fields of law, commerce, industry or in finance who may be relied upon to exercise independent judgment”.²⁴

In particular, there appear to be no requirements that arbitrators to investment disputes be equipped with expertise in other relevant areas of law, including the international law related to human rights, development or the environment.

2.2.4 No Strict Rules of Precedent

Strictly speaking, investment treaty awards rendered by arbitrators in disputes are binding only upon the two parties to the arbitration. However, it is widely acknowledged that arbitral tribunals will often take account of earlier awards, such that awards may be said to have some persuasive authority as precedents. This can be seen, for example in the context of the NAFTA Chapter 11 disputes which have been resolved in recent years. These cases are not arbitrated in a legal vacuum; rather counsel for both sides will typically marshal awards from earlier investment treaty disputes in an effort to influence the present Tribunal’s interpretations.²⁵ And tribunals have shown a predilection towards examining these earlier awards and sometimes following their dictates.²⁶

The NAFTA experience can be drawn upon here for a particular reason: in contrast to the situation under BITs, the established practice under the NAFTA is for states to register all disputes which they face. After public pressure, the NAFTA parties now also make available most documents related to arbitrations, including the final awards.²⁷

²³ An exception to this rule can be found in some BITs signed by Canada which provide that arbitrators selected for “disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute”. See for e.g. Agreement Between The Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Article XI, available online at: http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-e.asp

²⁴ the sets of arbitral rules referred to are: the ICC, SCC and UNCITRAL rules. These are described later in the text. The quoted reference is from the ICSID arbitration rules Article 14(1)

²⁵ J.C. Thomas notes that when an award was handed down in the dispute between the Metalclad Corporation v. United Mexican States, claimants in three separate NAFTA disputes promptly incorporated the award into their own legal argumentation in three other pending NAFTA arbitrations. See J.C. Thomas, “Reflections on Article 1105 of NAFTA: History, State Practice, and the Influence of Commentators”, 17 *ICSID Review*, Spring 2002, pg. 64 and note 113;

²⁶ See for example, the Tribunal’s ruling in the S.D. Myers case, where it borrows its reading of measures “equivalent to expropriation” from the earlier ruling in the NAFTA Pope & Talbot case: S.D. Myers v. Canada, Partial Award, November 13, 2000, at para 286.

²⁷ At the time of writing, at least two NAFTA Chapter 11 disputes have seen the parties agree to open the proceedings to the public: Methanex Corporation v. United States and United Parcel Service of America Inc. v. Canada. For more on the latter case, see: www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp

BITs arbitration, by contrast, can be more diffused and less transparent. One implication of the short-sighted transplant of commercial arbitration rules (such as those of UNCITRAL or the ICC) into BITs. has been to render impossible a full accounting of disputes. This is a serious shortcoming of these treaties, particularly as known cases are seen to implicate a broadening range of matters of public interest. Some of these known cases are examined in section 3 below.

3. Early Lessons From Concluded Treaty Arbitrations

3.1 The NAFTA Experience

Investor-state treaty arbitration dates back to the late 1980s, and follows on from earlier arbitrations which may have arisen under contracts between investors and states. Early treaty cases tended to arise out of clear-cut or egregious destruction or deprivation of property.²⁸ A more nuanced type of investor claim began to emerge in the 1980's and 1990's. A number of these cases alleged "creeping expropriation" whereby a series of government acts - which individually did not amount to an expropriation - could be seen as a whole, to have taken over an investor's property step by step. Efforts to elaborate upon the meaning of the common treaty language proscribing measures "tantamount to", "having equivalent effect to" or "indirect" expropriation are now leading to considerable confusion.

As well, there is a lack of clarity as to whether expropriation provisions may require that government regulation which *interferes* with an investment - and in the process, deprives it of a significant portion of its value - may trigger a requirement of compensation to investors. Likewise, where an expropriation has been for an important public purpose, such as the furtherance of public health or environmental protection - for example by banning a toxic chemical - there are also concerns that host states still must compensate affected investors.²⁹

International law has long recognized that a certain category of regulations - what some have categorized as exercises of "police-powers" - related to environment, public safety or correcting market imperfections, for example, would not need to be compensable. The difficulty, of course, is to devise some guidelines so as to allow greater certainty as to which sorts of governmental measures would fall under this head.³⁰

Concerns about the bounds of investment treaty expropriation clauses first emerged in relation to arbitrations under the NAFTA. Warning bells were sounded when the US-based Ethyl Corporation brought a claim against the Government of Canada in 1996. The firm claimed \$250 million dollars in damages for violations of key NAFTA investor rights as a result of a Canadian decision to impose a trade ban on a controversial gasoline additive produced by Ethyl.³¹ Less than a month after an arbitration tribunal held that it had jurisdiction to hear the case, the Government of Canada agreed to a settlement. In addition

²⁸ Asian Agricultural Products Limited v. Republic of Sri Lanka 1990, 30 International Legal Materials (ILM), pp 577-655 and American Manufacturing and Trading v. Zaire, award of Feb.21 1997, 36 ILM 1534

²⁹ Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, IISD-WWF-US, 2001, pp.30-33

³⁰ See the comments of M. Sornarajah (1994), pg. 294-6

³¹ See Mann 2001, pg.15

to offering the investor (US) \$13 million in compensation, Canada agreed to repeal its trade ban on the gasoline additive.

The Ethyl case triggered widespread fear that the NAFTA would serve as an effective instrument for challenging government regulation of public health, the environment and other sensitive areas. As one pair of commentators noted, the precedent seemed to herald the possibility that a key tenet of the environmental movement, “the polluter pays principle”, would be subverted into a “pay the polluter principle”.³²

Since 1995, at least 29 NAFTA claims have been pursued by investors, a sizable number of these cases have touched upon environmental or health issues, including bans on agrochemicals, regulation of hazardous waste sites and export restrictions on hazardous wastes.³³ Many of these disputes are still being arbitrated but even those cases which have yielded up final awards, have not necessarily helped to clarify the scope and import of common investment treaty provisions.

One Tribunal, in *Metalclad v. Mexico*, has noted that it would *not* need to inquire into “the motivation or intent” of a challenged measure, in order to determine whether it amounted to an expropriation.³⁴ This ruling has generated much criticism on the grounds that it seems not to carve-out an exception for the exercise of so-called police-powers.³⁵ In a subsequent court proceeding, the Tribunal’s award was partially annulled, thereby casting doubt on the persuasive authority of the *Metalclad* decision for future Tribunals.³⁶ Meanwhile, another NAFTA Tribunal has taken the different view that police-powers regulation would rarely be considered to be a deprivation rising to the level of a compensable expropriation:

The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the tribunal does not rule out that possibility.³⁷

Confusion as to the boundaries of acceptable government regulation in this realm prevails at a worrying time, as there is clear evidence that investors have awakened to the existence of the full constellation of international investment treaties and are challenging host state laws in record numbers.³⁸

Nor are the provisions on expropriation the only ones which admit to a certain degree of uncertainty in their application. As IISD has cautioned, several other standard treaty

³² see Howard Mann and Konrad Von Moltke, “NAFTA’s Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment”, IISD working paper, (1999), available at www.iisd.org/trade

³³ for a list of known claims see www.naftaclaims.com. The disputes referred to here are: *Crompton v. Canada*, *Metalclad v. United Mexican States*, and *S.D. Myers v. Canada*.

³⁴ *Metalclad v. United Mexican States*, Award of the Tribunal, August 30, 2000, paragraph 110

³⁵ See IISD/WWF-US, *Private Rights, Public Problems*, for e.g., pp.30-33

³⁶ *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664

³⁷ *S.D. Myers v. Canada*, Partial Award, at para 281, available on-line at: <http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp>

³⁸ See next section

provisions, including National Treatment, Most-Favored Nation Treatment, and Minimum Standard of treatment (including fair & equitable treatment and full protection & security) have yet to be fully elucidated.³⁹ A number of concerns have been raised as to the substantive import which might be attached to these provisions by investment tribunals.

3.2 Emerging BITs Disputes

As the NAFTA has thrown up creative and entrepreneurial investor claims, law firms are now looking anew at the extensive back-catalogue of bilateral investment treaties. Having dusted off these BITs, lawyers are now having greater recourse to arbitration under them. Data from ICSID, which is the only arbitral body to offer public records, offers some insight into this trend.

Over its more than 35 year history, the ICSID has seen 120 disputes registered. However, well over half of these 120 cases have been registered in the past 5 years alone. The trigger for this surge in cases appears to be an awakening interest in BITs (rather than in the investment contracts which had once been ICSID's virtually exclusive stock-in-trade in the pre-1990s period).

Indeed, ICSID Figures for the last three years reveal that treaties are at the center of an ever-increasing number of cases: 7 of 12 cases launched in 2000, 12 of 14 in 2001, and 16 of 19 in 2002. These figures include a handful of cases brought under the NAFTA's investment Chapter, but the overwhelming proportion, relate to the NAFTA Chapter 11's bilateral cousins: the BITs.

This surge in BITs disputes is such a recent phenomenon that many of these cases have yet to be resolved by arbitration Tribunals. As such, information is often restricted to that which has appeared in local press reports about the conflict between investor and host government, and occasional revelations from interviews with one of the parties or their representatives. The proceedings themselves are generally closed to public scrutiny.

