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Human Rights in Investment Arbitration

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To my elder brother, thank you.

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Human Rights in Investment Arbitration

Table of abbreviations:

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
COMESA	Common Market For Eastern And Southern Africa Investment Agreement
CRC	Convention on the Rights of Child
DSB	Dispute Settlement Body at WTO
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Court of Human Rights
ECT	Energy Charter Treaty
GATS	General Agreement on Trade in Services
ICCPR	The International Covenant on Civil and Political Rights
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
SRSG	UN Special Representative of the Secretary General
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade And Development
WTO	World Trade Organization

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Human Rights in Investment Arbitration

Introduction

Amongst all international laws, the Human rights law is unique in reaching broad areas of everyday life; it is not meant to work out matters of reciprocal convenience among states or those between a state and its foreign residents. However, due to its global attribute, human rights law is becoming more and more involved in financial matters.

Arbitration is an Alternative Dispute Resolution (ADR) mechanism in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. Investment Arbitration resolves matters related to investment agreements, which are bilateral most of the times. Its core concern is monetary and economic matters.

Arbitration has now become a primary remedy for conflicts involving large corporations, whose main targets are to secure confidentiality of disputes, and to receive a binding verdict in the least possible time. Arbitration is dispute resolution mechanism which secures these, as well as other, benefits to the disputing parties. And although the parties of the arbitration could be different corporations, in this dissertation we will be focusing (especially in the cases discussed) on cases where one party of the proceeding is a corporation, and the other is a State.

There are generally two methods of arbitration which are usually agreed upon in the contract, Ad Hoc or Institutional Arbitration. Institutional arbitration is carried out by a specialized institution. Each institution has its own set of rules which provide a framework for the arbitration. Ad hoc arbitrations are usually not administered by an institution. The parties will therefore have to determine all aspects of the arbitration themselves (e.g. number of arbitrators, appointing the arbitrators, the applicable law, and the procedures).

In cases of International Investment Disputes, disputing parties prefer to use institutional arbitration, especially that local courts cannot satisfy the needs of non-nationals of the State, in their disputes against the State itself. Local courts are generally not the suitable remedy for Investment disputes; let alone incidents when claims against the State of breaching Human Rights are made.

At the first sight, there would seem to be no common vocabulary, and no common understanding between the above-mentioned categories of law. Nevertheless, questions arose about whether investment agreements balance the interests of governments, corporations, and individuals equivalently. Such queries set the initial grounds on which to build a relation between investment agreements and human rights law.

Yet, there are many reasons for the human rights community to be interested and involved in debates around investment. In 2001, the net flow of foreign direct investment to developing countries was $205 billion (out of $735 billion in all countries)[1] a figure which dwarfs official development assistance ($53.7 billion in 2002) [2].

There are some 2000 bilateral investment deals world-wide, most of which are between developed and developing countries, many of which have entailed changes in domestic laws for host-countries. In most of these processes, human rights considerations are not taken into account during discussions of the economic and legal dimensions. Furthermore, foreign direct investment, which implies a presence in the territory of another state (using its resources, labour, domestic law) has arguably more potential impact on human rights that the rules governing exports and imports, or other aspects of international trade law.

There has not yet been a systematic analysis of investment in developing countries from a human rights perspective. As investment rules are debated and negotiated in various forms in all regions of the world it has become important for the human rights community to reflect upon the challenges that lie ahead in this rapidly evolving area of international law. It is also important for government officials and private sector actors to be cognizant of their human rights obligations in the increasingly globalized economy.[3] Such awareness would necessarily mean the meticulous review of investment as well as human rights agreements from cross-related perspective.

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[1] UNCTAD, World Investment Report 2002 Overview, p.9

[2] J. Randel, T. German and D. Ewing (eds) The Reality of Aid 2002, Manila, IBON Foundation, 2002, p. 145

[3] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights : Political and Legal Issues, A Background Paper for the Think Tank of the Board of Directors of Rights & Democracy, Investment in Developing Countries: Meeting the Human Rights Challenge, June 11, 2003, Ottawa, Canada.

From one end, it is now becoming eminent that when states sign investment agreements, they sometimes over-look the possibility of violation of the human rights norms if these agreements were applied continuously. From the other end, we note that when states ratify human rights treaties, they take on legally binding obligations with regard to human rights. International human rights treaties cover civil and political rights (e.g. freedom of expression or the right to a fair trial) as well as economic, social and cultural rights (e.g. the right to be free from hunger)[1].

One principle that should be kept in mind throughout reading this study is that the state must – at all times – protect human rights. It is in the nature of human rights obligations that they are obligations owed by the states to individuals within its jurisdiction[2].

There is sometimes vigorous debate within the international law field as to whether there is a hierarchy of legal sources. And each system of law deals with this matter differently. Articles 103 and 104 of the North American Free Trade Agreement (NAFTA) only mention NAFTA's superiority over other treaties but do not mention customary law. Nevertheless, it is to be noted that although NAFTA unequivocally prevails over provisions of another treaty in the event of incompatibility, it does not prevail over customary rules. An arbitral panel would be obligated to take these into consideration where they conflict with NAFTA[3]. In the absence of clear articles, it's left to the discretion of the judge or arbitrator to decide on said hierarchy of legal sources.

If a tribunal should examine such a situation, it would probably presume that the sources were compatible. If a State has violated the rules of the trade agreement, it would then have to demonstrate two things. It would first have to show that the measure had been taken to conform to an existing obligation under customary law. Hence, it would have to show that, for example, the right to life, work or health are indeed guaranteed under customary law. The state would then have to convince the tribunal that the trade agreement provisions is indeed incompatible with the right at

[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 2.

[2] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 22.

[3] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

risk, and that the measure in question and no other measure could enable it to fulfill its obligations under customary law. One can only imagine the magnitude of the task! Once these two facts were proven and the possibility of adhering to both sources simultaneously was established, the tribunal would have to decide on the order of precedence to be given to these sources according to the traditional rules of interpretation. The result is difficult to foresee in the abstract. It is not totally impossible that a treaty signatory could convince a tribunal that it had, during a period of turbulence on world financial markets, violated its obligation to allow the free transfer of capital in order to conform to customary law obligations concerning the right to health, to life or to the security of the person. It could argue that the potential effects of a financial crisis on its capacity to respect, protect, promote, and fulfil its human rights obligations demanded such a course of action[1]. It is thus worth questioning whether the Common Law System (in its structure) allows for more respect to Human Rights than that of the Civil Law System.

In this vein, arbitrators may look more or less favourably on human rights defences depending upon the particular human rights obligation in question. In other words, arbitrators could have a different stand in the cases present at hand; depending on the human rights breach in question. For example, is the State acting to prevent imminent bodily harm to local citizens? Or is the state adapting policies to further a social and economic right such as the right to the highest attainable standard of physical and mental health? Similarly, tribunals might also take differing views depending upon the perceived range of policy options available to governments in advancing the human rights objectives in question (e.g. were there measures which might have impacted less onerously upon the foreign investor while fulfilling the human right goals in question?)[2].

As such, some believe that leaders can and must be challenged when they transgress the fundamentals of human rights even if their actions were mere applications of a binding agreement. In this regard, NGO's have made it very clear that **no treaty should apply when contradicting with the people's rights, considering that human rights obligations are as legally binding as investment**

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 13.

treaties. And whilst this remains a *perfectionist demand*, both legal and practical challenges exist (as will be noted further in this dissertation).

NGO's have found it somewhat challenging to reflect the superiority of human rights norms over investment treaties in court proceedings. The most notable particular procedure used for human rights claims in investor-state arbitrations is by submitting *amicus* briefs to the investment tribunal.

In theory, human rights issues can be raised by the investor, by the host state itself, or by non-party actors. In case of the investor calling upon human rights issues, generally speaking, and absent unjustified discrimination between domestic and foreign investors, existing laws at the time an investment is made will not create a problem. Rather, it is changes in the laws that can lead to assertions of breaches of the IIA protections for foreign investors[1]. Surprisingly, human rights matters are rarely invoked by the investor. Rather, it is those submissions of *amicus curiae* that have seen the most impressive development in recent years.

Definition of amicus curiae submissions

The concept of *amicus curiae* was largely developed through the US courts[2], and was subsequently taken on by a range of other national legal systems[3].

Amicus curiae literally means "friend of the court". The term is used to describe a person with strong interest in or views on the subject matter of a court proceeding, but not a party to the trial, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such *amicus curiae* briefs are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases. Such may be filed by private persons or the government.

Amicus curiae are a person/entity who has been allowed by the court to plead or make submissions but who, however, is not directly involved in the action.

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[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 17.

[2] In appeals to the U.S. courts of appeals, such brief may be filed if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof. Fed.R.App.P. 29. See also Sup.Ct.Rule 37.

[3] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 5.

The concept of an amicus curiae is not inherently restricted to any one form of participation and could in appropriate cases include attendance at and participation in oral hearings, access to the disputing parties' documents and even cross-examination of witnesses. For instance, the European Court of Human Rights (ECHR) has previously permitted third parties to participate in the oral hearings stage of the proceedings[1].

The issue here is whether public international law is a unified body of law, in which one branch informs the workings of the other, or whether international investment law has become a separate branch unencumbered by considerations coming from other legal sources. This issue goes directly to the question of global governance over multinational corporations, and whether their extraordinary rights and remedies under international investment agreements pre-empt all human rights concerns.

In fact, investment law does not have a history of isolation from other parts of international law, although the impact of other branches of international law to date has been minimal. While this history does not reveal any inherent barrier to human rights law being a source of law that is relevant to the design, interpretation and application of international investment agreements, it also reveals that the systemic integration of human rights values is virtually completely absent in this area[2].

Prohibitions against slavery, genocide and human trafficking, for example, are fundamental principles of international law, accepted by the international community and of a so-called *jus cogens*[3] nature. It could well be that, in their defence, States claim that they act in pursuance of *jus cogens* obligations, pointing to the peremptory nature of such legal obligations and suggesting that this would justify a violation of

[1] Levine, (Eugenia), Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, Harvard School of Law, working paper 2010, page 9.

[2] (International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 9)

[3] a Latin phrase that literally means **"compelling law".** It stems from the idea already known in Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold.

IIAs. This may arise even where an investor is not involved in activities that directly trigger *jus cogens* questions[1].

National human rights' catastrophes originating from corporate malfunction are not new. However, in the past few years, the provocation of human rights issues into investment tribunals has spread at a particularly favoured manner.

Few tribunals have begun to grapple with many of these challenging questions and they find little in the way of guidance in the International Investment Agreements themselves – most of which are silent as to such considerations. Nevertheless, there are certain interpretive tools available to arbitrators, including provisions of international agreements and conventions. One example is the Vienna Convention on **the Law of Treaties** which has been underutilized by the International Investment Agreements arbitrators to date. For example, article 31 3 (c) has been cited as a possible tool for reconciling different international law norms in the areas of foreign investment and human rights[2].

The tribunal panels, so far, have each dealt with these interventions in a different way;

(i) Several NAFTA tribunals operating under UNCITRAL rules along with ICSID (International Centre for Settlement of Investment Disputes)[3] tribunals have accepted *amicus curiae* submissions relating to human rights and thus gave *amicus curiae* the right to interfere in the arbitral proceedings,

(ii) Others granted them the right to submit their briefs without the right to access documents thus limiting their effectiveness in the procedures, and

(iii) A number of tribunals refused the intervention in the first place.

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[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 13.

[2] Please refer to (Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7) – page 6) for more info.

[3] ICSID, Rules of Procedure for Arbitration Proceedings, available at http://www.sice.oas.org/dispute/comarb/icsid/icsid2a.asp hereinafter, ICSID Rules.

But whether tribunals accept amicus curiae submissions or not in relation to human rights, the current trend seems to indicate that the role of human rights in investment arbitration will continue to increase.

To date, there are few known investment cases where a State claims to have acted in defence of such a high-order human right. In a recent case dealing with a different subject, the investment tribunal expressed its view on a related issue: *whether or not investors should be granted protection in case they have violated jus cogens type of obligations whilst acting in full compliance with their duly binding contract*[1].

In one case, the tribunal expressed the view that protection "should not be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs" [2]*. In general,* Tribunals might assert jurisdiction over a case, but hold that investment treaties (or certain protections therein) are void or inapplicable in circumstances where they come into conflict with a peremptory (or *jus cogens*) norm[3].

There is clearly positive law in the spheres of both international investment law and international human rights law. By virtue of the *pacta sunt servanda* principle *(Latin for "agreements must be kept"),* States that have consented to the norms of the agreements must, in good faith, fulfill their obligations ensuing from this positive law. *Jus cogens* provisions constitute an exception, of course, in that they bind states without the need for consent. Thus, these provisions do not signify a "loss" of sovereignty, as is often believed, but an exercise thereof. However, this sovereignty was expressed differently when deciding on the specific means to be used to concretize these commitments or, in other words, when implementing mechanisms to sanction defaults. Indeed, and as we will see further in this thesis, the difference

[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 13.

[2] Case reference: Phoenix Action Ltd. v. Czech Republic. For more info, refer to Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 13.

[3] (Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7) – page 15)

between the mechanisms established in human rights law and investment law is a major problem with the relationship between these two bodies of law. While the investment agreements enable investors to sue states that obstruct the full enjoyment of investors' rights, international human rights treaties provide weak or non-existent remedies to citizens, however grave the violations[1].

Ultimately, the relationship between international investment law and human rights law must deal with the thorny question of the intent of the legislator—or, more bluntly, the question of political will. Unfortunately, we have come to a stage in the development of international law where the rights of some citizens receive so little protection while the rights of private actors receive so much more. This leads us to an initial question: *What was the real intent of the "legislator" when it made the law?* One could strongly argue that the interests of investors was given precedence over those of citizens. This is manifested by an extremely powerful and effectively enforced body of investment law, on the one hand, and a body of human rights law with useful normative content but lacking in effective enforcement mechanisms, on the other. One way to start addressing the current puzzle involved in the duality of sometimes contradictory international legal commitments is to go back to one of the original motivations for the creation of both legal regimes, that is, **how to promote sustainable development.** This question, in itself, is one of the main reasons of realization of arbitration in investment treaties. Sustainable development requires structural economic changes, which can only be brought about through investment. Investors frequently resort to international arbitration as a dispute settlement mechanism to protect their investments. Arjun Sengupta, UN Independent Expert on the Right to Development, reminds us of the challenge of implementing the right to development as a basic framework to guide international cooperation and policy design[2]:

> *"Recognizing the right to development as a human right raises the status of that right to one with universal applicability and inviolability. It also specifies a norm of action for the people, the institution or the state and international community on which the claim for that right is made. It confers on the implementation of that right a first-priority claim to national and international*

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

[2] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

resources and capacities and, furthermore, obliges the state and the international community, as well as other agencies of society, including individuals, to implement that right. The Vienna Declaration not only reaffirmed that the promotion and protection of such a right "is the first responsibility of Governments," but also reiterated the commitment contained in Article 56 of the Charter to take joint and separate action, stating specifically: "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development"

Within the framework of the right to development or otherwise, reviewing the compatibility (or incompatibility) of different bodies of international law and designing innovative means to ensure that international investment law does not compromise respect for human rights obligations are an urgent and highly important task[1].