In a recent Research Note on these emerging cases prepared for IISD, it can be seen that a number of BITs cases arise out of disputes related to privatization of formerly public services or concessions in the natural resources sector.⁴⁰ Many of these disputes originate in South America and follow on from record levels of privatization activity in that region during the 1990s.

Indeed, the Argentine Republic alone accounts for at least 7 BITs disputes registered in 2001 and 2002. Furthermore, a number of these disputes were either exacerbated or directly triggered by the financial crisis which has beset the troubled nation. Meanwhile, in at least three reported instances, the privatization of water and sewage concessions in Argentina and neighbouring Bolivia has given rise to arbitrations between foreign investors and host governments. These latter disputes are examined more fully in section 5.

Other known BITs cases have seen investor challenges arising out of:

³⁹ See the discussion in Mann 2001

⁴⁰ See Luke Eric Peterson, "Emerging Bilateral Investment Treaty Arbitration and Sustainable Development", International Institute for Sustainable Development, Research Note, April 2003

- A failure by Mexican authorities to renew a permit for a toxic waste facility⁴¹
- Efforts to recoup outstanding debts from a nation seeking special IMF debt-relief⁴²
- Revocation of tax and customs exemptions granted to mining investors in Burundi⁴³
- Several cases challenging treatment of the media and broadcasting sectors.⁴⁴

A broader portrait of these and other emerging BITs disputes is contained in the IISD's Research Note on emerging cases. The Human rights issues which might be raised in investment treaty arbitrations are singled out for especial attention in the next sub-section.

3.3 Human Rights Issues Implicated in BITs Disputes

While there has been some work undertaken to explore the relationship between the multilateral trading system and human rights, there have been fewer inquiries into the relationship between the international governance frameworks for investment and human rights.⁴⁵ Doubtless, this owes a great deal to the fact that, to the extent investment is governed by international rules; this is primarily through less-visible bilateral and regional treaties. It likely also owes to the fact that investment treaty dispute settlement is dispersed, ad-hoc and often opaque. As such, even where investor arbitrations might harbour implications for human rights, these cases might not necessarily come to public notice. Clearly, there is a need for immediate reform of the dispute settlement processes, so that cases may not proceed without publicity.

⁴¹ Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)

⁴² Booker plc v. Co-operative Republic of Guyana (Case No. ARB/01/9). At the time of this writing, this case was in the process of being abandoned by the investor after public outcry. See: Luke Eric Peterson, "Public Outcry Leads to Abandonment of Investment Treaty Arbitration Against Guyana", INVEST-SD Bulletin, March 28, 2003

⁴³ Antoine Goetz & others v. Republic of Burundi (Case No. ARB/01/2)

⁴⁴ Two recent cases against the Czech Republic have been brought by a firm and its major shareholder respectively, and arise out of the broadcasting firm's treatment at the hands of the local media council. These are Ronald S. Lauder v. The Czech Republic and CME Czech Republic B.V. v. The Czech Republic, both of which were mounted under UNCITRAL rules of arbitration pursuant to bilateral investment treaties. A partial award on the merits of the CME claim, and a final award in the Lauder claim are both available at:

<http://www.mfcr.cz/scripts/hpe/default.asp>. The partial award is being appealed in a Swedish Court as of this writing. Several other investors in the Czech media sector have threatened arbitrations including a press wholesaler alleging a government failure to break up cartel of newspaper publishers. See: Luke Eric Peterson, "Investors Emboldened by Arbitral Verdict Against Czech Republic", INVEST-SD Bulletin, April 11, 2003

⁴⁵ For an overview on trade and human rights see: Robert Howse and Makau Matua, "Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization", International Centre for Human Rights and Democratic Development, 2000; The UN High Commissioner for Human Rights has also reminded states of their human rights obligations in relation to trade liberalization. See Economic and Social Council, "The Agreement on Trade-Related Aspects of Intellectual Property Rights and its impact on the enjoyment of human rights", Report of the High Commissioner to the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2001/13); Economic and Social Council, "Globalization and its impact on the enjoyment of all human rights", Report of the High Commission to the Commission on Human Rights, (E/CN.4/2002/549); Economic and Social Council, "The liberalization of trade in services and human rights", Report of the High Commissioner to the Sub-Commission on the Promotion and Protection of Human Rights, (E/CN.4/Sub.2/2002/9)

On Investment and Human Rights see, however, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations", Glen Kelley, 2001 Columbia Journal of Transnational Law 483, which focuses more upon the proposed OECD Multilateral Agreement on Investment, than upon existing BITs.

For purposes of analysis, two general scenarios where there is an interface between investment treaty arbitration and human rights can be envisioned.

The *first* of these involves those situations where the host state's treatment of an investor can be argued to have been in *furtherance* of certain international human rights commitments of the host state. This might include ordinary exercises of state authority (for example under criminal law) to sanction foreign investors which are alleged to have violated the human rights of local citizens. It might also include situations where host states act proactively so as to further human rights, rather than in a merely reactive manner (i.e. in response to investor wrong-doing). These scenarios are examined in more detail in section 5.

A *second* and very different scenario where investment treaty arbitration and human rights may intersect is in those situations where *both* parties to an investment dispute appear to have been complicit (either by their actions or their omissions) in allowing human rights violations to be perpetrated by the state or by corporate actors (with the blessing or acquiescence of the state). In this scenario, neither party is claiming that its actions were pursuant to international human rights obligations. On the contrary, they may be in *breach* of fundamental human rights obligations. While compliance, or otherwise, with these human rights norms may be adjudicated in other bodies, it is unclear what role an investor's human rights record will play in the substantive deliberations of an investment treaty arbitration. The following section examines this scenario in more detail.

4. Complicity among Investors and Host States in Human Rights Abuses

4.1 Limited Relevance of Human Rights Norms to Such Arbitrations

It is an unfortunate reality that host states are not always minded to place their international human rights commitments at the forefront of their interaction with foreign investors. Indeed, as all nations - but developing countries in particular - increasingly compete for scarce foreign direct investment, it is sometimes the case that host states will ignore their international human rights obligations, or worse, permit them to be openly violated through the actions of State authorities or other third parties.⁴⁶ Human rights campaign groups have brought to the fore various instances where foreign direct investment by multinational corporations has exacerbated or contributed to conflict, having inimical effects upon human rights and human security in the host state.

In a report on the Dabhol Power Corporation's (a consortium of three US multinationals) operations in India, Amnesty International noted credible allegations of collusion between the foreign investors and the state authorities to suppress human rights, and added that this case was hardly an anomaly. Amnesty International noted that it had received similar complaints of protestors being "arbitrarily detained, raped and ill-treated" at a number of other industrial and development projects in the country.⁴⁷ This is a pattern which has been

⁴⁶ See for example, OECD, "Multinational Enterprises in situations of Violent Conflict and Widespread Human Rights Abuses, OECD working paper on international investment, May 2002, Number 2002/1

⁴⁷ Amnesty International, "The 'Enron project' in Maharashtra -- protests suppressed in the name of development", July 1997, available online at: <http://web.amnesty.org/library/Index/engASA200311997>

replicated in other nations which seek to put economic development ahead of domestic human rights considerations. Multinational firms have been accused of complicity in human rights abuses in Nigeria, Burma, Ecuador, Indonesia and Colombia – to refer to only a handful of the more notorious incidents.⁴⁸

On occasion, actions (or inactions) on the part of the host state may violate national or international human rights instruments. Citizens might be entitled to seek relief through local courts or, in some instances, ultimately through international mechanisms such as the complaints mechanism of the International Covenant on Civil and Political Rights (ICCPR) or through petition to the European or American Human Rights systems.⁴⁹

Efforts to bring investors to account for human rights breaches may be more difficult, as it is generally states, and not non-state actors, which are accountable for upholding the rights contained in international human rights instruments. As a non-state actor an allegation of violation of human rights through a local court process would be more likely to find an investor liable for torts or criminal violations in relation to its role in the state's perpetration of human rights abuses.

Provided that the state were not complicit in an investor's conduct, it might be expected that the state authorities would wish to use the criminal law to sanction investor misconduct. Such sanctions would clearly be in furtherance of human rights interests. If an investor sought to challenge *these* criminal sanctions through investment treaty arbitration, the case might not even be arbitrable.⁵⁰ But, in any case, such an exercise of criminal law would clearly fall within the police powers of a state.