Human rights involvement in investment arbitrations raises many difficulties on the theoretical and practical level. **Human rights** Solutions to such difficulties have not yet been discussed satisfactorily. This paper **"human rights in Investor-State Arbitration"** deals with this significant dilemma. The significance of this study lies in the delicate position of investment cases examined in this area in view of the agreements and/or violations that provoked human rights issues. Such analysis will be in view of corporate social responsibility, arbitral jurisdiction over human rights issues on the procedural and the substantive levels, public policy, and the principle of sovereignty. The benefit of human rights submissions raised in international investment arbitration in terms of social-justice issues will be discussed, as well as International law's unity.

This up-to-the-minute happening raises many questions like; when are third-party interventions valid in investor-state arbitration? Whether or not the superiority of human rights Law restricts the decisions of the arbitral tribunal? And what value has *amicus curiae* interventions had in promoting social justice issues in the arbitration process?

To get to the bottom of this tight spot, this paper will be divided into two parts:

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

In the first part, the scrutiny will be upon the extent to which human rights interventions in investor-state arbitrations are possible as regards of the applicable law and the jurisdiction of the arbitral tribunal,

the second part will deal with treaties and practical cases relating to human rights in investment arbitrations. We will also investigate the different approaches towards amicus curiae submissions and the resulting effect on tribunals.

Part One

The Rationale for human rights Involvement in Investment Arbitration

Despite the absence of human rights provisions in International Investment Agreements ("IIA"), human rights issues occasionally arise in IIA arbitrations. The parties in dispute and/or arbitrators have sometimes referred to human rights law for interpretive guidance in determining the substantive protections owed to foreign investors. Yet, the principal intrusion of human rights in investment arbitration remains through amicus submissions[1].

Amicus submissions force the tribunal to consider the balance between public interest and investor's rights. They ask the question; *to what extent can one interest prevail over the other? And, what are the criteria to strike the balance between private and public claims?*

Before attempting to substantiate the content of such obligations, it seems necessary to question whether legal persons such as corporations can be bearers of human rights responsibility. After all, these are traditionally considered to pertain to the domain of States alone. As this would be a subject that requires publications and studies to cover, we note that we favour the modern view which considers that corporate bodies can be and are actually held liable for any human rights violations. But we note that there are no generally accepted international legal principles that directly bind businesses. Although Corporate Social Responsibility is increasingly becoming a public demand for corporate success especially with the ever-increasing public awareness, a business' personal commitment cannot be the only pillar to be relied upon in securing human rights norms. There has to be some form of legal responsibility. The alarming thing is that multinational enterprises' power may not be matched by a corresponding degree of responsibility and accountability. Some have a budget that far exceeds that of many developing countries and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these multinational enterprises operate, the rule of law is ineffective; there are no legal remedies, and no

[1] (Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 4.

possibilities of redress – which goes to say that the multinational enterprises can act in near-total impunity[1]. This is where the international legal order comes in place, setting boundaries and returning Fair and Equitable treatment to order. The question remains is how effective the system is.

And eventually, apart from the "self-control" practiced by corporations to secure their reputation, the question would be, *"How to hold these powerful investment corporations accountable to their human rights violations if there is no system in place?",* more severely, *"how to hold them accountable if the basic idea of a possible link between an Investment Arrangement and Human Rights Obligation is in question?".* Our remedy is always in the legal system, and the answer thus lies in the hands of the arbitrators who will have to (at every chance of a linked case) assess (i) the divergence between the notion of Investment Arbitration and that of human rights, and (ii) the interlocutory linkage between Investment Arbitration and human rights. Based on this assessment, the tribunal would be able to determine the prevailing legal order of the distinct sectors of law and would thus reach a fair verdict as regards the disputed issue.

[1] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, 2004, page 6 / 433.

I. The Diversity in the Notion of Investment Arbitration and human rights

It is not technically impossible for treaties for the protection of investments to provide for human rights, but this would be highly unusual. The model Bilateral Investment Treaties ("BITs") for example of China (2003), France (2006), Germany (2005), the United Kingdom (2005) and the United States (2004) do not mention them[1]. Mention of human rights is equally absent from the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT); two highly important multilateral investment treaties. The ICSID Convention covers procedural and not substantial issues and hence does not address human rights. The most important print source for decisions on international investment law, the ICSID Reports, does not even include the term Human Rights in its index. This suggests that the present role of human rights in the context of investment arbitration is peripheral at best.

At the same time, it is beyond doubt today that international human rights law imposes a positive duty on states to adopt and enforce measures necessary to ensure that the economic activities carried on by businesses within their territory do not negatively impact the human rights of its people. This is the essence of the duty to protect individuals from the abuse of human rights by any potential violator; be it the government itself (and/or its agents or representatives), or other persons; Real or Corporate. There can also be no doubt that this positive duty extends to both domestic and foreign investors. The question for consideration is whether this duty on the State can come into conflict with the rights of foreign investors under international investment agreements, given that these rights may limit or condition the positive human rights duty of States.

Companies do not spontaneously want to be regulated, and one cannot grant them the benefit of the doubt when it comes to the implementation of Human Rights Charters. For companies to satisfactorily implement human rights charters, pressure should be imposed on them. That pressure should emanate from both the public opinion and legal authorities. Meaning, the same type of pressure as that which led

[1] See - Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 1. In its Articles 12 and 13, the US Model BIT does however address environmental and Labour Law.

to the adoption of the Charters by the State has to be applied. This leads to the inevitable conclusion that an independent and credible enforcement procedure has to be put in place. Sufficient monitoring and reporting activities is also expected. Some firm-specific codes make use of third party auditing. Still, many of the universal codes (such as the U.N. Global Compact - *a non-binding United Nations pact to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation*) appear to be relying exclusively upon the interest and ability of non-governmental organizations (NGOs), such as Human Rights Watch or Amnesty International, to assume this role without allocating any resources for the performance of these crucial duties. Moreover, without the availability of an independent adjudicator to interpret and apply the norms contained within any given corporate code, self-serving corporations or their agents could easily use the indeterminacy of language as a means of establishing "public relations compliance" rather than *the real thing*[1].

While social justice critiques of international economic institutions such as the World Trade Organization, World Bank and IMF (the International Monetary Fund) have been widespread for several years, it is only more recently that the social justice implications of international investment treaties and the way in which they are arbitrated has become of notable interest to academics as well as to wider civil society. As there is no central institutional framework that can set out any determinative answer to how human rights obligations will be covered throughout the application of these investment treaties, the primary process to which one must turn for the best answers available is the investor-state arbitration process and the decisions issued through it. This can be addressed in two inter-connected ways;

First, can disputes legitimately be raised to challenge the application (or non-application) of new measures taken by governments to protect human rights in their jurisdictions?

Second, if such disputes can legitimately be initiated, can foreign investors seek compensation for the taking of specific measures (not necessarily in direct breach to the Investment Treaty) by the State? And can one assess the likely outcomes of such disputes so that States may have confidence in their ability to

[1] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 9 / 436.

legislate in a manner consistent with their human rights duties in the face of the investor rights? [1]

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 15.

1) Procedural Adversity

There is immense variety between different investment treaties; there is also great variety between the different procedural rules under which they are adjudicated, **but there are unifying features of the system as a whole such that we can talk of *principles of International Investment Law.*** Unfortunately, all principles are of no use if they are not supported with an effective system to implement justice to all stakeholders. In this regard, the adjudicatory structure has at times been described as *an entrenched system of investment treaty arbitration designed to protect investors from the exercise of public authority* which is established as a general adjudicative system in the regulatory sphere[1]. We will not excavate into the details of the many procedural particulars of each of investment and human rights claims due to the multitude of agreements there is. Rather, we will shed the light on the highly evident peculiarity between the fundamental procedures of each of the two.

In general, procedural rules included in an International Investment Agreement will prevail over generic arbitration rules used in an arbitration such as the ICSID or UNCITRAL Arbitration Rules[2]. In investment disputes initiated under NAFTA chapter 11, an investor may choose to proceed on the basis of three different sets of arbitral rules: ICSID Arbitration Rules, the ICSID additional facility Rules or under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules)[3] on an *ad hoc* basis[4]. Although arbitration under ICSID is now the predominant form specified in Bilateral Investment Treaties, some agreements continue to refer to different procedural rules. Some treaties also make reference to the Arbitration Rules of the International Chamber of Commerce. As such, there is a growing number of different regimes governing investment arbitration, each with their

[1] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 2.

[2] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 31.

[3] UNCITRAL Arbitration Rules, available at http://www.jus.uio.no/lm/un.arbitration.rules.1976/

[4] See, NAFTA, ch. 11, art. 1120, which stipulates that a disputing investor may submit a claim against a host State to arbitration under either the Rules of the ICSID Convention, if both the host State and the home State of the claimant are parties to the Convention, or the Additional

idiosyncratic provisions[1]. But do these differing international investment procedures currently correctly balance the need to protect commercial interests and confidentiality with the requirements of transparency and openness where sensitive regulatory decisions of government are at issue? At the heart of these problems, it is argued, is the difficulty of reconciling a process with routes in private arbitration with cases which involve the regulatory decisions of sovereign governments[2].

At the WTO, disputes are settled in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes, which establishes a Dispute Settlement Body ("DSB"). Contrary to the mechanism implemented by NAFTA Chapter 11, this mechanism can only be used by members (all of them states), not nationals thereof. The institutional phase of dispute settlement begins with the formation of a panel, which issues a recommendation. The parties to the dispute can then appeal to the Standing Appellate Body, which reviews issues of law and legal interpretations of the special group[3]. The mandate of the panel is limited to WTO agreements, and members cannot use them to complain of the violation of human rights norms by another member. Likewise, the Appellate Body's jurisdiction expressly excludes agreements outside the WTO system. The issue here as well is to consider whether a panel or the Appellate Body could use legal norms originating outside the WTO system, in our case study human rights norms, once a complaint has been filed against an alleged violation of a WTO agreement. That is, how should the DSB rule on a situation of incompatibility between a WTO agreement and human rights provision?[4]

Complaints Initiation Procedure:

In regard to Investment proceedings: Investment protection treaties provide for their own system of enforcement. In investor-state arbitration, a state must submit

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Facility Rules of ICSID, if either the host State or the investor's home State is a party to the ICSID Convention, but not both, or the UNCITRAL Rules.

[1] Levine, (Eugenia), Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, Harvard School of Law, working paper 2010 page 5.

[2] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 4)

[3] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[4] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

itself to commercial arbitration with a foreign investor based upon a general statement of consent contained within the relevant treaty[1]. States typically give advance-consent to international arbitration in cases where a foreign investor alleges breach of the treaty protections. Thus, foreign investors may be able to bypass national courts, and pursue legal action against a government before an international arbitration tribunal in cases where the international agreement has been breached by the state and have harmed their interests[2]. Investment treaties contain a delineation of exactly what kinds of investors/investments may qualify to bring a claim. International investment protection treaties permit investors to bring claims on their own behalf, or on behalf of their investment enterprises, in the territory of another state party. Investors cannot bring claims against their home states, and investors cannot bring claims if their home state is not a party to the treaty[3]. Foreign investors would initiate arbitral proceedings for actions initiated by the State and which would contradict the duly signed agreement which the former benefits from.

On the other hand, in regard to Human Rights proceedings, we will note a lot of procedural difficulties when it comes to human rights claims especially at the initial stages. To begin with, it is worth noting that only two of the seven major UN human rights treaties lack a complaints procedure – the CRC and the ICESCR. In 1990 the ESCR committee began discussing such a procedure, in 1993 the Vienna World Human Rights Conference authorized further work on the question, and in 1997 the Committee submitted a complete draft Optional Protocol (UN Doc. E/CN.4/1997/105)[4]. Many human rights treaties still do not foresee the possibility of individual complaints by private persons, let alone juridical persons.

For the past decade an international complaints procedure has been under consideration, whereby an **individual-complaints mechanism** would be put in

[1] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 430 / 3.

[2] Example on Expropriation and the harm of property please refer to "Bilateral Investment Treaties and Land Reform in Southern Africa, 2010, page 5".

[3] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 20 / 447.

[4] International Human Rights in context, P. 362.

place. Unfortunately, it reflected a distinct lack of enthusiasm on the part of governments. This step, if accomplished, would bring the process of human rights complaints a step closer to international investment procedures complaints. Yet, there are some scholars who are strongly against this step. Micheal J. Dennis and David P. Stewart, for example, are strongly critical of the proposal and believe that the proposal for a new individual-complaints mechanism remains an ill-considered effort to mimic the structures of Investment Agreements – *and largely for mimicry's sake*. They conclude in their book:

> *"…There is still no reason to believe that they [the arbitrators] would, in fact, have better access to, or understanding of, the relevant economic, demographic, and statistical data than the government concerned, much less the time and ability to make more informed or effective choices about the allocation of limited resources in a malfunctioning economic system. Even if the adjudicators were to prove enlightened, it must be asked would it be the most desirable political choice to vest international adjudicators with the authority to proclaim what must be done domestically? Again, we think not."*[1]

Despite the sacred *right to a court*, the immunities given to some parties make the first barrier in the face of a person claiming human rights breach. One of the fundamental human rights is the "Right to a court". This right is an aspect of the human rights conferred on all persons by major conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region and are not concerned specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of international agreements' guarantee of treatment in accordance with international law, including fair and equitable treatment and full protection and security. On the other hand, there are assured statutory immunities of certain state agencies before their own courts. This form of immunity could arguably interfere with the human right to a court hearing. On top of that, relatively small number of human rights treaties grant legal remedies to individuals. Equally frustrating, the requirement of the exhaustion of local remedies as a condition for the exercise of jurisdiction by the international body is rare in investment law, whereas the contrary applies to human rights law where the necessity to exhaust local remedies is the rule. The system of investment arbitration places the investor and the State on an equal footing, thus supplanting diplomatic

[1] Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights", 98 AM.J.Int>L. (2004) page 462. International Human Rights in context, P. 362.

protection[1], but given the strict procedures of human rights' proceedings, it may, nonetheless, be necessary to take steps domestically to ensure that an award made against the investor – assuming he is the breaching party – can actually be enforced in their courts. In the absence of such statutory authority, an investor could challenge the award on the basis that legal remedies were not exhausted[2].

Procedural adversity in initiating legal proceedings defied in amicus curiae briefs:

Claimant companies and States defending claims have rarely raised human rights arguments in investment arbitration proceedings, and when they have done so, arguments have tended not to be set out in any great detail. On the other hand, civil society organisations, intervening in investment arbitration proceedings have regularly raised detailed human rights arguments through *amicus* submissions. In the cases where permission to make amicus submissions have so far been granted, human rights arguments have been mostly raised by petitioners. This contribution therefore analyses this recent trend in international investment arbitration for third party interventions which raise human rights arguments[3] and which thus defies the disparity between the legal proceedings of each of investment arbitration and human rights.

The increasing transparency surrounding international investment agreements arbitrations, and the associated willingness of arbitrators to entertain legal arguments from outside actors may give rise to an increasing number of interventions by non-parties seeking to inject human rights evidence or legal argumentation into certain disputes[4]. On top of that, the consensual nature of arbitration and its limited jurisdiction, given that the duties of the Tribunal derive from the treaties which govern this particular dispute, prohibit the tribunal from accepting

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[1] - Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 2.

[2] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 21 / 448.

[3] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 4.

[4] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7) – page 4.

amicus curiae submissions. Since neither the applicable treaties nor the consent of both parties provide for the participation of *amicus curiae*, the Tribunal does not have the power to join a non-party to the proceedings; to provide access to hearings[1].

This increases the hesitation assumed by states for opening its boundaries to new investors. In principle, the fear of being sued by a foreign investor may well have a chilling effect on states when they consider enacting legislation to respect, protect, promote or fulfill obligations relating to human rights. Furthermore, such lawsuits become effective pressure tactics for investors when a state's actions put their interests in jeopardy. Been and Beauvais (for example) mention several examples where companies successfully threatened NAFTA member states with the use of the Chapter 11 dispute settlement mechanism if the latter implemented measures that might interfere with the enjoyment of the former's property. One case involved threats by the tobacco company Philip Morris in response to Canada's announced intention to ban the use of the adjectives "light" and "mild" on cigarette packages since they might imply that these cigarette types are not as harmful. The company claimed that such a regulation would violate Article 1110 by being tantamount to an expropriation of its trademarks and goodwill. This example clearly illustrates the potential chilling effect of Chapter 11 on states as they attempt to fulfill their obligations in the area of human rights, in this case the right to health[2].

Dispute mechanism – arbitral or court procedures:

Generally speaking, the dispute mechanism between the two types of arbitrations themselves are different. And although we will be comparing between court procedures and international arbitration, it's important to note the differences in dispute mechanisms between institutional and ad hoc arbitration. Whilst institutional arbitration is carried out by a specialized institution, in ad hoc arbitration, the parties will have to determine all aspects of the arbitration themselves. Parties, in the latter case, could select the arbitrators they feel have the relevant experience to their case,

[1] This was reflected in the Tribunal's justification for refusing amicus briefs in Aguas del Tunari v. Bolivia which will be discussed later on. - Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 11.

[2] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

in addition to determining the number of arbitrators, the applicable law, and the procedures. Ad hoc arbitration could thus be considered more flexible.

In all cases, the formulation of the compromisory clause in the treaty or contract will reveal the breadth of the tribunal's jurisdiction. In many cases, it will be restricted to investment disputes, or to alleged violations of the substantive rights in the investment treaty. In the case of NAFTA, article 1116 effectively delimits NAFTA's applicability to alleged breaches of Section A, i.e. to breaches of NAFTA obligations. Similarly, Article 26(1) and (2) of the ECT provides that only breaches of obligations contained in its Part III are arbitrable. These restrictions to disputes originating from the breach of a treaty obligation coupled with the fact that these treaties contain no substantive human rights standards suggest that arbitral tribunals will lack the competence to rule on human rights issues as far as the NAFTA and the ETC are concerned[1].

Confidentiality of proceedings:

The confidentiality of the investor-state process raises issues of democratic rights to basic information about government conduct in relation to public interest issues. It brings up important issues relating to government accountability. It nurtures human rights concerns relating to the right to information. All of this, has played a major role in attracting investments into the countries which support Arbitration as an Alternative Dispute Resolution. Thus reflecting on public interest. It secured the trade secrets of major corporations whose now biggest asset is their "know-hows". The confidentiality of arbitration also reflects on securing the reputation of organizations. And in our modern world, where a corporation's reputation is one of its most important assets, we can note that corporations would thoroughly consider any agreement that might later (even remotely) affect its reputation. Still, the problem is that the ADR remedies cannot always have a positive effect. The confidentiality of the investor-state process has significant impacts on the basic political rights of citizens to participate in the democratic process, both at domestic and international levels. It prevents citizens from being able to follow or participate in public discourse as to the legitimacy of regulations adopted in many cases through democratic

[1] - Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 2.

means, or to participate effectively in the determination of such legitimacy by tribunals[1]. There is a still small but growing number of arbitrations in other arbitral form that have strong rules on confidentiality, such as the Stockholm Chamber of Commerce, the London Court of International Arbitration, and the arbitration facility of the International Chamber of Commerce in Paris. As a result, there is a growing risk of even higher levels of secrecy/confidentiality surrounding these arbitrations, as only ICSID has a mandatory posting of all its cases[2].

On the contrary, human rights cases are usually a magnet for the media and their details are thus justifiably widely covered. Human rights are understood to be near the heart of many international news issues, from international massive group cases to isolated incidents across the world, — and increasingly linked to discussions of international debt and trade, education and health. Coverage of human rights in the media is therefore likely to continue to grow — and it is appropriately expected from journalists and broadcasters to report them accurately[3]. The media are more receptive to human rights issues today due to the public concern and the nature of rights threatened by their breach.

For the first time since observers began to follow the known investor-state arbitrations, more investors chose to use the UNCITRAL Rules than ICSID in 2006. Some civil society groups have obtained observer status in order to promote transparency in arbitrations involving states. The current system, it may be argued, creates significant incoherence between **the secrecy** imposed by one set of UN Rules and the **calls for transparency** as one of the key ways to increase the appropriateness of corporate conduct. The effect perhaps is more drastic in developing countries. It is also arguable that these UN arbitration rules breach basic rights of citizens to information that should be public, as well as accepted UN norms regarding judicial processes dealing with public welfare matters. Coherence of UN approaches to these issues is thus at stake in the current UNCITRAL Rules revision process[4].

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[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 30.

[2] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 30.

[3] http://www.ichrp.org/files/summaries/22/106_summary_en.pdf

[4] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 30.

Enforcement of the verdict:

Despite the fact that international economic and human rights obligations share a focus on protecting non-state actors and often provide an individualized mechanism for enforcement, there is one notable distinction; the effectiveness of enforcement[1].

The fulfillment of human rights is greatly compromised by problems relating to their justiciability and overall weak mechanisms for enforcement. There's a limited enforceability of human rights tribunals' decisions by the competent bodies, whether the UN Human Rights Committee, the Inter-American Commission on Human Rights, or the African Commission of Human and Peoples' Rights. The Human Rights Committee reported that in only one-fifth of cases of ICCPR[2] violations between 1991 and 1999 did it note the State's will to implement measures of relief, remedy or compensation (and these, be it said, are far from realization itself) [3].To these obstacles may be added the phlegmatic political will of governments to implement these decisions. When it comes to Corporate Conduct, the major flaw of existing codes and of the use of domestic tort mechanisms, such as the U.S. Alien Tort Claims Act, is their lack of enforceability. For corporate codes, additional flaws exist in the lack of an impartial, independent adjudicatory mechanism to forge meaning out of indeterminate legal terms[4].Enforcement of Investment Awards, on the other hand, is completely the opposite as it provides possibly clearer methods of enforcement. Although it is true that securing a final arbitral award is often only the beginning of a

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[1] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 430 / 3.

[2] ICCPR is a key international human rights treaty, providing a range of protections for civil and political rights. The ICCPR, together with the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights, are considered the **International Bill of Human Rights**.

[3] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[4] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 10 / 437.

complicated process in enforcing arbitral awards against sovereigns and state entities, the investor can still follow standard procedures to ensure the award is enforced. There are many recurring issues at the enforcement stage of awards which provide good case studies for proper enforcement[1]. One must consider the applicable international and domestic legal frameworks in this regard. The International Centre for Settlement of Investment Disputes has defined a mechanism to the enforcement of interim relief and the issues of sovereign immunity and state entities.

The New York Convention[2] is one of the key instruments in international arbitration. It applies to the recognition and enforcement of foreign arbitral awards, and the referral by a court to arbitration. The convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. The convention defines several grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. Still, the convention fails to mention basic Human Rights issues that could lead to unfairness of the trial, like the right to self-defense, fair trial, etc.

As for mixed claims tribunals, even though it can only award compensation as relief, its award is normally eminently enforceable in most developed countries. Taking NAFTA as an example, its mere inclusion in the same, mixed claims arbitration has become increasingly more popular[3] especially due to the better enforceability opportunity. As such, notable cleavages remain between the effectiveness of enforcement mechanisms in the economic fields of trade and

[1] Please refer to Enforcement of Investment Treaty Arbitration Awards : A Global Guide ; by Castal Di Mourre, Published in 2015 ; Editor Julien Foret.

[2] New York, 10 June 1958.

[3] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 430 / 3.

investment, as compared to the equally important fields of human rights, environment, and labor.

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Considering all of the above, we note that the difference between the procedures in court / arbitral proceedings between human rights and investment arbitration starts from the very first step of a decision of a lawsuit, and up until the issued verdict is implemented.

Investment arbitration tribunals initially refused to allow third-party participation because of the inherent difference between arbitration proceedings and those before domestic or international courts. Tribunals also denied participation in Abritral proceedings due to procedural obstacle represented by the consensual nature of arbitration. If the parties were unwilling to consent to a third-party participation, the tribunal lacked the power to allow any for of amicus curiae intervention. In *Aguas del Tunari SA v. The Republic of Bolivia* known as the Bechtel case (which took place pursuant to the provisions of the Netherlands-UK BIT and which will be further discussed later on), the tribunal denied citizens and environmental groups standing at the arbitration due to procedural obstacle represented by the consensual nature of arbitration. As the parties were unwilling to consent to NGO's participation, the tribunal lacked the power to allow any form of third-party intervention[1].

[1] Levine, (Eugenia), Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, Harvard School of Law, working paper 2010 page 10.

This case will be further studied in Part Two of this paper.

2) Subject-matter of investment agreements and human rights norms

Alongside the significant discussion over the procedures of international investment arbitration with the comparison to human rights claims, there is also controversial substantive social justice issues raised. Notably, international investment law covers issues of economic and responsibility-related nature, and it touches upon (host/home) States' domestic interests, and private rights. The interaction between all these facets is far from the legal framework of human rights treaties[1] which are mainly concerned with the wellbeing and protection of the human nature of individuals.

The relationship between State and investors is embodied in the so-called State contracts[2]. A 'State contract' is defined as *"a contract made between the State, or an entity of the State, which may be defined as any organization created by the statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality"*. They are generally considered as being different from ordinary commercial contracts, since elements of public law regulation and governmental discretion are often identified in the host State's decision to negotiate, conclude, and terminate such contracts.[3] Investors, in these cases, also benefit from the clauses of Investment Treaties the State is a party of. Human Rights norms, on the other hand, are essentiality present from within the human nature.

The Ground Rules / the Essence of protection:

The incompatibility between human rights provisions and investment agreements' targets might be contradicting. Said difference has been the topic of debate of some scholars. Human rights have drawn the strength from the injunctions

[1] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, PhD Programme in International Studies, Academic Year 2010/2011, University of Trento, – page 9.

[2] UNCTAD, State Contracts, 2004, p. 3, available at http://www.unctad.org/en/docs/iteiit200411_en.pdf, (last visited: 10 November 2010).

[3] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, PhD Programme in International Studies, Academic Year 2010/2011, University of Trento, – page 31.

expressed in different religious traditions to care for those in need and those who cannot look after themselves[1].Human rights laws all aim to apply one sacred rule: **the protection and respect of Human Dignity.**

When it comes to investment law, the rules are emergent from the interplay of three basic principles: (i) the economic self-determination of States, nations and people; (ii) the right of nations to economic development; and (iii) the Permanent Sovereignty of States, nations and people over their natural wealth and resources[2].

The rights of the investor being protected generally include:

- The requirement for **national treatment of foreign investors** compared to domestic investors in the host state; that is, treatment no less favourable than a domestic investor would receive;

- The requirement for **most favoured nation treatment** of foreign investors, so that an investor from a home state covered by a treaty is given the best treatment available to any other foreign investor in the host state;

- **Fair and equitable treatment**, also known as the minimum international standards of treatment required of the host state, is a baseline level of treatment a host government must provide to foreign investors. This includes, in most cases, the protection of the "legitimate expectations" of the investor; and

- **The prohibition against expropriation without compensation.** Customary international law seems to provide well-established principles to govern any expropriatory measure deemed to be lawful “public purpose”, “non-discrimination”, “due process of law”, and payment of prompt, adequate, and effective compensation.

[1] International Human Rights in context, P. 269.

[2] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, PhD Programme in International Studies, Academic Year 2010/2011, University of Trento, – page 14.

In that sense, the essence of protection of foreign investors lies in a simple rationale; *as States cannot invoke their domestic legislation to avoid international responsibility, they cannot in the same way refer to their internal legal order to deprive foreign investors of their rights under public international law*[1].

The right of states to regulate is an inherent aspect of state sovereignty. Of this, there is no doubt. Yet, states routinely place limitations on the exercise of this sovereign right through international law, be it in treaties or through the development of customary international law. Indeed, the restriction of sovereign regulatory capacity is one of the most important results of international law, and allows states to address issues in a coherent and effective manner. Thus, the limitation of sovereign rights by international investment agreements is not, in itself, objectionable. Rather, it is the very purpose of international law. The origin of the right to regulate in international investment law lies in the customary international law concept of "police powers". Police Powers has been defined as: "*The power of a state to place restraints on personal freedom and property rights of persons for the protection of the public safety, health, and morals, or the promotion of the public convenience and general prosperity. … The police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within the constitutional limits and is an essential attribute of government*[2]. This definition would seem, with some degree of certainty, to include human rights law either directly or through its related mechanisms, and hence exclude such regulation from being compensable as a breach of international investment rights. Basic Human Rights are certainly included in Public Order of the State. A simple example of such is the Right to Life. As such, where New York Convention defines Public Policy as one of the grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award, it's safe to say that the New York Convention, in its essence, has allowed the refusal of enforcement of an arbitral award where a breach of human rights has occurred. The problem is that, notwithstanding the general consensus on the police powers concept, no formula has ever been fully accepted for distinguishing between a compensable taking and a non-compensable regulation. Phrased in more technical language, the issue may be understood as determining when the nature and public purpose of a measure should be the final test of a regulation, or whether its economic effects on a business should be the test. No clear

[1] Indirect Expropriation in International Law, previous reference, page 15.