Unfortunately, as the introduction to this section noted, not all host states are keen to enforce human rights compliance of foreign investors. Where the state is recalcitrant, other actors might seek to act. Some public interest groups have mounted a specialized form of litigation which seeks to hold multinational corporations liable for grave human rights breaches committed abroad, through actions such as those available under the home State laws.⁵¹

; see also the report of Human Rights Watch, "The Enron Corporation: Corporate Complicity in Human Rights Violations", January 2002, at pg 2, available online at: <http://www.hrw.org/reports/1999/enron/>

⁴⁸ See International Council on Human Rights Policy, *Beyond Voluntarism*, 2002, pg.104

⁴⁹ International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, Gen Assem Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967); Optional Protocol to the ICCPR, adopted Dec.16, 1966, entered into force arch 23, 1976, 999 UNTS 171, reprinted in 6 ILM 383 (1967); European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov.4, 1950, entered into force Sept.3, 1953, 213 UNTS 221, ETS 5; American Convention on Human Rights (Pact of San José), signed Nov.22, 1969, entered into force July 18, 1978, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev.6 (1979), reprinted in 9 ILM 673 (1970)

⁵⁰ Eric Schwartz notes that "Most, if not all legal systems for reasons of public policy exclude certain matters from the range of disputes that can validly be arbitrated Such matters commonly include, or have in the past included, for example, disputes concerning criminal or family law" Moreover, international conventions used to enforce arbitral awards often allow domestic courts to refuse to enforce or to set aside awards which tread on these areas. See Eric Schwartz, "The Domain of Arbitration and Issues of Arbitrability: The View from the ICC", *ICSID Review*, Vol.9, No, 1, at pp.17-8

⁵¹ Halina Ward, "Governing Multinationals: The Role of Foreign Direct Liability", The Royal Institute for International Affairs, Energy and Environment Programme, Briefing Paper New Series No.18, February 2001

It is less clear, however, that the investment treaty arbitration process will offer a useful avenue for redressing most human rights violations related to investment activity. Firstly, arbitral Tribunals in investment disputes will not be able to hear direct claims of violations of human rights. These Tribunals must restrict themselves to considering allegations of violations of the instruments over which they have jurisdiction. Such jurisdiction will differ from treaty to treaty, and may be limited to the relevant provisions of the investment treaty in question, to other investment agreements between the parties, or, at its broadest, to “any investment dispute” between the investor and the host state.⁵² But in no case, are Tribunals empowered to entertain claims by citizens of human rights violations.

Nor do treaties condition any of the substantive investment rights upon corresponding human rights responsibilities of the investor. In principle, an investment Tribunal could consider illicit activities (such as corruption or bribery which are directly relevant to the investment relationship and which might nullify the relevant investment contract) during the substantive portion of the proceedings.⁵³ But, there is nothing to suggest that investment Tribunals are empowered as a general rule, to condition investor rights, such as those under a BIT, depending upon whether an investor may have contributed to a host state’s suppression of certain human rights.

For example, if the host state has imposed performance requirements on an investor (for e.g. to hire a certain percentage of locals) in contravention of the BIT, it is unclear what legal grounds there would be for investor rights to be nullified or circumscribed by virtue of the investor’s (and the host state’s) poor human rights record. There is one important exception here. It might be the case that certain egregious human rights violations would preclude a Tribunal from finding jurisdiction in an investment treaty dispute or from finding for an investor on the substance of a dispute.

4.2 Disputes Which Implicate Peremptory Norms of International Law

Many treaty arbitrations will include rules of international law as part of the applicable law to the dispute. And in public international law, there is some form of hierarchy whereby treaty obligations, would be of no effect in the event that they conflict with a fundamental peremptory norm of international law. Indeed Article 53 of the *Vienna Convention on the Law of Treaties* provides that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”; and Article 64 of the same Convention notes 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.”

⁵² Parra 1997, 338-9; Parra notes that many BITs cover an extremely broad range of investment disputes. It is unclear that this extends to human rights disputes.

⁵³ Audley Sheppard and Joachim Delaney, “Corruption and International Arbitration”, paper presented to the 10th Annual International Anti-Corruption Conference, Prague, Czech Republic, October 2001, available online at <http://www.10iacc.org/download/workshops/cs16a.pdf>

As a result, *jus cogens* international laws would seem to be relevant to any arbitration where rules of international law constitute part of the applicable law. Some indication of which international laws carry peremptory status can be found in paragraph 5 of the Commentary to Article 26 the International Law Commission Draft Articles stated:

Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.⁵⁴

Other commentators have noted that prohibitions on forced, compulsory or indentured labour are also universally embraced as human rights violations of universal concern.⁵⁵ The prohibition against forced and bonded labour, exploitative child labour and other slave-like practices as well as the freedom to association may also be considered *erga omnes* international human rights.⁵⁶

Whereas there is no question that a treaty or agreement which was incompatible with these *jus cogens* rights would be invalid, it is less clear how an investor's alleged violation of such norms would impact an investment treaty arbitration. The treaty itself would not be invalidated, but the jurisdiction of the tribunal and the substantive merits of the investor's claims might be invalidated.

In addition to the prospect that tribunals would take these considerations into account, there is also scope for domestic courts to consider egregious investor conduct *post facto* -if the courts are approached by either party to the arbitration in an effort to annul or enforce the Tribunal's award. Such recourse to domestic courts is common where one of the parties is unwilling to comply with the arbitral award. There is an expert literature which discusses the grounds under which courts may refuse enforcement or grant annulment of an award, and although these differ from legal system to legal system, they will typically include: the non-arbitrability of a given subject-matter or the violation of public policy. These areas are beyond the scope of the author's expertise, but signify two important areas which should receive future consideration by researchers interested in the intersection between human rights and investment treaty arbitration.⁵⁷ Where Tribunals have ignored important human rights considerations, domestic courts might have some scope to consider these issues.

⁵⁴ *The Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2, p. 208*

⁵⁵ Some Commentators note that certain non-derogable human rights set out in treaties such as the International Covenant on Civil and Political Rights, will constitute such peremptory norms. Reisman notes that these may include: Arts. 4(2), 6, 7, 8(1), 8(2), 11, 15, 16 and 18. Michael Reisman, "The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold", 15 ICSID Review, No. 2, 2000, at 377

⁵⁶ S.H. Cleveland (2001), "Human Rights Sanctions and the WTO", 199-261 in F. Francioni, *Environment, Human Rights & International Trade* (Oxford: Hart Publishing) at 206.

⁵⁷ On public policy, see the 2002 Report of the International Law Association's Committee on International Commercial Arbitration "On Public Policy as a Bar to Enforcement of International Arbitral Awards", available at: <http://www.ila-hq.org/pdf/Int%20Commercial%20Arbitration/International%20Commercial%20Arbitration%202002.pdf>; on non-arbitrability of subject matter as a grounds for annulment, see Shane Spelliscy, "Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors", 12 American Review of International Arbitration 95, 2001.

While arbitral tribunals have yet to face situations where investors are alleged to have been involved in violation of peremptory norms of international law, it should be noted that a Tribunal's ability to determine the relevance of such issues, is obviously pre-conditioned on that tribunal's knowledge of the investor's human rights record in relation to the investment. Recalling that this section of the paper explores those situations where the investor and the host state have chosen to remain silent on these issues, much may depend upon the initiative of outside actors who wish to petition the tribunal to take heed of these considerations.

4.3 Scope for Non-Parties to an Arbitration to Raise Human Rights Concerns

Even where the two parties are complicit in ignoring the human rights implications of the investment activity – and may prefer to focus their submissions to the Tribunal upon their commercial dispute – there may be procedural scope for non-parties to an arbitration to bring forward human rights facts and arguments for a Tribunal's consideration. Accordingly, lawyers should be aware that they enjoy the opportunity to introduce these human rights considerations into the arbitral conversation.

For example, in two arbitrations under the NAFTA, Tribunals have indicated that they are minded to allow written submissions by groups wishing to bring forward arguments based upon sustainable development or environmental concerns.⁵⁸ In one of these two cases, the Tribunal is still deliberating as to whether *amicus curiae* may make factual interventions, in addition to legal ones.⁵⁹ A more recent BIT's dispute has seen a Tribunal reject a request by citizen's groups and non-governmental organizations to be added as *actual* parties to the dispute.⁶⁰ However, the Tribunal professed to have *not* prejudged its ability to allow these parties to play a lesser role in the arbitration – either as *amicus curiae* or as expert witnesses – at some later stage of the proceedings.⁶¹

In a similar vein, there is some possibility that a *home* state of an investor, who is party to the BIT in question, might also be able to intervene in an investment treaty arbitration. Typically, it might be expected that the home state's interests would be in harmony with those of its investor, and that the former would *not* seek to play any role in the dispute. Indeed, one rationale for including provisions for investor-state arbitration in modern investment treaties had been to “depoliticize” the dispute and to absolve home states from the need to espouse the claims of their investors.⁶² However, several recent treaty disputes have demonstrated that investors sometimes enjoy an ability to “treaty-shop” for a viable investment treaty to use in their disputes with a host government. Investors may enjoy the ability to adopt a “home state” of convenience. This situation arises because a number of treaties define an investor's nationality by reference to where it is legally incorporated –

⁵⁸ See for example, the IISD's intervention in the NAFTA Methanex case: http://www.iisd.org/trade/investment_regime.htm

⁵⁹ See the Transcript of the Methanex Tribunal's hearing on March 31, 2003, available on the website of the US State Department: <http://www.state.gov/documents/organization/19455.pdf>

⁶⁰ See the press release of one of the would-be interveners, the Centre for International Environmental Law: http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html

⁶¹ *ibid.*

⁶² Ibrahim Shihata, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA”, 1 ICSID Review—Foreign Investment Law Journal 1 (1986)

rather than by some more exacting test, such as its primary site of business.⁶³ As such, some recent investment disputes have seen subsidiaries of US-based investors use BITs signed between the Netherlands with developing or transition economies, in situations where the US had yet to conclude a treaty with the host state.⁶⁴ Accordingly, the nominal “home state” of an investor may not have a sense of affinity or loyalty to the investor.