[2] Black's Law Dictionary, 6th edition, 1990.

rules are found for this choice. The uncertainty as to where to draw the line becomes even more acute when the rights of investors under IIAs are factored in[1].

International arbitration proceedings under Chapter 11 of the North American Free Trade Agreement (NAFTA) first focused attention on the wide-ranging areas of sensitive government regulation that could potentially be challenged through arbitration tribunals. Many of these cases appeared to have profound social justice implications, involving government regulation ostensibly aimed at e.g. protecting the environment, or ensuring a universal postal service. More recently, the impact of various arbitration processes under bilateral investment treaties is being realised[2].

Nature of persons protected:

In some respects, human rights and investment law differ dramatically, starting by the nature of persons included under the protection of the law.

In Jurisprudence, a natural person is a person that is an individual human being, as opposed to a legal person, which may be a private or public organization. Both have their own legal personality. A legal person can be a business entity, a non-governmental organization, or even a governmental organization. An investor can be a person or an organization that puts money into financial schemes, property, etc. with the expectation of achieving a profit. Historically, a human being was not always necessarily a natural person in some jurisdictions where a slave was a *thing* rather than a *person*.

Human Rights norms and Investment Law differ in the scope of coverage of persons under their umbrella. Fundamental Human Rights are implicitly granted only to Human Beings (or Natural Persons today). For example, the right for food, the right for education, and the right for physical security can only be provided to natural persons and cannot be granted to Corporations or non-governmental organizations. Investment Treaties, on the other hand, do not usually differentiate whether their provisions cover Individual Human Beings, or a Legal Person. All they aim at is arranging the relationship between the state and the "Investor"; regardless if this

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 18.

[2] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 3.

investor is an individual human being or a legal person. It's a strictly financial and economical relationship between different parties.

We note that, in investment arbitration, and in the cases where the investor is a natural person, human rights are rarely invoked by investors. This may in part stem from the fact that the standard of protection provided by human rights instruments is typically lower than the standard contained in investment treaties and contracts. Even where in cases where human rights of the investor could have been relevant, tribunals did not address the human rights issues. Thus in Biloune v. Ghana (an example which we will further discuss in Part 2 of this dissertation), the Tribunal declared it lacked jurisdiction to examine the allegations of human rights violations[1].

Nationality Privileges versus Humanitarian Equality:

The paradox of nationality as it exists in the investment context is alien to human rights law. In investment arbitration, nationality is crucial. Not only is the entire concept of Investment Treaties founded on the possession of a specific nationality, but to establish a tribunal's jurisdiction the investor must fulfil both positive and negative requirements; (i) the investor must be a national of a State party to a particular investment instrument (for example ICSID or NAFTA), (ii) and the investor must not be a national of the investment's host State. This has led to what is termed "nationality planning"[2].

By contrast, nationality is irrelevant in human rights law. Foreigners and nationals alike are guaranteed rights irrespective of any specific nationality. After all, it is the core of human rights that we are all born free and equal. The United Nations Human Rights office of the High Commissioner for Human Rights defines human rights as those rights that are "*inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any*

[1] Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 7.

[2] Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 17.

other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible"[1]*.*

In investment treaties, what seems more controversial than the equal treatment of all foreigners is the conferment upon national investors of rights against their own State. The privileged treatment accorded to foreign investors is based precisely on their quality as aliens upon the desire to attract foreign investments[2]. After all, the focus in Investment treaties is providing investors from the home state with special international law rights and remedies to protect the investment into the host state[3]*.* The focus in human rights treaties, on the other hand, is to protect these inborn rights across the globe, in any possible case.

Cases of Direct or Indirect Expropriation:

Another area that shows great differences between the two is the substantive issue of expropriation. In investment law, the "all or nothing" principle apply. This means that investors are entitled to full compensation in case of an expropriation and to nothing if a legitimate regulation is found to have occurred. By contrast, the ECHR has developed a more differentiated practice based on a proportionality test which includes the amount of compensation in its considerations. Rather than using the proportionality text to decide whether an expropriation has occurred, it is used to decide "whether a suitable balancing of the State's interest to interfere and the property protection interest of the person hit by the interference has taken place.

When it comes to the Human Rights obligations of States, three main points should be kept in mind; (i) a sizeable corpus of positive human rights law is codified in international treaties and other documents; (ii) by virtue of the *pacta sunt servanda* principle, states are bound to respect their commitments in good faith when they ratify such treaties; (iii) states' fulfillment of the obligations arising from the positive nature of these rights has been inconsistent, to say the least, due to the weaknesses

[1] www.ohchr.org/en/issues/pages/whatarehumanrights.aspx .

[2] Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 17.

[3] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, Page 3.

of domestic and international enforcement and sanction mechanisms. [1] This, in itself causes a lot of friction between the State's obligation to protect and serve the people, and the investment treaties it has been through; especially when circumstances change and the treaties no longer reflect proper working order. States can go through Expropriation as one of the means to set things back to order, but investment treaties allow investors from one State to sue for expropriation or indirect expropriation of their property. Indirect expropriation has been interpreted to include regulations or other activities of governments which significantly diminish the value of investments. On the basis of such a loss, foreign investors of a State which has signed a treaty can bring a claim against a State party to the same investment treaty directly before an international tribunal (and bypassing the domestic court system)[2].

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 2.

II. Interlocutory linkage between Investment Arbitration and human rights

Despite the notable difference between Human Rights field of Law and Investment Arbitration, one cannot but note down the overriding connection between the two. This connection eventually appears through arbitral proceedings. Indeed, the Special Representative of the Secretary General for Business and Human Rights (SRSG) recognized the need to identify and understand the linkages between international investment agreements and the debate on business and human rights at the consultations on the "Duty to Protect" held in Copenhagen in November 2007. The SRSG has explicitly and implicitly noted that international investment agreements can play an important role in defining the current relationship of human rights governance to multinational corporations[1].

Whereas it is true that the two fields of law differ in the procedures implemented as well as in the matter ruled, Amicus curiae submissions have now for a long time been a mechanism by which national and international courts and tribunals are accepting interventions by third parties who are not directly involved in proceedings. Most of the times this intervention is characterized by a will to protect human rights, by interfering in Investment disputes to which the State is a party thereof. This procedural beam of light allowing unconventional intervention has reflected on the relationship between Human Rights Law and Investment Arbitration allowing a new site of common grounds covering the same legal framework, and further covering the cheering for the humanitarian theme. At the international level, the European Court of human rights, the Inter-American Court of human rights, the European Court of Justice, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the World Trade Organisation Dispute Settlement Body, NAFTA, and ICSID arbitration tribunals have all accepted amicus submissions from non-governmental bodies or independent experts[2].

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, Page 5.

[2] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 5.

1) The Legal Framework

The framework of something is a hypothetical description of an entity or a process. It is the underlying structure of that thing; *"providing a factual framework for future research"*. The term Framework can also be used as a reference for Structure itself; *"the manner of construction of something and the arrangement of its parts"*, or the enclosing frame around something *"like of a door or window opening"*. It can also be a set of assumptions, concepts, values, and practices that constitutes a way of viewing reality. The term "Framework" is widely used in corporations to usually describe liability through publishing the documents of *"Framework of Accountability"* for their employees as a guideline for reference for responsibility to act / react and as a guideline for managers for applying liability. This allows the fair application of disciplinary measures and performance evaluations from one end and publicizes management expectations of employees from another.

Looking into those *sets of ideas* or *assumptions* (and especially with all the differences noted between Investment Arbitration and Human Rights Laws), it is without doubt that combining Human Rights with Investment Arbitration in the same "Assumption / Concept / Value / Practices" seems odd. Yet, both laws – and their applying procedures – meet in a *graph-like-circle-intersection* that serves both laws equally. And it is with due contemplation that one can understand that the binding of Human Rights Norms to Investment Arbitration is the general framework they both serve. The key word here being *"general".* In order to reflect specialization, our studies have become so concentrated on the details that we sometimes overlook the "general" framework of laws, or the big picture. The sight of the bigger picture was only triggered by the practical interference of amicus curiae submissions to Investment Arbitration.

Understandably, the inclusion of both laws in one generic framework might sound odd considering the differences in the subject-matter of the two fields of law. From one end, Investment Arbitration is an alternative jurisdiction to national courts and is sought to apply and uphold the regulations of Investment Agreements. It is usually bound to the parties of the Investment Agreement only, and, due to the sensitivity of Investment relations, the jurisdiction is usually selected by those parties in preference to national courts. From another end, Human Rights Law has a much wider framework; covering all the rights that our jurists can so far think of; starting with basic rights of food and water; and continuing to economic and even social rights. Human Rights Law does not require pre-approval or pre-signature of any

agreement between parties so that it becomes binding; its essence mandates that all humans are equal, and no document is needed to prove or administer this. This wide sense of Human Rights law allows its interference with many other fields as it is continuously expected to be the shielding umbrella for all human transactions.

Foreign investment (as supported by an international investment treaty – whether bilateral or not) is a phenomenon that opposes a private investor to a (host) State. It is hence an economic relationship established between actors whose nature is inherently different – *private v. public.* The legal framework regulating such partnership does inevitably encompass international and domestic law: the role and the extent to which international law may supersede (and be influenced by) domestic legal orders, is thus a further element to be analysed when studying direct or indirect issues resulting from the State's decisions.

At a closer look over both fields, and especially with the recent global changes in the legal order, we note that the laws are crossing paths more often than not, perhaps due to the type of rights Investment Agreements tap on and the duty of Human Rights thereof.

- States do not go into Investment Agreements unless and until they spot a requirement for fulfilling some of the needs of the people; a requirement which the State is usually incapable of covering without foreign support / interference.

- The needs of the people as noted above are usually that of a significance that forces the State to seek support out of its border lines.

- When trouble occurs, whether the source is internal at the investor's level, regulatory at the state's level, or simply a change in the market circumstances, the State is (rightfully) obliged to put the Rights of the People as a priority; whereas the Investor (rightfully) cherishes the Investment Agreement at a respected grade in all communications.

  Neither party would be mistaken in asking for the application of the compulsory rules that would guide the relationship. The Investment Agreement is in full effect (due to the nature of the dealing of the Investor), and Human Rights Law is equally in full effect (given the nature of the rights covered and the supremacy of Human Rights).

Choice of Tribunal, Choice of Rules:

Investment Arbitration aims at the protection of the parties of a treaty to secure their economic rights. It is built on the State's consent to a bilateral or multinational Investment Agreement which decides how the investment disputes will be dealt with. At the same time, Human Rights Law is based on securing the rights of humans simply because they are humans. These two laws found a common ground in their construction when the lawful application of Investment Agreements started threatening Human Rights' security. The two fields' relation has, thus, been struck by non-party actors shedding the light more and more on the linkage between the two and hence leading to Amicus Curiae submissions being accepted in tribunals. The acceptance of amicus curiae submissions represents a completely new view of the concepts of the two systems of law, and a new assumption for the extent of protection of each.

Some argued that international human rights conventions impose little or no obligations on the activities of non-state actors and, to the extent that they do impose obligations, their breach is a matter of dispute between the states that are party to the applicable treaty. This is now a far too narrow reading of the state of the international legal order today. Non-state actors have easily identifiable interests that do not necessarily conform to those of any particular state. In addition to possessing international legal interests, non-state actors also possess positive duties to act under such obligations and interests[1]. The submissions of amicus curiae have thus not been targeting to divine *new rights*; it is simply a matter of noting that there may be multiple actors against whom existing rights can be exercised[2].

States have obligations to respect, protect and fulfill human rights. In some cases, their obligations are immediate: for example, discrimination can never be justified, and freedom of association should always be respected. In other cases, their obligations involve a progressive realization of rights; for example, with respect to the right to an adequate standard of living, the right to the highest attainable standard of health, the rights to food, education and housing. Despite the high moral

[1] Bilateral Investment Treaties and Land Reform in Southern Africa, 2010, www.dd-rd.ca Rights & Democracy, page 5.

[2] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, Page 15 / 442.

status of international human rights norms, States for the most part have failed to provide adequate legal protection for victims of economic, social and cultural rights violations, many of them resisting the notion that this category of rights are justiciable[1]. An example of these economic, social and cultural rights is the right to participate in the conduct of public affairs which is codified by the Universal Declaration of Human Rights (UDHR), of which Article 21(3) states that ***"the will of the people shall be the basis of the authority of government."*** Likewise, the Vienna Declaration and Program of Action posit democracy as being ***"based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."***[2] And whilst this looks ideal in theory, it is imperative to question the extent to which the authorities are, in fact, echoing the will of the people in many parts of the world (especially in third-world countries) where the only remedy available for citizens in cases of human rights breaches by the government is through the local courts of the government itself. To that, we also question whether arbitration (as a system) could be a remedy for better securing human rights (especially in their economic and social sense). The right codified by Article 21 of the UDHR must be understood as a right to participate not only in public institutions but also in the determination of political, economic, social and cultural systems. A similar interpretation should apply to the right of peoples to self-determination and to freely determine their economic, political, and social development. Article 1 of the two covenants enshrines the right of people and the individuals forming them to choose their economic system and, consequently, to influence the process whereby wealth is produced and distributed, notwithstanding Article 17 of the UDHR which guarantees individual property rights, people and individuals possess the inalienable right to participate in that process[3]. The ECHR for instance, grants any person who feels that his rights have been violated by a State Party the right to take a case to the court (European Court of Human Rights). Governments who signed up to the ECHR have made a legal commitment to abide by certain standards of behavior and to protect the basic rights and freedoms of people.

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] BACHAND Remi, and ROUSSEAU Stephanie, previous reference.

[3] BACHAND Remi, and ROUSSEAU Stephanie, previous reference.

Seen through a rights-based paradigm, there are balancing rights-based claims that States need to consider in order to ensure that they are protecting the rights of their people to essential services such as water, or vulnerable or otherwise disadvantaged groups (e.g. indigenous peoples). These are subjects which potentially engage human rights norms and standards set out in international human rights treaties and many national constitutions. Increasing numbers of academic commentators, UN Agencies and NGOs have picked upon the human rights dimensions of many international investment cases[1].