In cases which raise controversial issues, or where the investor has been accused of complicity in human rights violations, the putative home state might be in a position to intervene in a case – particularly where the investor and the *host* state have both preferred to ignore these “extraneous” human rights concerns. At least one investment treaty (the NAFTA) expressly provides for the right of home states to address Tribunals, however it would be unusual, even where the treaty is silent on the matter, for a Tribunal to not accept arguments from a state, which is, after all, a signatory to the bilateral investment treaty in question.

Much will depend upon the ingenuity and creativity of outside actors who wish to push human rights considerations into the frame – perhaps against the wishes of the two parties to the dispute. Moreover, Tribunals which have reason to believe that an investor may be complicit in grave human rights abuses may be able to exercise their own authority under the relevant arbitral rules to commission expert reports on these issues. In the absence of concrete cases which have grappled with these issues, it would be premature to state with certainty how tribunals would conduct themselves. On the one hand, it is quite clear that Tribunals would be hard-pressed to ignore situations where investors or states are implicated in grave human rights violations of a *jus cogens* nature. On the other, it is not obvious how less egregious investor conduct would affect that investor’s investment treaty claims. Whereas host states may have clear international treaty obligations to uphold various other human rights, investors are not constrained by equally clear obligations under international law, either under human rights treaties or the relevant investment treaty.

As the obligations of the host state are often clearer, it is to these which we now turn. It will be seen that the failure by a host state to prevent investors from harming various human rights enunciated in international treaties, could give rise to the liability of the host state in human rights forums. Moreover, it will be suggested that where host states do elect to act so as to promote and protect their international human rights treaty obligations, sometimes by regulating or sanctioning investor activity, that there is scope for investment Tribunals to take these competing human rights obligations into account when assessing the manner in which host states have complied with their treaty obligations to foreign investors.

⁶³ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, (Geneva:1998), pp.38-41; See for example the definition used in Article 1 (b) of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Boliva.

⁶⁴ A case against the Czech Republic by American investor Ronald S. Lauder was mounted in this fashion under the Netherlands-Czech Republic BIT. Likewise, the controversial case of *Aguas Del Tunari v. Bolivia* was mounted by a subsidiary of the US-based Bechtel Corporation through a Dutch BIT with Bolivia. The Bolivia case is discussed in more detail in section 5.2 below.

5. When Host States Defend Treatment of Investors on Human Rights Grounds

By times, a state's treatment of an investor can be argued to have been in *furtherance* of other international commitments (specifically human rights norms which the state is obligated to promote and respect). States will have duties to *fulfill* certain of the human rights to which they have agreed to adhere to; as well, states will have obligations to *protect* human rights from violation by public authorities, and in some instances even by private actors. A recent report of the International Council for Human Rights Policy notes that:

The idea that states can be responsible for abuses committed by private actors, including companies, has been reaffirmed formally in human rights treaties, general comments by UN expert bodies which interpret these treaties, and decisions of regional human rights courts in Europe and the Americas.⁶⁵

For example in several instances, the European Court of Human Rights has held that contracting states will have *positive* obligations to regulate economic activity in a manner which does not violate human rights such as the right to respect for private and family life. In two cases, the Court has held states to be in breach of the European Convention, by virtue of their *failure* to prevent businesses from emitting severe environmental pollution which adversely affected citizens living in the vicinity of factories and plants.⁶⁶

The point here, is that, international human rights commitments will sometimes require more of a state than to simply refrain from interfering with the rights of citizens. On occasion, international obligations will require that states regulate the activity of non-state actors, including business actors, in a fashion which ensures that citizens may enjoy certain of their rights.

At other times, states may well be expected to act of their own volition, in a manner which seeks to progressively fulfill other human rights commitments which the state may have undertaken in international treaties. Examples here could include, commitments to promote the right to adequate food, the right to education, the right to participate in cultural life, or the right to water. These economic and social rights – which are not crude entitlements, but rather rights which need to be progressively realized over time - are discussed more fully in section 5.1 below.

Suffice to say, that international human rights treaty commitments will sometimes require that states undertake to regulate the economy, and hence foreign investors embedded therein, in a manner which fulfils and protects human rights undertakings. However, in instances where the host state has entered into other international commitments to foreign investors through bilateral investment treaties, this will necessarily open up the possibility that foreign investors might be able to challenge their treatment at the hands of the host state. At the same time, host states may be able to advert to their human rights obligations in

⁶⁵ Beyond Voluntarism, pg.54

⁶⁶ Lopez Ostra v. Spain, ECHR, Guerra and Others v. Italy, ECHR, Reports of Judgments and Decisions 1998-I, No. 64 (Feb 19 1998), at para 58

defence of investment treaty claims brought by foreign investors. While there have been no known investment treaty arbitrations where host states have adverted to these human rights obligations, nevertheless investors have sometimes threatened to use investment treaties in order to challenge human-rights inspired measures.

The Republic of South Africa has seen its proposed system for Economic Empowerment of disadvantaged ethnic groups informally challenged by foreign investors in this manner. The South African plan is intended to promote greater participation by the black majority – and other South Africans of mixed race or Indian origin – in the economy, both in ownership and managerial capacities.⁶⁷ Foreign investors, including those in the mining sector, have reacted warily to proposals in this area; at times, threatening use of bilateral investment treaties in an effort to discourage some of the more far-reaching proposals being considered.⁶⁸ At the time of this writing, framework legislation was being considered by the South African Cabinet, while industry-specific charter agreements were still being negotiated with some industry stakeholders.⁶⁹

At present, there have been no known formal arbitrations mounted against South Africa.⁷⁰ In an email interview in July of 2002, the Executive Director of Anglo-American, a major mining firm operating in South Africa, alluded to political considerations which gravitate against a formal BIT challenge:

We are fully aware of the 1994 Investment Protection and Promotion Agreement (IPPA) between the UK and SA governments. It is the view of some of the protagonists in the minerals debates here that the Minerals Bill flouts key provisions of the Agreement. In weighing up whether to invoke the Agreement the impact on UK-SA relations and on relations between the mining industry and the SA government of such a case are a material consideration. Suffice it to say the industry is not pursuing this route.⁷¹

Of course, BITs may be useful levers for foreign investors to invoke in the context of informal discussion with governments. It is not immediately clear to what extent earlier

⁶⁷ Nicol Degli Innocenti and David White, “S Africa promotes empowerment plan”, *The Financial Times*, March 27, 2003

⁶⁸ *The Economist*, “South African Mining: the Diggers are Restless”, June 22-28 2002

⁶⁹ Nicol Degli Innocenti and David White, “S Africa promotes empowerment plan”, *The Financial Times*, March 27, 2003

⁷⁰ It is notable that some recent South African BITs contain exceptions clauses which carve out certain racial empowerment legislation and preferences from BIT provisions (namely those which guarantee that foreign investors would receive treatment not less favorable than that given to nationals or preferred third parties). However, not all treaties contain this exception, including those with key inward investors such as the United Kingdom and other developed countries.

Moreover, none of South Africa’s BITs are known to take steps to shelter such racial empowerment legislation from claims which invoke *other* treaty provisions, most notably those on expropriation, or measures having a “similar” or “equivalent” effect to expropriation. Accordingly, it is not clear whether some threshold of interference (perhaps causing a loss of 40%, 60%, or 80% of an investment’s value to an investor) would trigger this clause and entitle the affected investors to compensation.

See *International Investment Agreements in South Africa*, Report of the Institute for Global Dialogue, June 1, 2000; see for eg UK-SA BIT Treaty Series No.35 (1998), CM 4039

⁷¹ Personal Communication with Michael Spicer, July 2, 2002, on file with author

proposals have been diluted by threats of investment treaty arbitration. In other contexts, threats of investment treaty arbitration are known to have “chilled” government plans for public health inspired regulations.⁷² Indeed, informal usages may prove more effective than actual formal arbitrations, which have sometimes backfired on firms. In several recent instances, investors which have mounted claims against developing countries have received considerable negative publicity and were forced to abandon those claims.⁷³

While investor rights and human rights considerations may never be weighed in a formal arbitration in the South African minerals context, there is some possibility that other arbitrations could pit human rights obligations against investor rights. Section five examines several ongoing arbitrations arising out of foreign investment in water and sewage services in the developing world. It is argued that host states facing such investor claims, may have some legal recourse to invoke their obligations under human rights treaties to promote a right to water.

5.1 The Case of a Right to Water

With global water use growing at twice the rate of population growth over the past century, the latest United Nations figures showed that some 18% of the world’s population lacked access to safe water in 2000. Worldwide, a number of conflicts have been traced to contention over limited water resources. A key target of the UN Millennium Development goals is to reduce by half the number of people lacking sustainable access to drinking water by the year 2015.