Foreign investment is, for many states, a major component of their development strategies, and is obviously an economic activity. As such, it has a direct bearing on the economic and social welfare of not just the investor, but also on the communities in which the investment is made and on the people living there[2]. In this aspect, Investment treaties' role is twofold. On one hand, they serve a political role *(we need to keep in mind that globalization forces governments to enrol in treaties in order to survive the current order)*, on the other, they embrace positive economic benefits for the community. Such treaties are supposed to help in the prevention of negative economic consequences for poor and indigenous communities and the protection of rights in these communities. Human rights are protected and respected as long as the treaties are serving these goals. But as soon as this balance is knocked, then the uprising of defence begins; and hence the claims of NGO's and members of the civil society for a balanced arrangement which protects the citizens of the state in the first place.

To secure the Investor's rights, and to ensure the State's reassurance to foreign investment, almost all of the recent generations of international investment agreements have included special dispute settlement processes for foreign investors. This is the so-called *"investor-state arbitration"* process. It allows foreign investors the right to initiate international arbitrations directly against the host state for alleged breaches of the international investment agreements rights they obtain. Only private foreign investors can initiate these arbitrations, as the foreign investors have no obligations under the international investment agreements to be enforced against them through the dispute settlement process. Many of these arbitrations take place in

[1] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 4.

[2] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 8.

a completely confidential setting, a fact that raises its own human rights issues. To date, many arbitrations under this process are known to have been initiated, with no way to know the exact number due to the confidentiality rules applied in many cases[1].

A State has an unambiguous role in considering the communities and considering worst-case scenarios when signing a treaty. In the context of state duty to protect and promote human rights, the most critical issues that arise are the duties to legislate in order to implement international human rights obligations into domestic law and to enforce such legislation. In investment law terms, this relates to what has been described in some texts as the right of host states to regulate. At the same time, however, international investment agreements limit the right of states to regulate, and these limits may extend to the state duty to protect and promote human rights. These limits arise from the application of the investor rights provisions common to almost all international investment agreements, and the ability of investors to unilaterally enforce these rights in investor-state arbitrations.

Complications do not arise from perfect working order. Problems arise when issues, which were not expected at the beginning of the planning of the Investment Agreement arise and need to be dealt with. This is when Glitches of the IA are identified. In normal running of the day-to-day operations, and as long as the Investment Treaty is serving its role in providing a good economic enhancement for the state, then there is no foundation of the breaking of human rights. But, as soon as this equilibrium between the rights of the investor and the rights of the citizens of the state is weighed in disadvantage to the peoples, then human rights law becomes a major player in determining what should continue and what should be altered. In the end, the State's sole existence is to serve the people and ensure their rights and requirements are fulfilled. When a taking is in breach of contractual or treaty obligations, it has to be considered illegal, and consequences will thus need to be dealt with to reform the situation.

International law concerning the protection and treatment of aliens developed primarily as customary international law, resulting from the first wave of globalization. Customary rules were further complemented by bilateral and multilateral treaty rules, with the aim of encouraging secure and peaceful international relations in the

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, Page 4.

investment field. Accordingly, the State would be compelled to grant to foreign investors the same treatment applicable to nationals, at the minimum. Therefore, in this sense, the national treatment was to be deemed insufficient insofar as it did not reach the standards generally accepted by civilized nations.

Nationally, there are two types of provisions that expressly address human rights concerns. The first type is that which would address the state duty to protect and promote human rights in terms of its regulatory, enforcement and policy processes. The second is that which addresses the investors directly and set requirements for their observation of human rights standards[1].

Despite the absence of human rights provisions in IIAs, human rights issues occasionally arise in IIA arbitrations. For example, foreign investors and/or arbitrators have sometimes referred to human rights law for interpretive guidance in determining the substantive protections owed to foreign investors[2] due to their generic, supreme and fair nature.

Most bilateral investment treaties provide the investor with a choice of commercial arbitration rules under which to bring a claim. The drafters of future treaty texts need only make minor changes to ensure openness of future proceedings. The rules themselves are general in scope, leaving considerable leeway for a tribunal to adopt the practices and procedures that suit the circumstances of the claim to be heard. Accordingly, the addition of potential compensation claims for the violation of human rights by an investor/investment would not be difficult to accommodate. Investment treaties also generally provide for the claimant's choice of at least one of the arbitrators, as well as designation of an appointing authority. Whereas investment claimants might choose economic law scholars or lawyers, human rights claimants would probably choose human rights scholars or adjudicators (i.e., persons who have experience sitting on state-to-state human rights tribunals). Moreover, whereas the integrity of domestic regulators and courts could be questioned with respect to the uniform and non-discriminatory application of international human rights norms in any given country, tribunals established under a human rights protection mechanism

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 9.

[2] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7) – page 4.

would not necessarily suffer from similar attacks on their credibility or impartiality. An international tribunal would hear prospective claims of ill-treatment at the hands of an investor/investment, with an international mandate and international law expertise rather than a local tribunal with no international law experience and potentially conflicting mandates[1].

The adoption of a voluntary approach to the regulation of transnational corporations in such an important area as human rights seems to indicate a tacit acknowledgement by the drafters of these codes that there exists only the most limited of means whereby these norms can be enforced. This is not to say that such means do not exist, for every state maintains the sovereign political and regulatory authority to adopt and enforce human rights codes; rather, it is only that their adoption and universal enforcement does not appear imminent[2].

A view on Corporate Social Responsibility:

People are going back more to their Humanitarian Grounds, thus differentiating between *being Human* and *acting as a Human Being*. This is forcing businesses to act accordingly to attract more business and thus increase profits. Businesses are now using **corporate social responsibility** concept to boost their brands' image, increase their sales through feeding people's hunger for responsible acts. It can take many forms depending on the company and the industry it's operating in. People are proving every day that they are willing to pay a little more for the product or service of a business which reflects high ethics and better contributes to the environment and to helping people. Lebanon is no exception on this, and the recent spread of brandswhich support the environment and the community is a proof (example, Zaatar w Zeit, Advance Rent a Car's contribution to foresting, Virgin Radio Lebanon's financial support to the community). Another example is the recent trend

[1] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 8 / 435.

[2] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 8 / 435.

of Glass Milk Bottles that is being spread in the United Kingdom (although for a higher price) due to youth's preference not to use plastics.

Corporate Social Responsibility is still, nonetheless, a non-compulsory act which businesses do to enhance their image. The OECD (Organisation for Economic Co-operation and Development)[1] Guidelines and other global instruments for corporate responsibility face the task of giving meaning to the concept of business responsibility in a context where business entities themselves are often quite fuzzy and where the associated challenges of control and monitoring – both by companies and by societies – have become more complex. This heightens the challenge of putting in place an appropriate framework for global governance.

Not all legal obligations are treaty-based; some are rooted in customary international law which is premised upon the long-standing practice of states and whose structures bind all states regardless of their consent. As Robert Howse and Makau Mutua observe[2]:

> The scope and content of the customary international law of human rights, as indeed of all customary law is a work-in-progress. While there are certain human rights whose status as custom is generally agreed upon, that list is not necessarily complete or closed. But it is clear from existent international law that a "state violates international law if, as a matter of state policy, it practices, encourages or condones" the following conduct: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; detention; systematic racial discrimination such as apartheid; and consistent patterns of gross violations of internationally recognized human rights.

[1] An intergovernmental economic organization with 36 member countries as of today.

[2] Human Rights and Bilateral Investment Treaties, 2009, www.dd-rd.ca Rights & Democracy, Page 21.

2) The Humanitarian theme of *amicus curiae*

Over the past decades, the character of the international legal order has changed considerably. It has changed in terms of norm development, the scope of the activity being regulated; and the actors upon whom international obligations fall. These changes have been brought about through an evolutionary process most often referred to as "globalization" – whereby enhanced telecommunications and data technology developments and dramatically increased flows in trade and transnational investment have altered the social and economic relationships that exist between states and between states and non-state actors[1].

The relation between the two fields of law has also been struck by changes, notably by non-party actors increasingly shedding the light on the linkage between the two and stubbornly submitting inferences to the tribunals until the tribunals bent and these *Amicus Curiae submissions* started being accepted in tribunals. The standard procedures for each of Human Rights and Investment Treaties claims have not been alien from the changes led by globalization, and it was only through this procedural challenge that the essence of these two laws has started to bind. The acceptance of amicus curiae submissions represents a completely new view of the concepts of the two systems of law, and a new assumption for the extent of protection of each.

The issues of both substantive and procedural fairness in international investment arbitration can now clearly be addressed through the medium of human rights. There appears to be a strong rationale for raising human rights issues in the context of investment arbitration; especially when the investors are specifically enforcing their property rights. Certain human rights violations, such as those related to the protection of the investor's property, may at the same time constitute a breach of a particular treaty obligation and hence fall within the realm of the Investment Tribunal's competence, thus providing access to investment arbitration[2]. The Human Rights inference in this case in relatively direct. In other cases, where the Economic and Social Rights of the people are in question, things might not be that simple.

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[1] Todd Weiler, Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order, 27 B.C. Int'l & Comp. L. Rev. 429 (2004), Page 429.

[2] Human Rights and International Investment Arbitration (Christoph H. Schreuer and Clara Reiner) in: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, E.-U. Petersmann eds.) 82 (2009), page 2.

While international investment flows primarily between developed countries, its huge impact in the developing world cannot be ignored. In quantitative terms, foreign direct investment remains on average four times higher than international aid figures[1]. Human rights organizations and experts have grown increasingly concerned about international trade agreements, the provisions they contain and their potential for undermining human rights protections. This concern has been driven by dozens of documented violations resulting from unregulated corporate activity in some parts of the world; dispute settlement decisions that have negative impacts on policies related to rights protection; powerful intellectual property regimes that compromise people's access to medicines, control over resources and the access to technology; agricultural trade that has resulted in subsidized imports destroying livelihoods of subsistence farmers; increased concentration of wealth stemming from the logic of comparative advantage; and ongoing liberalization of services that many fear threaten public policies (or potential policies) which favour universal and non-discriminatory access to health, education, water and other social services[2].

There is a responsibility for all economic actors to respect human rights, whether derived from legal or societal norms. The question is whether investment agreements say anything explicit regarding the responsibilities of foreign investors in this regard, or of states in regard to the activities of foreign investors. Existing research and surveys show that, *almost without exception*, they do not. Foreign investors, in fact, face public actors that could on the one hand have contributed to the drafting of the international rules to be applied; or, on the other, could shield themselves and their violations behind the exercise of regulatory powers, according to their local legislation and with the aim to satisfy a public need[3], regardless of whether or not their claim is truthful or an allegation to counter what is no longer a beneficial deal for the State.

The dual role of States as treaty parties and actual or potential respondents in investor-state disputes, is an expression of a twofold interest: respectively, an

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[3] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, PhD Programme in International Studies, Academic Year 2010/2011, University of Trento, page 28.

interest in the interpretation of the treaty's broad clauses –that they contributed to create during the state-to state negotiations; and an interest in avoiding liability. This, clearly, further complicates the investment issue practically and theoretically: **expansive interpretation of tribunals, in favor of protecting investors' rights, could cause states' disincentives in concluding investment treaties, leading to unstable and pejorative market conditions; moreover, the treatment as equals of investors and States before an international arbitrator, would obscures the asymmetries in the distribution of power between the two parties**[1].

It could be argued, in reference to the Investor's Obligations to respect Human Rights, and the benefit of the people, that if the host state itself has not adopted the obligation for application of the regulations that provide the Social Protection of its people, it may not be possible to expect a foreign investor operating in its territory to be obliged to honour the obligation either. The State; by signing off on investment agreements that do not protect its people's rights in the long-run, cannot request the investor to take those into consideration especially if the "home" state of the investor has not adopted the obligation. The investor may simply be discouraged from proceeding with what it might accordingly consider to be an unnecessarily onerous regulatory environment[2]. But the price, in this case, will be paid by the people, who will suffer from the conflicting laws and the Gaps used by each party to avoid fulfilling their roles. It is why amicus curiae submissions have become a humanitarian need to maintain the balance and secure the citizen's rights in countries where the people's rights has been put at risk due to an economic agreement. It is also why several tribunals have accepted amicus curiae submissions and dealt with them as the only fair remedy to the conflicting demands of each of the State and the Investor(s). NAFTA tribunals, in this regard[3], made no specific reference to human rights in their rationale for acceptance of amicus submissions, the tribunals in these cases explicitly referred to human rights in their decisions to

[1] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, PhD Programme in International Studies, Academic Year 2010/2011, University of Trento, page 36.

[2] Weiler (Todd), "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", Boston College International and Comparative Law Review, Vol. 27, Issue 2 Interrelationships: International Economic Law and Developing Countries, 2004, page 18 / 445.

[3] Glamis and UPS cases, and which shed the light on this matter, to be further discussed in Part II.

accept the amicus submissions. The two ICSID tribunals with identical arbitrators arising from the Argentine economic crisis – Suez/Vivendi v Argentina and Suez/Interagua v Argentina (which will also be tapped on in part two) – have explicitly stated that the raising of human rights arguments that would not otherwise be made is a strong part of the rationale for allowing the amicus submissions. In Suez/Vivendi the Tribunal states[1]:

> *[T]he investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. (emphasis added)*

As a result, the situation highlights that there are strong public interest grounds in allowing amicus curiae submissions. Furthermore, the human rights expertise of the petitioners was one of the grounds for accepting that they would be able to assist the Tribunal in its decision-making over the case.60 The petitioners were a combination of national and international civil society organizations specializing in human rights, environmental law and broader social justice issues.61 The Suez/Interagua Tribunal, declined to accept amicus briefs from the petitioners on the basis that they had submitted insufficient information regarding their expertise, experience and independence, but again the Tribunal found that strong public interest, including the same human rights dimensions, made this an appropriate subject matter for amicus curiae submissions.

Placement of Human Rights Norms in Investment Treaties:

International Investment Treaties do not usually include any obligation on the parties for the respect of human rights norms with a clear valid penalty in case of violation. Rather, reference to human rights is usually in the preamble of the treaties. This raises the difficulty of application that while a preamble can have an impact on the interpretation of an agreement, for many interpreters it does not create rights or place obligations on any state party or an investor. Thus, it may be useful in setting a

[1] Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, page 13.

tone for interpreting the obligation in the agreement and can have an impact on its application, but may not require in itself any acts (or omissions to act) by States or investors. However, despite the absence of human rights provisions in International Investment Agreements, human rights issues are recently being brought up in the latter's arbitrations. For example, foreign investors and/or arbitrators have sometimes referred to human rights law for interpretive guidance in determining the substantive protections owed to foreign investors[1].

[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7) – page 4.

Part Two

Recent Developments in human rights Intercession in Investment Arbitration

All the theoretical links between Arbitration rules applied in investment treaties along with Human Rights' law authority lead to an inevitable link in both academic and applicable rules to be applied. Said scholastic *possible* link allowing third parties to interfere in the course of multi-million-dollar disputes have sometimes lead to understandable radical stands on part of arbitration panels and those of scholars. The agreements being applied also had a huge effect on the accessibility of the third parties to the investment proceedings making it rather impossible to have a unique / unified stand on whether amicus curiae submissions are to be welcomed (on basis of human rights law superiority or the humanity of the case or other) or declined (on the basis of respect to contractual agreement or confidentiality of arbitral proceedings or other). The conflict between a host State's Contractual obligations and its other international law obligations cannot simply be resolved by declaring public international law triumphant. Rather, there should be balance between the rights of the investors and those of both the host State and the international community as a whole.

Discussions have mostly erupted about Expropriation and Nationalization being the most visible form of a State's demonstration of power versus its international investors. In the traditional discussions in the matter, some scholars defended the right and others defended the superiority of BIT's (and multilateral investment agreements). Today, the discussion is more about the effect any decision has on the people. But which people? Baade correctly notes in one of his writings, "it seems perfectly logical to require that nationalization be in the public interest. The question is, of course, *whose public interest, as determined by whom"*. This statement clarifies the gist of the problem at hand, which is the polarity between investors' rights and States' sovereignty, in a globalized world[1]. The answer of this has defined scholars' stands in interpreting Investment Agreements (Part 1), and has shaped the response of many arbitration panels (Part 2). In light of the severity of

[1] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, School of International Studies, University of Trento, PhD Programme in International Studies, Academic Year 2010/2011, P. 31.

situation, some panels even deemed it was crucial to justify in intemperance the basis of their decision (being approval or denial of amicus curiae submissions).

This paper is but one modest contribution to the ongoing effort to strike a new balance in international law, a balance that would permit more cohesiveness and ensure that the development of each society is based on the core objective of respecting, promoting and realizing the human rights of all its citizens without neglecting the power and respect of contractual arrangements (including investment agreements).

I. Investment Agreements' dilemma with *amicus curiae:* different approaches

In recent years, specialized agencies of the United Nations, as well as the Organization for Economic Cooperation and Development OECD, have slowly begun to explore the interface and relationship between human rights and International Investment Agreements' obligations[1]. These inquiries are taking place against a wider backdrop of work discussing the relationship between international investment law and several other areas of international law, with some pointing to the need to consider cross cutting issues such as the need to mitigate the International Investment Agreement system's lack of coordination with other fields of international law, such as the application of international human rights, or also international social and environmental law. More broadly, the interaction between IIA's and other public policy objectives has been exemplified in earlier investor-State dispute settlement cases that have touched upon environmental or health-related issues.

A number of commentators have argued that the acceptance of *amicus* submissions should be seen as part of a broader positive trend towards broadening participation and increasing the openness and transparency in a number of investment treaty arbitration procedures which reflects the need for investor-state arbitration to be perceived as being a legitimate form of dispute resolution. Still, while many commentators have viewed the acceptance of *amicus* submissions as a positive development, they have differed markedly on the potentially negative aspects of *amicus* participation and have thus insisted on the need to impose strict limits on the extent of non-party involvement in arbitration proceedings. It is argued that there are dangers that the acceptance of *amicus* submissions may marginalize the wishes of the parties and will also impose extra burdens upon investors (since the majority of *amicus* submissions will advance arguments that support States) in a way that will make the system less attractive to them. It is also suggested that tribunals will have to remain vigilant in order to ensure that NGOs accepted as *amici* are in fact accountable and representative organizations. Arguments are also made that it is important to limit the scope of non-party participation, including to restrict *amici*'s access to documents, in that their role is not to dispute the arguments of the parties, but simply to assist in reaching the correct, just decision.

[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), – page 3.

This rather divided debate between parties supporting amicus submissions and those rejecting the concept reflects the wider divisions about the purposes and aims of international investment arbitration. On the one hand, strict limits to the involvement of *amicus curiae* reflects the private law origins of an arbitration process driven by the wishes of the parties, the need for confidentiality, and worries that non-parties will have agendas that will distort proceedings. As per the supporters of this course, parties should be able to choose to make or reject arguments as they see fit, based on the assessment of the strengths of their case as they see them, and not have said arguments imposed upon them. The imposing of said submissions in essence contradicts the nature of Arbitration laws. On the other hand, and as per the supporters of *amici* submissions, the fact that sovereign States are subject to such procedures, that cases can involve sensitive regulatory issues and that judgments can potentially have important wider public impacts drives the call for greater legitimacy, of which effective participation by *amicus curiae* is perceived as being part. Ideally, each party built a legitimate theory in its defence.

The fundamental objective of capital-exporting States is to establish clear rules and thereby secure the protection of the investments of their nationals abroad; whereas, the goal pursued by developing, capital importing States is to encourage investments in their territory and attract foreign capital. Entering into an investment treaty is therefore conducive to both these purposes, since it establishes a beneficial legal relationship for all the contracting States. The rationale of Investment Treaties is creating the legal framework to govern investments by nationals of one country in the territory of the other country.

To attract foreign investors and thereby participating in the international market economy, developing States have to guarantee the health of the investment climate in their territories. In many cases, hurried capital withdrawals happen when, following a rumor *(be it true or false)* about the poor economic situation of a country, a critical mass of short-term investors convert their investments and move them to sunnier — or, at any rate, steadier — climates. The rumor becomes a self-fulfilling prophecy as the currency sell-off devalues it on the market. The country is then faced with the intolerable dilemma of either letting its currency be dragged down or investing precious public funds to shore it up. This is precisely the situation that caused the crash of the Thai baht in 1997 and drove the region into financial crisis in the following months. The effects of the crisis on human rights in Thailand and neighboring countries are now well-documented: massive job losses, particularly among lower-income people, runaway inflation affecting food prices, decreased

public health and education budgets, and so on. The social and economic rights violations experienced by these populations were exacerbated by grave violations of civil and political rights. Arrests of trade union leaders and other attacks on freedom of association were facilitated by the adoption of emergency measures and the weakening of labour standards by certain governments[1].

As all the cases involving sensitive regulatory issues are being adjudicated upon, the debate about the economic benefits to countries of signing up to these investment treaties is becoming increasingly contested[2] especially that, practically, as application of the treaties and the movement of investment money across countries (or even across continents) starts, and throughout the ongoing investment relation, there is a clear reference to the contradicting interest of States versus Investors. This is also reflected in UN's GA Resolutions and particularly in reference to cases of nationalization (or direct expropriation). UN General Assembly Resolution 3201 encapsulating the "Declaration on the Establishment of a New International Economic Order", declared indeed **the right to nationalize or transfer of ownership to nationals, as an expression of the decolonized countries' permanent sovereignty over their natural resources,** omitting any reference to the obligation to pay compensation. This result was further reinforced in GA Resolution 3281, which although alluding to compensation, established the competence of host States' domestic courts. Besides these endeavours *against* international investments' protection, the practice of international arbitration reveals that only GA Resolution 1803 that provided for adequate compensation in case of expropriation, was regarded as an authoritative expression of customary international law[3]. The contradiction in expropriation (or nationalization), nonetheless, is none but a single example of the several issues that arise between the two parties of the Investment Relation. Disputes arise, and the benefit of the people becomes at risk; in light of the State's obligations towards the people. The discussion has went into discussing the origin of rights to understand how to deal with said rights. In his "*Pure Theory of Law"*, Kelsen explains that the law only creates obligations and that it is these

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

[2] A paper on Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, Assistant Professor, University of Warwick – page 4

[3] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, School of International Studies, University of Trento, PhD Programme in International Studies, Academic Year 2010/2011, page 12.

obligations which create rights, or “reflex rights” as he terms them. Property, for Kelsen, as the dominion of a person over a thing, is an obligation of all other people not to disturb an individual in his disposition over a thing, and the individual then possesses a reflex right of property over that thing. In this conception, property is primarily a social relation, a relationship between individuals, and only secondarily a relationship to a thing. In a market economy, where production is largely in private hands, this dominium over things becomes an imperium over society and individuals, by determining the production of wealth and hence its distribution among the population. The public authorities must intervene if they are to limit this imperium to activities obeying the common will and serving public needs and interests[1].

Looking at these Investor-State disputes from one of the angles, it is important to distinguish between situations in which the State acts in its public *(de iure imperii)* or private *(de iure gestionis)* capacity, in order to establish the applicable law. The analysis begins with the concept of the right to regulate, and then considers the interaction between this right to regulate and the rights of investors that may limit the right to regulate. Two options would thus be developed: (1) either the law of the host State was to be applied, or (2) the contract was considered as internationalized. In the first case, domestic legislation is applied as a consequence of the principle of State Sovereignty; remedies thus had to be searched-for in the local laws, covering also claims that the violation of the contract amounted to a taking. According to the internationalization doctrine (second case), instead, the inclusion of arbitration, choice of law and stabilization clauses in the document accounted for the will of the parties to treat the contract as internationalized, so that breaches of its provisions entail international responsibility. As a result, the violation of foreign investment agreements by State-induced measures, would qualify as a taking that is compensable. This theory, moreover, implied that the obligations arising from the contract may reside in an external system, to be variously termed as transnational law of business, general principles of law, lex mercatoria, international law.

To support one side of the heated discussions in amicus interference in said disputes, it was highlighted that NGOs[2] with particular human rights expertise may be

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] NGO: Non-Governmental Organizations; referring to the organizations which look after Human Rights applications. NGO’s are funded from different resources and their source of funding (most of the times) directs their stands.

better informed about the human rights' legal framework and how it applies to the situation on the ground than governments, *particularly those from developing countries with limited resources*. It also seems likely that governments will not raise relevant human rights arguments in all cases through fear that they are creating obligations for themselves in other settings. For example, an argument in an investment tribunal by a government that it has a universal obligation to provide water to its population might then be utilised by individuals litigating in domestic courts against that government for non-provision of such essential services. So allowing *amicus curiae* submissions which articulate the nature of these human rights obligations is a way of introducing arguments that the tribunal might not otherwise hear.

NGO'S interference, nonetheless, cannot be deemed as a transfer of responsibility from the State to the civil community. Article 28 of the UDHR[1] (whose content also constitutes one of the central principles of the Declaration on the Right to Development) calls on states to create and guarantee the domestic and international conditions for the realization of fundamental rights and freedoms. States have the primary responsibility for ensuring that human rights are respected, protected, and fulfilled, which does not, of course, exempt individuals and private corporations from the obligation of respecting these rights and cooperating with states in their protection. In 1993, over 170 states adopted the Vienna Declaration and Programme of Action, stating that human rights were indivisible, interdependent and universal; and furthermore that their protection was the first responsibility of government. Civil and political rights generate immediate obligations, whereas economic, social and cultural (ESC) rights generally place more emphasis on the obligation of progressive realization, with the exception of the ban on discrimination (Article 2) and the guarantee of union freedoms (Article 8), which create an immediate obligation. In the case of ESC rights guaranteed by the ICESCR, the states have committed to guaranteeing that rights may be exercised without discrimination, and to taking steps to achieve "progressively the full realization of the rights recognized," particularly through the adoption of legislative measures. Thus, states must enact laws, policies and mechanisms favoring the progressive realization

[1] **Article 28 of the Universal Declaration** of Human Rights stipulates that Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

of the right to health, healthy and adequate food, and just and favorable working conditions which ensure an adequate standard of living. [1]

On occasion in international investment arbitration, there have thus been human rights arguments raised by governments in defence of alleged international investment agreement breaches. Although this appears to be an emerging trend – one which is difficult to assess given that most pleadings in IIA arbitrations remain confidential – there is some evidence that governments advert in IIA arbitration to certain human rights obligations contained in national constitutions or international treaties. IIAs give few instructions as to how such human rights are to be squared with the investment protections guaranteed to foreign investors[2].

The trend that Human Rights invocations have been raised by NGO's and government does not mean that investment arbitration is necessarily de-legitimised for having the primary purpose of protecting investors' rights, although most of the times the link between Human Rights and the Investor's rights is evident in Property Laws and Expropriation (or indirect expropriation). International courts and tribunals must inevitably be differentiated and specialised in order to perform their critical function. But their specialisation makes it very hard for them to connect with the concerns of civil society. In the context of the investment arbitration cases considered here, this distance is exemplified by the nature of the primary legal issues which are the concerns of investment tribunals such as determining whether an expropriation has taken place, whether there has been fair and equitable treatment and whether any necessity justifies the actions of the State. The scenarios which give rise to these same legal issues are viewed by many civil society actors as involving very different factors - challenging corporate investor rule and the need to take into account the welfare of the people and broader social justice impacts of the investment arbitration process which do not find natural expression in the terminology of international investment law. 80 It is in light of this separation that *amicus* briefs serve to marshal, crystallize and articulate public concerns in a form that is rendered relevant and intelligible to a specialised court. They translate these public concerns from a noise to a signal which is able to be heard by the tribunals.

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[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada.

[2] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 8.

The language and obligations of human rights is the chosen method by which a great number of *amici* have chosen to frame their arguments. The noise of social justice is translated into the signal of human rights. These are legal obligations which tribunals find difficult to ignore - under ICSID Article 42 and according to many other bilateral investment treaties they are directed to apply such rules of international law as might be applicable. The success of such a strategy and the relevance of the legal obligations is demonstrated by the fact that the tribunals have found a need to accept these submissions. The distinction between 'contract-claims' as opposed to 'treaty-claims' is of particular significance also in the current generation of investment law. ICSID tribunals have given different answers to the question whether contractual behavior attributed to the State according to international rules of attribution can be, either ipso facto (by that very fact or act) or under certain circumstances, not only a contract claim but also a violation of the Investment Treaty, and hence a 'treaty claim'".), having obvious repercussions on the role attributed to public international law in this context.

As it is not possible to investigate all Bilateral or Multilateral Investment Agreements in this aspect, due to the vast number of these agreements, we will only examine the most important ones which have had a direct relationship with Human Right's interference in their investment terms. The agreements we will look into are NAFTA, TRIMs and GATS (relating to the World Trade Organization), and the ICSID. These agreements are also the ones used in Section II of Part II "Invocations of Human Rights in International Case Studies". Our strategy in looking into scholar's views will be imbedded within the scholar's reference to the agreements or as relevant their opinion is to the agreement examined.