Increasingly, United Nations human rights bodies have emphasized that a right to water is implicit in a number of key international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).⁷⁴

The rights in instruments such as the ICESCR are legally binding. But in contrast with more traditional “negative” rights such as civil and political rights which typically require that the state refrain from interfering with their exercise, the rights in the ICESCR are economic and

⁷² In the late 1990s, the Philip Morris Company threatened the government of Canada with a NAFTA arbitration if Canada persisted with plans to introduce plain (generic) packaging of tobacco products. The government abandoned its plans in this area. See “The Danger of International Investment Agreements for Tobacco Control in Canada”, Submission of Physicians for a Smoke-Free Canada to the Federal Standing Committee on Foreign Affairs and International Trade, April 1999, at pg.14. Available online at: http://www.smoke-free.ca/pdf_1/wtosubmission.pdf

⁷³ see Luke Eric Peterson “Public Outcry Leads to Abandonment of Investment Treaty Arbitration Against Guyana”, INVEST-SD Bulletin, March 28, 2003

⁷⁴ According to a recent General Comment of the Committee on Economic, Social and Cultural Rights, a right to water is implicit in Articles 11 and 12 of the ICESCR and explicit in Article 14(2) of CEDAW and Article 24(2) of the Convention on the Rights of the Child. (Committee on Economic, Social and Cultural Rights), *Right to Water* (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), General Comment No.15 (2002), January 20, 2003) The best known of these three UN instruments - and the most widely endorsed - is the ICESCR which was drafted in 1966 and had 146 states parties as of 2002. (compared with 149 endorsements for its sister covenant the International Covenant on Civil and Political Rights (ICCPR), with which it forms the UN’s International Bill of Rights). See UN High Commissioner for Human Rights website on ICESCR at: http://www.unhchr.ch/html/menu3/b/a_cescr.htm

social rights - to education, to health, etc. - characterized by a need for “positive” state action. The positive-negative distinction between civil and political rights on the one hand and economic and social rights on the other, is not rigid however, as some civil rights such as the right to a fair trial, demand that the state create the framework within which this right may be enjoyed.

Given the widely divergent capacities of states to implement and promote social and economic rights, the ICESCR recognises that the rights are ones which a State Party undertakes to “the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the covenant”.⁷⁵

Curiously, these rights have been referred to infrequently in the context of national jurisprudence, and there is currently no mechanism available for individuals to pursue international claims for violations of the rights (although one is being considered by states parties).⁷⁶ Rather, the rights tend to be elaborated through the reporting requirements under the Covenant, which require states to report on their progress in implementing the rights, and also through a series of “General Comments” issued by the UN Committee on Economic, Social and Cultural Rights. While not legally binding, the Committee’s special expertise renders such comments as “more or less authoritative statements of interpretation”.⁷⁷

A recent General Comment issued by the Committee has elaborated upon the substantive implication of the right to water and some of the state measures necessary to ensure its fulfillment.⁷⁸ In its Comment, the Committee emphasizes that the ICESCR’s mandate for progressive realization imposes certain steps that are “deliberate, concrete and targeted towards the full realization of the right to water.”⁷⁹ To assist State Parties in moving towards realization of the right, the Committee elaborates upon some of the specific legal obligations which may be inherent in the right to water. These may include: a need to establish effective regulatory systems which provide for public participation, monitoring, and penalties for non-compliance; in addition to concrete steps to ensure that water is affordable, and distributed with equity in mind, such that poor households are not disproportionately burdened.⁸⁰ As well, the Committee envisions an obligation on the part of host states to ensure that third parties charged with water delivery are not permitted to compromise “equal, affordable and physical access to sufficient, safe and acceptable water.”⁸¹

⁷⁵ ICESCR, Article 2

⁷⁶ International Human Rights in Context, Henry J, Steiner and Philip Alston, Oxford University Press, 2000, Second edition, 275-6; On the draft optional protocol see: Report of the High Commissioner for Human Rights, “Draft Optional Protocol to the International Covenant on Economic, social and Cultural Rights”, July 14, 2000, document # E/CN.4/2000/49. Available online at:

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2000.49.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2000.49.En?Opendocument)

⁷⁷ Steiner and Alston 2000, pg. 265

⁷⁸ Committee on Economic, Social and Cultural Rights, the Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), General Comment No.15 (2002), January 20, 2003

⁷⁹ General Comment, para 17

⁸⁰ See especially paras 13-15, 27 and 49

⁸¹ at para 24

The Committee also offers various examples of potential violations of the right, including:

- i. “Arbitrary or unjustified disconnection or exclusion from water services or facilities”⁸²
- ii. “discriminatory or unaffordable increases in the price of water”⁸³
- iii. “pollution and diminution of water resources affecting human health”⁸⁴
- iv. “failure to enact or enforce laws to prevent the contamination and inequitable extraction of water”⁸⁵
- v. “failure of a state to take into account its international legal obligations regarding the right to water when entering into agreements with other states or with international organizations.”⁸⁶

The committee’s effort to flesh out the substantive import of the international right to water may be of particular relevance to a series of emerging treaty-based investor-state arbitrations which have arisen out of disputes between developing countries and foreign investors in the water and sewage service sector. Several of these disputes are surveyed in the following section, followed by a discussion about how the right to water may be of use to host states faced with similar arbitrations. The discussion does not presume to assess whether human rights arguments will be determinative in a given particular arbitration - as the full details and legal pleadings in these arbitrations are not fully available. Rather, the arbitrations – and the issues they raise – are important for illustrative purposes, as they point to potential arguments which host states might make in appropriate contexts.

5.2 Known Investment Arbitrations Related to Water & Sewage Concessions

The earliest known investment arbitration to arise in this area is that of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*.⁸⁷ In 1996, Vivendi/CGE brought a dispute under the France-Argentina Bilateral Investment Treaty (BIT), arising out of an investment in water & sewage services provision in the Tucuman province of Argentina. Vivendi/CGE alleged violations of various substantive BITs provisions including those on fair & equitable treatment and against expropriation without compensation. The investor maintained that it encountered obstruction and harassment from various branches of the Tucuman provincial government, alleging a “concerted public attack ... by government authorities, which included a series of inflammatory statements and other acts encouraging customers not to pay their bills.”⁸⁸

⁸² General Comment, para 44 (a)

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ General Comment, para 44 (b)

⁸⁶ General Comment, para 44 (c)

⁸⁷ See Award at para 1, http://www.worldbank.org/icsid/cases/ada_AwardoftheTribunal.pdf

⁸⁸ at para 30, the Tribunal quotes from the investor’s claim

For its part, the Argentine Republic accused the investor of various failures under the terms of the concession contract, affecting the delivery of water and sewage services to the citizens of Tucuman. The Tribunal noted that the investor and the host state differed over such important matters as:

the method for measuring water consumption, the level of tariffs for customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of (the investor) to pass-through to customers certain taxes and the quality of the water delivered.⁸⁹

Although the two sides attempted to resolve their differences and renegotiate a new contract, they ultimately failed and the investor launched its arbitration.

In an Award rendered in November of 2000, the Tribunal noted that the nature of the claims in this dispute were so closely intertwined with the interpretation of the provisions of the concession agreement between the two parties, that the Tribunal could not assess alleged violations of the bilateral investment treaty, without first having to interpret the Concession Agreement itself. Because the Concession Agreement had explicitly assigned such an interpretive task exclusively to the administrative courts of Tucuman province, the Tribunal held that it could not arrogate this task to itself. Thus, while the Tribunal had declared its jurisdiction to hear the BIT's claim, it dismissed the claims on the grounds that the claimants ought to first pursue their case in the administrative courts of Tucuman.

This award has since been partially annulled in a separate ICID process which may open the door for a new arbitration to be mounted by the investor before a new Tribunal.⁹⁰ Counsel for the investor has hinted that this course of action will likely be pursued.⁹¹ A new dispute mounted by CGE/Vivendi would be one of several pending arbitrations over water privatization.

Some similar regulatory issues appear to be implicated in another BIT's arbitration launched by the Azurix Corporation, a spin-off of the Enron Corporation, against the government of Argentina. In 1999, Azurix obtained a 30-year concession to run the newly privatized water systems in the province of Buenos Aires.⁹² Conflicts quickly arose over water quality & pressure. Customers complained of poor water pressure.⁹³ The government was later forced to warn half a million customers to avoid drinking the local water and to minimize exposure to showers and baths, due to an outbreak of toxic bacteria in the local water supply.⁹⁴

⁸⁹ *Compania de Aguas Del Aconquija, S.A. & Compagnie General des Eaux v. Argentine Republic*, ICSID ARB/97/3, Final Award, at para 32

⁹⁰ Decision on Annulment, *Compania De Aguas Del Aconquija S.A. and Vivendi Universal (formerly Compagnie des Eaux) v. Argentine Republic*, July 3, 2002, in 41 ILM 1135, No.5

⁹¹ See Luke Eric Peterson, "Vivendi-Argentina Water Dispute Heading Back to BIT Arbitration?", *INVEST-SD Bulletin*, Jan.17, 2003

⁹² Monica Perin, "Azurix Water Bugs Argentina", *Houston Business Journal*, May 5, 2000, <http://houston.bizjournals.com/houston/stories/2000/05/08/tidbits.html>

⁹³ *ibid.*

⁹⁴ *ibid.*

Azurix countered that problems with water quality, “for the most part are due to failures by the Province to deliver infrastructure that it committed to deliver under the concession contract.”⁹⁵ In October of 2001 Azurix Buenos Aires terminated its concession contract, and filed a claim under the US-Argentina BIT, alleging that the regulatory actions of Argentina and its political subdivisions had violated the guarantees against expropriation, and fair and equitable treatment and “security and protection.”⁹⁶ The firm is seeking more than \$550 million (US) in compensation.⁹⁷

A third BITs case which also arises out of a water privatization dispute has emerged in Bolivia, where a long-term water-supply contract between a consortium led by the US-based Bechtel Corporation and Cochabamba, Bolivia’s third largest city, gave the consortium exclusive rights to all the water in the area, including in formerly community-held wells.⁹⁸ Subsequent increases in local water rates – some bills doubled and amounted to a quarter of monthly incomes – and the legal expropriation of all public water supplies, triggered widespread unrest in Cochabamba and across the country. These protests led to serious violence and the eventual declaration of martial law. Authorities warned executives that their safety could not be guaranteed and they were forced to flee the country.

Currently, the government and the consortium disagree as to whether Aguas Del Tunari abandoned its concession or was forced out. An arbitration mounted by the investor is currently underway at ICSID. Among other issues, the case is expected to grapple with the appropriate level of regulatory oversight of a public utility consistent with a host state’s commitments under a BIT.

Having surveyed these known BITs arbitrations, what scope may there be for cases like these to consider the obligations of host states, which may have made human rights treaty undertakings, to respect the right to water?

5.3 Injecting the Right to Water into Investment Treaty Arbitrations

Recalling the earlier recognition that Tribunals may only address claims for which it has jurisdiction under the given investment treaty, it should be reiterated that citizen claims of a violation of the international *human right* to water would *not* be arbitrable by investment Tribunals. This does not signal, however, that human rights norms might not be of relevance for purposes of interpreting the substantive provisions of an investment treaty. In other words, Tribunals may take account of various international obligations – to citizens on the one hand, and to investors on the other – which host states may have undertaken to respect.

As we have seen earlier, Tribunals will often have recourse to interpret investment treaty rights in light of applicable rules of international law. And it is here that there may be important scope for tribunals to consider applicable human rights obligations including, for example, those contained in human rights treaties which have been acceded to by host states.

⁹⁵ Azurix, SEC Quarterly Report, Nov. 19 2001 Available on-line at: www.sec.gov/Archives/edgar/data/1080205/000095012901504206/0000950129-01-504206.txt

⁹⁶ *ibid.*

⁹⁷ Luke Eric Peterson, “Dusted-off Trade Treaties Ensure There Is No Such Thing as a Free Riot”, *The Guardian* (UK), May 6, 2002

⁹⁸ William Finnegan, “Letter from Bolivia, Leasing the Rain: the Race to Control Water Turns Violent”, *The New Yorker*, April 8, 2002

Earlier ICSID Tribunals have had no difficulty in holding that obligations imposed by other international conventions entered into by a host state may be adverted to in that state's defence of its treatment of the investor. In the case of *SPP v. Egypt*, the Tribunal took seriously the argument that a host state's failure to interfere with an investment, might have been contrary to its international law commitments under a UNESCO Convention on the protection of cultural antiquities.⁹⁹ Although the argument was not persuasive on the facts of the case, nevertheless it signaled that ICSID Tribunals may take account of a state's broader international law commitments, in the course of assessing that state's compliance with its investment treaty commitments to foreign investors.

In those disputes where concessionaires engaged in water & sewage concessions have challenged their treatment at the hands of the host state, there would appear to be considerable scope for host states to advert to their own international human rights obligations.¹⁰⁰ In the summaries of the various water & sewage arbitrations above, it has been seen that vigorous disagreements will often arise between investors and host states on issues such as: the level of tariffs; the appropriate recourse where customers are unable to pay their bills (including possible cessation of service); and levels of water availability and quality. These questions relating to the price and quality of water will inevitably have implications for whether the poorest and most vulnerable members of society will have access to water.

Given that a right to water is included in several human rights instruments discussed above, and its elaboration by the Committee, while not a binding interpretation, does offer important guidance as to the normative content of this right, it would seem that host states which are party to the *ICESCR* and other covenants (including American human rights instruments¹⁰¹), should seriously consider putting forward a defence of their treatment of foreign investors which includes reference to these competing international commitments in the human rights realm. In so doing, they would place squarely upon the Tribunal the onus to reconcile competing international obligations of the host state, rather than allowing investment principles to trump human rights principles by default.

It should be cautioned, however, that Tribunals will not be impressed by empty references to human rights arguments which merely attempt to disguise egregious, arbitrary or protectionist treatment of investors. Indeed, to draw an analogy, one Tribunal which arbitrated a NAFTA dispute arising out of the imposition of an export ban on hazardous wastes held that a clear protectionist intent – as articulated in one Cabinet Minister's public

⁹⁹ Award in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, 32 *International Legal Materials*, No.4, July 1993, at para 154

¹⁰⁰ Commentators have suggested, in other international economic contexts (notably at the World Trade Organization) that developing countries, in particular, might marshal certain economic, social and cultural rights in an effort to buttress legal and political positions in relation to the right to health or the right to food see Caroline Dommen, "The Covenant on Economic, Social and Cultural Rights : A Treasure Chest of Support for Developing Countries' Concerns in the WTO?", in *Bridges Between Trade and Sustainable Development Monthly*, January-April 2001, pg.21-22; and Caroline Dommen, "Raising Human Rights Concerns in the WTO – Actors, Processes and Possible Strategies", 24(1) *Human Rights Quarterly* 1, February 2002.

¹⁰¹ American Declaration on the Rights and Duties of Man, 1948 and American Convention on Human Rights, 1969, in Ian Brownlie, ed., *Basic Documents on Human Rights*, Third edition, Clarendon Press, Oxford, 1994, at pp 488 and 495

comments – undercut the Government of Canada’s efforts to justify its actions by reference to international environmental norms.¹⁰² By the same token, Tribunals might be expected to give short shrift to human rights arguments put forward by States in a bad faith effort to disguise other intentions.

That said, there may be several uses to which human rights norms might be employed in such arguments, in an effort to buttress a state’s good faith effort to regulate water service providers so as to ensure water safety or access to the resource for the poorest and most vulnerable members of a community.

5.3.1 Human Rights Obligations Underlying a State’s Exercise of its Police Powers

As noted in section 3.1 there is some confusion as to whether arbitral Tribunals will hold certain police powers regulations to be compensable forms of takings.¹⁰³ One context in which a right to water might usefully be adverted to, is that where a host state seeks to justify its regulation of an investment as a non-compensatory measure in this fashion. By referring to long-standing and broadly endorsed international human rights obligations, a host state might be able to present a plausible argument that certain regulations of water concessionaires falls within such a police power function. This is not to prejudge the specific merits and allegations at the centre of the investor-state arbitrations mentioned earlier. Information on these disputes is too scant (with legal pleadings generally confidential) to assess the validity of such claims by the host state.

5.3.2 Human Rights Obligations Used to Mitigate the Level of Damages Owed

Another instance where human rights norms might be of use would be in assessing the level of compensation in those instances where state conduct does rise to the level of an expropriation or is tantamount to such. Investment treaties differ in terms of the compensation to be paid in the event of an expropriation; some treaties indicate that “full” compensation will be owed, whereas others stipulate that compensation ought to merely be “appropriate”, “fair”, “just” or “reasonable”.¹⁰⁴ These variations introduce some interpretive leeway for a Tribunal to determine the level of compensation to be paid, at least in those instances where the treaty does not mandate “full” compensation. Thus, for example, in the event, that state measures will be found to amount to an expropriation of an investor’s investment - but can be construed by the host state to have been undertaken in the furtherance of competing human rights commitments (for eg to encourage access to water for the most vulnerable members of a community) - it might be argued that this motive ought to figure in a Tribunal’s calculation of damages owing to the affected investor.

In this vein, Philippe Sands has criticized the failure of an ICSID tribunal to consider the environmental purpose underlying an expropriation of land by the government of Costa

¹⁰² SD Myers esp. paras 252-7

¹⁰³ See also Sornarajah at pg. 300 where he cautions that “The identification of where there is a compensable taking as a result of interference with property rights and when there is non-compensable regulatory taking is fraught with the same difficulties as exist in domestic law.”

¹⁰⁴ UNCTAD, “Taking of Property”, Series on International Investment Agreements, 2000, pp.26-31; Elihu Lauterpacht, “International Law and Private Foreign Investment”, The Inaugural Earl A. Snyder Lecture in International Law, 4 Indiana Journal of Global Legal Studies 259, 1997

Rica, when it calculated the level of compensation owing to an investor.¹⁰⁵ Professor Sands looked more favorably upon the approach employed by the European Court of Human rights when resolving cases related to the violation of that Convention's Optional Protocol on the right to property. Sands noted that the European Court has shown a willingness to modulate the level of compensation owing, in situations where "legitimate objectives of 'public interest'" lie behind the impugned measure. Sands raises an important concern: namely, that onerous levels of compensation awarded to investors could preclude poorer states from "taking effective measures to give effect to their international obligations to protect their environmental patrimony, since they will often not be in a position to finance an interference."¹⁰⁶

Similar concerns will certainly attend the arbitration of disputes implicating economic or social rights, such as the right to water. Because these rights are contingent upon the best-efforts of a state to utilize "the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the covenant", arbitrators ought to be awake to the human rights implications of any methodology used for evaluating compensation in such cases.¹⁰⁷ Indeed, if the effective regulation of water concessionaires, in a good-faith effort to promote the normative core of the right to water (including for example, accessibility, equity, etc.) were found to trigger concomitant requirements for "full" compensation, this will necessarily have a direct and measurable effect upon the level of "available resources" which may be harnessed to the effort to progressively realize the right in question.