NAFTA: North American Free Trade Agreement:

Apparently, awards made under NAFTA endorse absolute theories of property rights: not only an expansive scope of application is given to the notion of expropriation, but also wide formulations concerning expropriatory measures are adopted in treaties, thereby enlarging the breadth of the term—and of the ground for claiming compensation. In the European context, instead, property has been

traditionally conceived as serving a social purpose, and thereby, as dominated by prior societal interests for the fulfilment of a common goal[1].

In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement (Article 103, North American Free Trade Agreement). As per article 103 of the Charter of the United Nations, in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Even more than civil and political rights, the justiciability of most economic, social and cultural rights is deplorably limited at present. Despite General comment No. 9 of the Committee on Economic, Social and Cultural Rights (CESCR), which notes that "a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary, as there is a chronic lack of protection for these rights in domestic legal systems.

Furthermore, discussions on the adoption of an optional protocol to the treaty have gone no further than the drafting of a preliminary document by the CESCR and, in 2003, the formation of a working group under the Commission on human rights to study the matter. This delay, due among other factors to the staunch opposition by the United States (a non-signatory of the ICESCR), Australia, and now Canada, is a considerable hindrance to the development of ICESCR jurisprudence. As a result, millions of people suffering from malnutrition, famine, or chronic lack of access to basic health care are deprived of effective legal remedies or any international recourse[2].

NAFTA, specifically, prevents states from requiring foreign investors:

…

[1] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, School of International Studies, University of Trento, PhD Programme in International Studies, Academic Year 2010/2011– page 28.

[2] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

…

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement;…

In NAFTA, this provision reads as follows:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

a) for a public purpose;

b) on a non-discriminatory basis;

c) in accordance with due process of law and Article 1105(1); and

d) on payment of compensation […].

There is a gray area as to the distinction between a direct expropriation and a "regulatory measure" or "act of public authority. As is evident from the above, the addition of the terms *"directly or indirectly"* signifies a definitive inclusion of indirect expropriation in the definition. This concept being relatively vague, some observers fear that it might be used to prevent state parties from exercising regulatory authority, in the areas of labour and environmental law for example.

The NAFTA dispute settlement mechanism has jurisdiction over the entire agreement (with the exception of Chapter 19 on antidumping and countervailing duties, which contains its own dispute settlement mechanism). Where an arbitral panel formed to rule on a dispute determines non-compliance with the Agreement and the member fails to apply the panel's recommendations, this chapter allows for suspension of the benefits to the losing party. For our purposes, however, the

relevant mechanism is the one instituted under Section B of Chapter 11. The special feature of this mechanism is that it allows investors themselves, not their state of origin, to submit a dispute to arbitration where they feel that their rights under the chapter were violated.

How should an arbitral panel should deal with an incompatibility between a Chapter 11 rule and a human rights obligation? Article 1131 stipulates that a tribunal instituted in accordance with Chapter 11 should make its decision "in accordance with this Agreement and applicable rules of international law." A priori, this means that provisions of human rights or environmental law treaties should be taken into consideration in the tribunal's decisions. However, Articles 103 and 104 stipulate that in case of incompatibility with other treaties, NAFTA prevails, except in regard to certain specific agreements determined by Article 104 and Annex 104.1. In adhering to these agreements, "the Party [shall choose] the alternative that is the least inconsistent with the other provisions of this Agreement." Thus, the parties were allowed to give precedence to a small number of agreements existing in 1994 over NAFTA, but they must show that they have done everything possible to avoid an excessive violation of the trade agreement. As for all the agreements signed after 1994 as well as those relating to other subjects, including human rights, they are subordinate to NAFTA[1].

As a result to all of the above, recent NAFTA arbitrations have included public hearings on closed circuit television or at least transcripts of the hearings and access to a wide range of documentation relating to the proceedings.

WTO: World Trade Organization:

At the WTO, two main agreements govern direct investments: the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS).

On the subject of *how* should the tribunal rule on a situation of incompatibility between a trade agreement and human rights provision, several scholars tried to analyze the WTO's position on this. For example, Gabrielle Marceau discusses the

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

DSB rule[1] on a situation of incompatibility between a WTO agreement and human rights provision. Marceau explains that the body of law arising from the WTO is a lex specialis[2] system and, as such, cannot be overruled by another body of law. Referring to the second part of DSU Article 3(2) which reads, *"Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,"* she states that:

> *The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO treaty. WTO adjudicating bodies cannot give direct effect to human rights in any way that would set aside or amend a WTO provision. If they were to allow a non-WTO provision on human rights to supersede and set aside a WTO provision and therefore to give a legal effect to and enforce a non-WTO provision in superseding a WTO provision, they would be adding to or diminishing the WTO covered agreements (or amending them).*

Pauwelyn differs somewhat from this analysis. For him, new conventions, even if negotiated outside the WTO, could be regarded as altering the intent of the parties and be taken into consideration in DSB decisions. He points out, for example, that the International Court of Justice uses sources in its decisions that are not cited in its Article 38. Stressing the presumption that sources are non-hierarchical, Pauwelyn thinks that the DSB could use sources other than its own treaties, provided that these are accepted by all the parties to the dispute and that the sources may be interpreted as prevailing over the treaties related to the dispute under the usual rules of interpretation. In this way, a party could justify violating a WTO treaty with reference to an obligation external to the WTO.

As is evident, the debate on whether a Party can justify a violation of a WTO agreement based on other obligations in international law is not resolved. However, it seems clear that international law can be used to interpret the WTO agreements. DSU Article 3(2) states that the purpose of the dispute settlement mechanism is *"to*

[1] The general rule is for the DSB to take decisions by consensus (Article 2.4 of the DSU). Footnote 1 to Article 2.4 of the DSU defines consensus as being achieved if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[2] A lex specialis is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts. The name comes from the full statement of the doctrine, a legal maxim in Latin: Lex specialis derogat legi generali.

preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The special group formed to rule in the case Korea: Measures affecting government procurement interpreted this article as follows[1]:

> *Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO*

Therefore, the DSB must use customary law where its rules do not conflict with the WTO agreement or, as Pauwelyn puts it, to fill the holes in a treaty.

When it comes to transparency of the proceedings of Investor-State arbitration, in the WTO, all cases are known and governments are free to release at least their own legal materials to the public. This (from one end) opens the door for the public at least be informed of the proceedings and hence provides NGO's with motive and tools to participate through amicus submissions, and (from another end) provides higher transparency of said steps towards the public.

TRIMs (The Agreement on Trade-Related Investment Measures)

The debate around the inclusion of investments in the multilateral forum of the WTO (and GATT prior to it) has been raging for many years. The Agreement on Trade-Related Investment Measures, or TRIMs agreement is an extremely limited agreement, and developing countries' resistance on this score shows how keenly they sense the potential loss represented by the liberalization their markets to foreign capital. The TRIMS Agreement. only prevents members from implementing trade-related investment measures that are inconsistent with national treatment (Art. III of GATT of 1994), such as requiring the use of domestic content, or imposing quantitative restrictions (Art XI of GATT of 1994).

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

GATS (General Agreement on Trade in Services)

GATS is an agreement designed to regulate members' measures affecting trade in services. All services are covered by this agreement except those supplied "in the exercise of governmental authority"; that is, services provided "neither on a commercial basis nor in competition with one or more service suppliers." GATS must be considered an investment agreement in that one of its four modes of service supply consists in the supply of a service "through commercial presence in the territory of any other Member." This means that foreign investors in the service sector are protected by the GATS rules.

GATS sets up two types of obligations: general obligations and disciplines, covered in Part II, and specific commitments, covered in Part III. The principal obligations of Part II concern both MFN treatment and transparency. Prior to the entry into force of the agreement, members were allowed to maintain measures incompatible with MFN treatment, subject to these measures being listed in the annex on exemptions. These exemptions are, in general, few in number[1].

Access to markets and national treatment are the two types of specific commitments contemplated in the agreement. Contrary to the obligations set up under the general disciplines, those covered by specific commitments only apply to sectors expressly included by the members in their schedule of commitments. Whereas the majority of members have liberalized several sectors and sub-sectors, only a small number of countries have made commitments in obviously sensitive human rights-related sectors such as health and education. Nevertheless there is a risk to citizens of the countries that have undertaken or will undertake service sector commitments that the potential for effective realization of rights — to the highest attainable standard of health, for example — may be diminished.

The market of many developing countries has not yet proven sufficiently attractive to multinationals to justify massive investments. Analyzing the situation in Africa, we note that Western companies have their eyes on this continent as a potentially profitable market. Certain investors have undertaken market access and national treatment commitments in the health insurance sector, and pressure for further liberalization probably exists within the ongoing negotiations. The threats to human rights involve two possible shifts: 1) from a public to a private model in which

[1] BACHAND Remi, and ROUSSEAU Stephanie, International Investment and Human Rights, June 2003, Ottawa, Canada

profit inevitably takes precedence over the right to health, and 2) from a preventive to a curative model in which prevention is given short shrift because it is not seen as profitable by the private sector. Though, as noted, few countries have yet undertaken health-related commitments, new ones might well surface at the ongoing GATS negotiations. *The structure of this agreement is such that once the commitment is undertaken, it can only be amended by payment of compensation to the members affected by the "de-liberalizing" measure. This monetary penalty makes withdrawal from commitments highly improbable or even impossible.*

ICSID: International Centre for Settlement of Investment Disputes[1]:

The tension between private and public rights can be explained by referring to Art. 4299 in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The article specifies the substantive law to be applied by ICSID Tribunals, and provides that, failing any agreement between the parties, ***"the Tribunal shall apply ... such rules of international law that may be applicable"[2].***

Only with the NAFTA arbitrations and those that might be conducted under IIAs to which Canada and the United States are parties, investor-state arbitrations take place under a cloak of confidentiality. Under the ICSID Arbitration Rules, the existence of a case is made public. But this is the primary concession as the parties can otherwise keep the proceedings and all written submissions and arguments almost entirely confidential. The final award, however, may be made public by either party. Under the UNCITRAL Arbitration Rules (a UN Body) the existence of a case is not even made known in any formal manner. In addition, each arbitrating party may prevent the other from releasing even the final decision.

The possible lack of transparency in the investor-state process is unique to its field. It gets more extreme depending on the agreement governing the process. Even

[1] The **International Centre for Settlement of Investment Disputes** (ICSID) is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between international investors. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

[2] Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests, Alice Ruzza, School of International Studies, University of Trento, PhD Programme in International Studies, Academic Year 2010/2011, page 22.

though no precise rule exists under ICSID (and UNCITRAL) in the investor-state process, parties are able to gain confidentiality orders from the tribunals that work to keep all legal documents in a case confidential. In some recent instances, even when *amicus curiae* submissions have been allowed, the *amici* have not been given access to the written arguments in the case, making the preparation of such arguments a precarious experience "*Amicus Curiae*-Accepted" cases[1].

As under NAFTA, ICSID rules have now been changed in order to institutionalize the procedure by which tribunals should decide upon whether to accept amicus submissions. The criteria the tribunal should apply is very similar to that under NAFTA.

Other:

As we have touched on the major structure's position towards amicus curiae submissions, it's important to generically go through other stands towards this subject. We will tap on (1) Some other forms of international agreements, and (2) tribunal's stands (and their reasoning) towards amicus curiae submissions. Section II will further elaborate on the major cases reflecting on this.

International Agreements

There are very limited number of surveys concerning the inclusion of express provisions on human rights in IIAs, and these appear to document few express inclusions of human rights obligations in an IIA. The European Free Trade Area-Singapore Agreement of 2002 includes a preambular paragraph, "Reaffirming their commitment to the principles set out in the United Nations Charter and the Universal Declaration of human rights". The Canada – Colombia Free Trade Agreement also includes a reference to the UDHR in the agreement's preamble[2].

The initial generations of International Investment Agreements were focused solely and exclusively on investor rights. It was not until the 1990s that any reference to social issues, such as labour and the environment, materialized in any such

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008, page 29.

[2] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), – page 3.

agreements. Post 1990, the majority of such references come from agreements that feature the United States, Canada and some European countries as one state party. South-south agreements do not appear to have such provisions, or at least not in significant quantity.

Some US and Canadian BITs have entrenched procedures for accepting amicus submissions, stipulated that all hearings will be open to the public and all documents will be made public, subject to limits to protect commercial confidentiality. These provisions are set in stark contrast to investment arbitration conducted under UNCITRAL[1] rules (other than NAFTA claims), which do not even require public notification that a claim has been lodged, where disclosure of documents is far more restricted, and no amici have ever been granted permission to participate. ICSID rules fall somewhere in between - with documents, hearings and awards that are kept private without the consent of the two parties. Commentators have therefore questioned the extent to which amici who are permitted to participate in such proceedings, are able to participate effectively. For instance, in cases where amici do not have access to documents which contain the arguments of the parties there has been criticism that this is likely to limit the effectiveness of amicus submissions. Not only does this party defend amicus submissions, they also demand broader privileges to amici to ensure effectiveness.

Canada and the US now pursue the latter course as a matter of routine in all new agreements, demonstrating unequivocally that there is no fundamental obstacle to a transparent process. In both cases, all new IIAs include provisions requiring:

- Public notice be given of all newly filed arbitration claims;
- All legal arguments of the parties are available to the public;
- The oral hearings can be opened to the public;
- All decisions of the Tribunal will be made public; and
- Procedures for the participation of civil society through *amicus curiae* submissions are set out.

While the transparency issue first surfaced and was responded to by the NAFTA states, it is no longer just a North American issue or response. In the African

[1] UNCITRAL: The United Nations Commission on International Trade Law.

Regional Agreement (Common Market For Eastern And Southern Africa Investment Agreement For The COMESA Common Investment Area, Article 28), concluded in May 2007 the following provisions on transparency in the investor-state process:

ARTICLE 28

Investor-State Disputes

…

5. All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 28, the initiation of an arbitral tribunal, or the pleadings, evidence and decisions in them, shall be available to the public.

6. Procedural and substantive oral hearings shall be open to the public.

7. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

8. An arbitral tribunal shall be open to the receipt of amicus curiae submissions in accordance with the process set out in Annex A with necessary adaptation for application to investor-state disputes under this Article.