Interestingly, in at least one water privatization case at ICSID, non-party petitioners have urged the Tribunal to consider the financial impact of any damages leveled against Bolivia, and specifically, the likelihood that a multi-million dollar claim will further undermine the efforts of the government to make water affordable and accessible to its citizens. Indeed, the petitioners (a coalition of citizens, politicians and civil society groups) went so far as to couch this argument explicitly in "rights" language.¹⁰⁸ However, it is notable that the petitioners did not advert to any national or international human rights norms which might have reinforced their arguments.

This omission serves to underscore the extent to which the international human rights community has failed thus far to make its existence known to the emerging international investment law regime. Further work needs to be undertaken in order to assess emerging

¹⁰⁵ See the case of *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 ILM 317 (2000); Philippe Sands, "Arbitrating Environmental Disputes", Draft Remarks on the occasion of the annual ICSID/ICC/AAA Colloquium, Nov.10, 2000, Washington, DC (quoted with permission of Prof. Sands).

¹⁰⁶ It should be noted that the actual valuation methodology used to value the property in the Costa Rica case is reputed to have been quite favorable to the Costa Rican government. However, Professor Sands' concern is that the "standard" of compensation which determines what portion of that value ought to be owed to an investor, will not vary in those cases where important public interests underlay the expropriation. On the difference between standards of compensation (which are often prescribed in the relevant BIT) and the valuation process, see: Lauterpacht above.

¹⁰⁷ Indeed, the General Comment on the Right to Water explicitly calls for "judges, adjudicators and members of the legal profession" to "pay greater attention to violations of the right to water in the exercise of their functions", at para 58

¹⁰⁸ Petition of La Coordinadora para la Defensa del Agua y Vida, et.al. to the Arbitral Tribunal, Aug.29, 2002, para. 18

investment treaty disputes through a human rights lens, so as to ascertain their possible implications for human rights issues. An essential part of this task will be to further analyse the prospect for human rights norms to be injected into investment arbitrations, and weighed by Tribunals tasked with interpreting investment treaty obligations, in a manner which will be consonant with consideration of a host state's broader international commitments, including human rights.

5.3.3 Failure of Tribunals to Consider these Human Rights Obligations

It is possible that Tribunals might fail to recognize that good faith regulatory measures of water concessionaires were exercises of police powers. Likewise, they might prove unwilling to moderate compensation owing, even where the treaty seems to provide some interpretative leeway. Recalling the warning of the Committee on Economic, Social and Cultural Rights that a state should take into account "its international legal obligations regarding the right to water when entering into agreements with other states", it is conceivable that some states might find that their investment treaty obligations – as interpreted by tribunals – place them afoul of their human rights commitments.

While it is expected that Tribunals *would* interpret BIT provisions in a manner which is sensitive to these human rights obligations of host states, in the event that Tribunals did not, then states might find that they are liable for violations of their human rights undertakings. Any such liability would be a matter not for the investment tribunals, but for the adjudicative bodies which supervise the relevant human rights treaties. A human rights body would likely take account of whether a state's investment treaty obligations are so onerous and prohibitive, that states have not retained sufficient regulatory capacity and resources to implement their human rights obligations.

It is hoped, however, that such scenarios would be rare, as investment tribunals would seem to enjoy the ability to interpret investment treaty obligations in a manner which does not ignore a host state's competing international obligations.

6. Policy Considerations

As the discussion in sections 4 and 5 has shown, the consideration accorded to human rights rules will differ depending upon whether the treatment of host states can be construed as having been undertaken, at least in part, in furtherance of competing international human rights obligations, or, on the contrary, whether the treatment of an investor has little to do with those obligations, and indeed may occur in a broader context where the investor and the host state, whatever their commercial disagreements, have conspired to ignore or act in open defiance of fundamental human rights. In section five we saw that human rights norms might prove a useful tool for host states to invoke, in an effort to justify their regulation or treatment of investors. In section four, it was less clear how, and to what extent, the conduct of the investor which was not penalized by the host state – and as such was not related to the investment treaty claim - will play a substantive role in an investment arbitration.

It is at least clear that, where investors and host states are implicated in the violation of certain peremptory human rights norms (such as slavery or forced labor), that investment Tribunals should not be able to ignore these compelling norms, (where they have been brought to the notice of the Tribunal). But it is less clear how other conduct on the part of

the investor – which does not rise to the level of a violation of a *jus cogens* right – would be relevant to the investment treaty arbitration.

Given that tribunals have not yet been asked to grapple with the various human rights issues discussed in this paper, it would be a mistake to exclude the possibility that *other* (non-peremptory) human rights issues might condition a Tribunal's interpretation of alleged violations of investor rights. Under the framework of these investment treaties, investors do not have any specific responsibilities to respect other (non *jus cogens*) human rights.¹⁰⁹

Certainly, matters would be much clearer if investment treaties were to impose countervailing duties and responsibilities upon investors. As currently drafted, BITs are extremely narrow in their formulation: according substantive rights to investors, without any need for corresponding duties or obligations on the part of those investors. If treaties were to require that investors respect specific human rights duties, then these responsibilities would clearly be relevant to a Tribunal's assessment of an investor's claim under the treaty. Indeed, it might be possible for an investor's right to invoke international arbitration to be conditioned upon clear evidence that the investor has complied with minimum human rights responsibilities as set out in the treaty, or incorporated by reference. In the event that the investor has failed to live up to these obligations, then the tribunal would lack jurisdiction to consider the investor's claims.

It must be stressed, however, that on any of the scenarios (real and proposed) in this paper, that investment tribunals would *not* usurp the adjudicative function of existing courts and tribunals to assess violations of human rights standards. As things presently stand, BITs provide that where the commercial rights are allegedly violated, tribunals will have a narrowly tailored form of dispute resolution to assess these investor claims. While it has been argued that a host state's competing human rights obligations might be a mitigating – and legally recognized – consideration in assessing the host state's compliance with its investor obligations, this is not to suggest that these investment tribunals will be charged with an ability to enforce the human rights themselves. Nor would citizens enjoy the ability to bring claims of human rights violations to these tribunals. Such claims ought to be brought through existing or future human rights bodies which have been expressly designed for the purpose.

Certainly, it would be a preferable course for states to show greater commitment to these human rights adjudication mechanisms. It should be clear that most western states have not devoted commensurate energy, resources and commitment to the forums for human rights adjudication on the one hand, and investment arbitration on the other. Forums for adjudication of human rights disputes, particularly at the international level, are often weak. Meanwhile, states have had few qualms about creating systems where foreign investors will enjoy recourse to effective and binding dispute settlement – and often without any need to

¹⁰⁹ Of course, host states often will have international human rights treaty obligations, and the failure of the state to prevent investors from harming citizens in the host state, might well trigger the responsibility of the host state under other human rights instruments. See for example the situations discussed in section 5.1, where host states have been found to have violated their human rights treaty commitments, by virtue of their failure to prevent non-state actors (in this case, businesses) from harming citizens.

exhaust domestic legal remedies which is the case under most international human rights dispute mechanisms.

At the same time, procedural and substantive changes to strengthen the ability of investment arbitration might be needed in order to take into account competing human rights obligations of host states and investors. The following two sub-sections explore some of these possible changes.

6.1 Procedural Changes to Investment Treaty Arbitration

By grafting in a variety of commercial arbitration rules (such as those of UNCITRAL) into the common run of investment treaties, state parties are now reaping some of the difficulties which might have been expected to result from such “institutional misappropriation”. Even the ICSID system, which was tailor-made for investment arbitration, has not proven ideal for the resolution of investment disputes that reach into fundamental concerns of public policy and regulation.

First, the lack of transparency surrounding arbitrations is proving to be an egregious failing as many known cases are challenging a broad spectrum of public policy measures in relation to environmental protection, regulation of essential public services, and domestic tax policy. It is deeply problematic that similar cases need not even be publicly notified. The fact that arbitral proceedings and many documents pertaining to them, will remain confidential unless both parties consent to the contrary, also poses serious difficulties.

The problems occasioned by this opaque method of dispute resolution have led at least one nation (the United States) to require that future investment rules will expressly provide for full transparency both in the launching of claims, and in their resolution.¹¹⁰ Such openness will be an essential precondition to any fuller appreciation of the human rights implications of investment treaty arbitration. It must be cautioned however, that some 2100 investment treaties have already been concluded since the 1950s, with little or no consideration of this need for transparency.

Just as the arbitral process lacks transparency, it also lacks legitimacy as a credible institution for resolving the thorny questions of public policy increasingly laid before arbitrators. Any suggestion that Tribunals interpret investment treaty provisions in light of human rights norms (as suggested in section 5), necessarily supposes some familiarity and facility on the part of the arbitrators with these latter norms. However, as was noted much earlier, investment treaties and the common arbitral rules are virtually bereft of guidelines for the selection of arbitrators. A party may elect to choose an arbitrator with human rights expertise, but there are, at present, no assurances that those selected to preside over disputes will display knowledge and sensitivity to human rights concerns.¹¹¹

¹¹⁰ See John Audley, “Environment’s New Role in U.S. Trade Policy”, Carnegie Endowment for International Peace, Trade, Equity, and Development Series, Issue no. 3, September 2002, pg.4

¹¹¹ It is notable that an eminent human rights jurist, Thomas Buergenthal, was a member of the arbitral tribunal which first examined the CGE/Vivendi water dispute (mentioned in section 5.2 above). However, the award handed down by Judge Buergenthal’s tribunal in the Vivendi case has been partially annulled. Should the investor mount a new claim, it would be before a new tribunal

It has also been argued herein that an important means for human rights arguments to be injected into arbitral contexts will be through the intervention by an investor's home state or interested third-parties (*amicus curiae*). However, at present, bilateral investment treaties do not generally contain provisions which expressly allow for such intervention and set the modalities for it. Recently, the United States has negotiated free trade agreements with several nations, whose investment chapters provide for these types of interventions.¹¹² Otherwise, the capacity will be at the discretion of the Tribunal and will often be circumscribed by the possible recalcitrance of one or both parties to the arbitration. For instance, in the case of an *amicus* intervention in a NAFTA investment dispute, the Tribunal indicated that it was minded to accept *written* interventions from petitioning environmental organizations, however it noted that it was unable to grant access to attend the proceedings themselves or to deliver *oral* interventions, without the express consent of the parties.¹¹³

6.2 Substantive Changes to Investment Treaties

States can expect to face growing demands for them to strive for greater coherence of their various commitments – economic, social, environmental, human rights, etc. - at the international level. This is particularly so, as investment arbitrators are increasingly called upon to grapple with the relative priority of different international commitments each of which may have been entered into in good faith, but in studied silence as to other existing international obligations.

One question which states will eventually have to deal with as the international governance regimes for investment and human rights begin to intersect, is the very different types of rights which are contained in the respective regimes. Human rights are often held to be of a deontological character, that is they owe their origins to natural rights theories which posit rights which contain some inalienable core; these rights may be balanced with other rights and public goods, but are not ordinarily dismissed on grounds of mere expediency. By contrast, the investment rights contained in investment treaties are largely *instrumental*, insofar as they have been created and guaranteed often on the express understanding that their protection may lead to enhanced flows of investment to the states parties to investment treaties.¹¹⁴ In this sense, these rights owe their birthright to their perceived expediency in bringing about certain economic developments. For instance, the preamble to the BIT between the Netherlands and Bolivia is explicit in its recognition that “agreement upon the treatment to be accorded to ... investments will stimulate the flow of capital and technology and the economic development of the Contracting parties”.¹¹⁵

Yet, as treaties continue to proliferate, they have not been matched by evidence that they contribute to enhanced flows of investment. Indeed, a recent report of the World Bank is the latest to point to the lack of correlation between investment flows and the conclusion of

¹¹² See the investment provisions of the US-Chile and US-Singapore Free Trade Agreements.

¹¹³ See Howard Mann, “Opening the Doors, At Least a Little: Comments on the *amicus* Decision in *Methanex v. United States*”, 10 *Reciel* 2001, no. 4, pp 241-5, available online at: http://www.iisd.org/pdf/2001/trade_reciel_methanex.pdf

¹¹⁴ This is not meant to include those BIT provisions which incorporate customary international law rules, which obviously do have an existence outside of the treaty.

¹¹⁵ Preambular statement of Dutch-Bolivian BIT

these treaties.¹¹⁶ Given that the standard rationale for the creation and extension of such investor rights has not stood the test of time, it stands to reason that states might wish to consider new rationales for negotiating investment protection treaties.

Any reconsideration of the purpose and rationale of these treaties should reconsider the failure to include binding investor responsibilities in earlier treaties. Such responsibilities could include requirements such as a need for human rights impact assessments¹¹⁷, requirements for investors to adhere to transparency requirements with respect to royalties and taxes paid to host states¹¹⁸; or an explicit conditioning of rights upon respect for domestic and international human rights rules (as alluded to in section 6). Such provisions might ensure that Tribunals faced with situations where an investor mounts a claim against a host state - but one or both parties are known to have been complicit in human rights violations related to the investment - would have greater legal grounds for taking these human rights impacts into account in its examination of the investor's claim.

However, the inclusion of investor responsibilities in investment treaties, would necessarily require that investment tribunals grapple more frequently and at an ever-greater level of sophistication with human rights norms. This presupposes ever-greater human rights expertise on the part of arbitrators, and invests these Tribunals with greater authority as fora where human rights concerns will be elaborated and interpreted. It must be stressed that investment tribunals would not become an adjudicative forum for human rights norms. Rather, they would only adjudicate investor rights, but in a manner which conditioned these investor rights on compliance of the investors with minimum human rights responsibilities. Naturally, it should be asked whether these ad-hoc Tribunals can be expected to have the legitimacy to be entrusted with such a critical task.

In this context, it might also be considered whether the resolution of international investor disputes might be better handled by existing (or purpose-built) human rights courts. While such a proposal is not endorsed here, it does warrant further examination. While there would be considerable divergences between the substantive protections offered under the existing instrumental rights granted on an ad-hoc basis under investment treaties, from those rights which investors might enjoy under human rights frameworks, nevertheless there might be a number of benefits to be gained from a decision to protect investor interests through the latter avenue, rather than the former.

¹¹⁶ On the failure of these treaties to promote new investment flows, see for eg the World Bank's 2003 Report on Global Economic Prospects, www.worldbank.org. See also the lukewarm endorsement of these treaties offered by UNCTAD (1998), notwithstanding UNCTAD's continued practice of facilitating the negotiation of new such treaties.

¹¹⁷ See for eg the work of the Danish Institute for Human Rights' project on business and human rights on this front: <http://www.humanrights.dk/departments/Research/Projects/mj/>

¹¹⁸ There is an international civil society campaign which is lobbying for greater transparency of payments by investors to host states. Obviously such revenues are essential if host states are to work towards the progressive realization of human rights such as the right to food, the right to health, the right to education, etc. Also, where these revenues are not transparently accounted for, it is very easy for these revenues to be siphoned towards weapons and resources which may fuel conflicts and might be used in the suppression of the rights of the citizenry.

The capacity for competing norms to be considered in a coherent manner and balanced accordingly, might be greatly accentuated. It is expected that human rights courts which already deal with cases of grave abuses on the one hand, and invasions of property interests on the other, would be adept at reconciling the competing interests at stake.¹¹⁹ This might also be done with much fuller transparency than is the case under current models of investment arbitration. Moreover, the role of precedent in this system would ensure greater predictability for investors and host governments alike, in contrast to the current ad-hoc system of investor arbitration where Tribunals generally take heed of known awards, but are under no duty to follow their dictates. It would, however, require the creation of such institutions for regions which do not have them, and a reassessment of rules which forbid corporations from bringing claims in some existing systems (such as the American Human Rights system).¹²⁰

Regardless of the feasibility of such a specific proposal, there is a manifest need for greater coordination at the international level between the codes for investor responsibility¹²¹, the norms used to restrain state maltreatment of its citizens, and lastly the norms which protect foreign investors. As has been argued here, the current system of BITs is often silent on human rights considerations and opaque in its ad-hoc dispute settlement mechanism. The current situation renders it difficult for analysts to be certain about the human rights implications of investment arbitration.

6.3 Recommendations

Having taken an initial survey of the relationship of international human rights to investment treaties and investment treaty arbitration, the following would seem to be useful:

- Reform of the existing treaties, so as to ensure that investor-state disputes will be publicly notified, irrespective of which venue is selected by an investor, and open to the public.
- Attention paid in future investment treaties to the need for similar notification processes for disputes and openness of the proceedings.
- Ongoing monitoring and analysis of those emerging investment treaty disputes which implicate human rights issues.
- Capacity-building for human rights practitioners, NGOs and governments on the potential for human rights considerations to be tabled in investor-state arbitrations, both by host states in defence of human-rights inspired treatment of foreign investors, and by other parties which seek to intervene in arbitrations in their capacity as *amicus curiae* or as home states of an investor.
- Capacity-building for investment arbitrators so that they may be apprised of the international human rights system

¹¹⁹ A right to the peaceful enjoyment of one's possessions is included in Article 1 of an Optional Protocol to the European Convention on Human Rights and Fundamental Freedoms. Meanwhile, Article 21 of the American Convention on Human Rights contains a right to property.

¹²⁰ Although arbitration lawyers are aware that investors may mount claims under some human rights systems, it is also recognized that the American system's bar on corporate claims renders this avenue less useful for many investors. See R. Doak Bishop, et.al., "Strategic Options Available When Catastrophe Strikes the Major International Energy Project", 36 Texas International Law Journal, No.4, Summer 2001, at 661-2

¹²¹ Such as the voluntary OECD Guidelines for Multinational Enterprises.

- Exploration of the scope for inclusion of minimum human rights responsibilities for investors, in future investment treaties.
- Analysis of potential roles for existing regional human rights courts and other prospective international institutions to be used to resolve international investor disputes. Particular attention would be given to the issue of coherence in international law.

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