A further example of the inclusion of human rights comes from the recently concluded but not yet in force regional agreement among Eastern and Southern African states grouped into the COMESA region. Article 7.2.d of the COMESA Agreement places the human rights issue, along with other social issues, into a forward-looking agenda for the institutional structure established to implement the Agreement (COMESA Common Investment Area Committee), enabling it to consider and make:

Recommendations to the [COMESA] Council on any policy issues that need to be made to enhance the objectives of this Agreement. For example, the development of common minimum standards relating to investment in areas such as:

(i) environmental impact and social impact assessments

(ii) labour standards

(iii) respect for human rights

(iv) conduct in conflict zones

(v) corruption

(vi) subsidies; and…12

This is the first time that any investment agreement has expressly included human rights issues related to investment as a possible future working item under the Agreement. The inclusion of closely related mechanisms, such as social and environmental assessments, buttresses the human rights element *per se* as well. This global first falls short of including actual standards, but the express recognition of the linkage and enabling of future standards-oriented work is still noteworthy. That this comes from a developing country region is also, it may be suggested, noteworthy[1].

Given the scarcity of human rights provisions in the current stock of IIAs, the logical question arises as to whether there is a structural impediment in IIAs that keeps references down to such low numbers. The short answer is no, there is not.

Tribunals' stand and reasoning

There is remarkable similarity in the reasoning of tribunals about the rationale for the decisions to accept amicus submissions in these cases. All of the tribunals (except Glamis v USA where no detailed reasoning was provided) highlighted a number of factors which were key to their decision-making. First, they highlighted the public interest or public importance of the issues in question as key to them deciding to grant the petitions.35 Second, they maintained that the expertise and perspectives which the amici might bring would be important in assisting them come to the correct decision in the case.36 In addition, the acceptance of amicus submissions would also have the desirable consequence that it would improve the transparency of investor-state arbitration in cases of substantial public interest, thereby enhancing its legitimacy in the eyes of the public.

It is interesting to compare these rationales with the functions of *amicus curiae* before international courts and tribunals. We can find four core functions for amici submission; first, the provision of specialist legal expertise, particularly about matters outside the court's core competence; second, the provision of factual information relevant to the case of which the Court might not otherwise be aware; third, access to proceedings to persons who might be affected by the decision of the

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008 – page 10)

court or tribunal; and finally as a mechanism for allowing participation of those who are representing broader public interest considerations. *Amici* will thus be able to represent broader public interest considerations and provide legal and possibly even factual information which will help the court in deciding the case. A*micus curiae* submissions also protect the interest of the court or tribunal in addition to that of the person trying to participate.

As set out above, there are three key rationales identified by the tribunals in decisions to accept the amicus submissions in the cases considered. **First,** the tribunals highlighted the public interest or public importance of the issues in question, **second,** they maintained that the expertise and perspectives which the amici might bring would be important in assisting them come to the correct decision in the case and **third** it would also have the desirable consequence that it would improve the transparency of the arbitration process, thereby enhancing its legitimacy in the eyes of the public. But these roles are inherently problematic, and even contradictory when considering the human rights submissions of the amici.

With regard to the first two roles, there are dangers in the amici being asked to simultaneously perform both these roles in the investment arbitration process. Investment arbitrators inevitably have very limited if any expertise in human rights law. So the amici are asked to take on a key role in informing the tribunal with regard to the legal issues – the nature and relevance of the human rights obligations. They then must also argue for the consideration of issues of public importance through the medium of these same human rights obligations. It must be extremely difficult for the tribunal to make an objective assessment about the nature of the legal obligations that should be taken into account, when the “experts” on those issues are then arguing strongly for them to be interpreted in line with the public interests they represent. It is true that there has been a blurring of this role in many other national and international courts and tribunals, but where international courts and tribunals are dealing with issues beyond their core expertise, they appear far more likely to explicitly deal with or even adopt the approach of amici where the amici are more akin to independent experts, than being representative of public interests, and therefore advocates for a particular interpretation of the legal obligations. The Methanex tribunal explicitly stated that „amici are not experts; such persons are advocates (in the non-pejorative sense) and not „independent" in that they advance a particular case to a tribunal." But this is not an approach which appears to have been taken by those tribunals which have allowed submissions (at least partly) on the basis of human rights expertise.

The third key rationale for the acceptance of amicus submissions was the perceived positive impact on the transparency of investor-state arbitration, thereby enhancing its legitimacy in the eyes of the public. But, it is difficult to understand how the acceptance of amicus submissions is a transparency mechanism. Holding public hearings, making tribunal documents publicly available and publicising decisions are all procedures that make the arbitration process more transparent, and as such are "legitimacy"-ends in themselves. Accepting amicus curiae submissions is a mechanism for increasing participation in the arbitration process. The extent of effective participation will depend upon other transparency issues, in particular the extent of access to key documents which enable the amici can understand the detailed arguments of the parties in the case. But, if the amicus submissions themselves are to have any legitimising function for the tribunal, then it is the extent to which that participation is viewed as meaningful which will determine the degree of legitimacy obtained.

In Fireman's Fund v. Mexico, the arbitral tribunal indicated that it would examine other arbitral awards – not because they were binding precedents – but because they might be persuasive in helping to illuminate the meaning of expropriation under customary international law. The arbitrators observed that proportionality is used by the European Court of human rights, but added, without elaboration, that "it may be questioned whether it is a viable source of interpreting article 1110 of the NAFTA."[1]

In some cases, *like the case of ADC v. Hungary ICSID arbitration*[2]*,* when arbitrators found that the claimants had suffered an expropriation, the arbitrators turned to ECHR (European Court of human rights) expropriation cases for guidance in quantifying the compensation owed to the foreign investors. Despite that the case was that of an Investment Arbitration essence, the arbitrators found it crucial to turn to ECHR cases, thus assuring the presence of cooperation between ADR (especially arbitration) and human rights courts. ECHR jurisprudence was relied upon by the arbitrators as part of the expropriation analysis. The claimants, a pair of Cyprus incorporated entities accused Hungary of having expropriated their investments in a

[1] Peterson, L.E., Selected Recent Developments in IIA Arbitration and Human Rights, UNCTAD (United Nations Conference on Trade And Development), Geneva, IIA MONITOR No. 2 (2009): 11/06/09 (UNCTAD/WEB/DIAE/IA/2009/7), page 6.

[2] ADC Affiliate Limited and ADC and ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award October 2, 2006.

project to build an airport terminal at Budapest Airport. The investors were contracted to build the terminal, and to collect fees from various businesses operating out of the terminal (including passenger user fees, retail and duty-free outlet fees, and aircraft parking fees). After finding that the claimants had suffered an expropriation, the arbitrators turned to ECHR expropriation cases for guidance in quantifying the compensation owed to the foreign investors. This case, with its simple reference to ECHR, reflected the interlocutory linkage of the two systems of law, both in essence and in practical application.

II. Invocations of human rights in International Case Studies

The internal legislation of the State is subject to the compelling authority of international conventions, (investment) treaties, principles and rules, in light of which the conduct of the State should be evaluated; yet, **it is *how* arbitral organs determine and enforce the applicable law that in fact establishes and strengthen the existing rules.**

As we have noted in Section I of Part II *"Investment Agreements' dilemma with amicus curiae: different approaches"*, there is not one stand on whether the tribunal should accept amicus curiae submissions, and to what extent are amici allowed to be informed of the procedures of the case at hand. Some of the differences erupt from the applicable agreement itself, and others (with the non-clarity of agreements), is governed by the tribunal's acceptance of said submissions for the greater benefit of the case.

The question arises as to why have such arguments been so prevalent? Partly this must be because of the civil society organizations that have made the interventions. This has included a number of human rights organizations. But it has also included environmental organizations, indigenous groups, trade unions and more general social justice and legal campaigning organizations. So human rights arguments do not appear to be inevitable because of the coalitions of organizations making the submissions. A strong rationale for utilizing this framework must be that human rights are international and national legal obligations through which particular values are given legal expression. A human rights framework creates primary obligations with regard to e.g. provision of essential services, the rights of indigenous peoples or the rights of workers. It requires States to justify interference with these rights and to protect its people from interference with those rights by third parties. Such rights and obligations have considerable attractiveness to groups who are seeking to intervene into a system whose primary function is perceived by those groups to be the protection of the property rights of international investors.

The discussion cencerning amicus curiae evolved slightly differently in the domain of ICSID arbitration since the Convention provided the relevant framework for procedural decisions. Yet the NAFTA cases played a role in providing precedent for the conclusion reached by the tribunals. For example, Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID

ARB/03/219). Order in response to a petition for Trancperancy and Participation as amicus curiae, 19 May 2005.

1) "*Amicus Curiae*-accepted" cases

There is remarkable similarity in the reasoning of all the tribunals which accepted Amicus Curiae submissions tapping on the rationale for the decisions to accept amicus submissions in these cases. All of the tribunals *(except Glamis v. USA where no detailed reasoning was provided)* highlighted a number of factors which were key to their decision-making. We will start by looking into the case of *Methanex Corp. v United States* which is the first investment arbitration in which amicus curiae rights were accorded, then *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, and lastly we will look into *Glamis Gold v United States* which, although did not provide reasoning for acceptance of the amicus curiae submissions but is considered nonetheless of equal importance as the rest of the cases due to the precedence it set in this type of requests.

i. Methanex Corp. v United States, NAFTA.

Case summary:	**Award: August 3, 2005**
	Human Rights issues raised by *Amici-curiae*
	Amici-curiae's demands were accepted

The opening up of investment arbitration proceedings to wider public participation through the submissions of amicus briefs started in the Methanex case. This involved a claim filed under Chapter 11 of NAFTA in which the claimant sought US$970 million of damages because of a Californian ban on a gasoline additive. It was argued by the US government that the rationale for this ban was that the additive was a health risk because it potentially contaminated groundwater. There was great public interest in the case due to the potential for a government measure, ostensibly aimed at protecting public health and the environment, to give rise to such an enormous claim for damages by a private corporation. **Both the US and Canadian governments argued that public interest in the issues and the need for openness and transparency in NAFTA proceedings made it appropriate for the tribunal to accept submissions from suitably qualified amicus curiae.** In a landmark decision, the NAFTA tribunal held that it had the power to accept submissions by amicus curiae. This was followed, in October 2003 by a statement on third party participation issued by the Free Trade Commission of NAFTA (consisting of representatives of the governments of the States Parties to NAFTA – the USA,

Canada and Mexico), stating that any person with a significant presence in the territory of a party may file for leave to file a petition. The tribunal should, in making its decision on whether to accept the amicus submission, consider the extent to which:

> *"(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
>
> *(b) the non-disputing party submission would address matters within the scope of the dispute;*
>
> *(c) the non-disputing party has a significant interest in the arbitration; and*
>
> *(d) there is a public interest in the subject-matter of the arbitration."*

This procedure was adopted by the Methanex tribunal who accepted briefs from a number of civil society groups concerned primarily with the potential environmental impact of the tribunal's decision.

This case was thus marked as the first investment arbitration in which *amicus curiae* rights were accorded. Based on an interpretation of the relevant UNCITRAL and NAFTA provisions, the Tribunal concluded that by article 15(1) of the UNCITRAL arbitration Rules it [the Tribunal] has the power to accept amicus submissions (in writing) from each of the petitioners. It concluded that *"the public interest in this arbitration arises from its subject matter"* and argued that *"the Chapter 11 arbitral process could benefit from being perceived as more open or transparent"* so that *"the tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular."*

Still, at a closer look at the case, we can't help but notice that both governments of the mentioned dispute (Canada, as the investor is Canadian, and the United States, where the investment was taking place) did not object on amicus curiae submissions thus rendering the decision of the Tribunal to accept amicus curiae rather understandable and acceptable. Due to the (understandable) public interest in the case, both the United States and Canada needed to keep the people

informed of their decisions and the steps they'd been taken. From one end, it reflected hugely on the advocacy to the right to Health, and from another end it also was an important case for Canada for supporting its investors abroad.

This case, although marks the beginning of a dangerous change in the legal order, did not cause an uprising in the legal sense of a procedural infringement being made; by allowing non-party actors to contribute to the legal proceedings.

Eventually, the tribunal issued is ruling to reject all of the company's arguments with a crystal-clear statement that **non-discriminatory regulations in the public interest (such as environmental laws) will almost never be considered expropriation;** this reflected (for the people) some welcome reasoning on national treatment; and precedent-setting explicit reliance on arguments from IISD's (International Institute for Sustainable Development's) amicus brief. The IISD was considered as an expert in the subject matter whose interference and input was welcome.

Two further NAFTA tribunals operating under UNCITRAL rules have since found that they had the power to accept amicus submissions and have accepted submissions from a number of interested third parties.

The NAFTA case of Methanex v. United States was the first investment arbitration in which amicus curiae rights were accorded; hence the importance of mentioning it on top of our cases. Based on an interpretation of the relevant UNCITRAL and NAFTA provisions, the Tribunal concluded that "by Article 15(1) of the UNCITRAL Arbitration Rules it – the Tribunal – has the power to accept amicus submissions in writing. From each of the petitioners. The tribunal noted that the public interest in this arbitration arises from its subject matter and argued that *"the Chapter 11 arbitral process could benefit from being perceived as more open or transparent" so that "the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular.*

ii. Biwater *Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID ARB/05/22.

Case summary:	**Award: 24 July 2008** **Human Rights issues raised by *Amici-curiae*** **Amici-curiae's demands were accepted**

Biwater v. Tanzania Tribunal accepted an amicus submission from five international and national non-governmental organizations specializing in a range of human rights, environmental and broader social justice issues. The *amici* in Biwater stated that their primary concerns are human rights and sustainable development. The tribunal cited this human rights expertise as **one of the grounds on which their petition should be accepted**. The Biwater tribunal also cited the above passage from Suez and Vivendi[1], including the importance of human rights considerations, as equally applying in their case, and stated that the petitioners appeared to have the reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

In their judgment, the Tribunal found in favour of the petitioners to the extent that an expropriation had taken place but did not award any damages because no loss could be found to the claimant. With regard to the amicus submission, the award included a detailed summary of the arguments in the amicus petition, and stated that the petitioners had provided a ***useful contribution to these proceedings***, ***through their specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania*** which had materially differed from the interests, expertise and perspectives of the two disputing parties. Still, **the Tribunal reiterated that there had been no initial need to provide the petitioners with disclosure of documents filed in the dispute, as the broad policy issues on**

[1] Also a case whereby the tribunal made sure not to deny the right of amicus curiae to submit their petitions due to public interest. The tribunal cited heavily the cases of Methanex v. United States of America and UPS v. Canada (both of which involved public hearings) to support its views on amicus curiae submissions. The extensive explanation of the tribunal in reference to acceptance of the principle of amicus curiae submissions made their explanation a foundation and a main reference for many scholars and for other tribunals defending the rights of amicus curiae to participate in tribunal proceedings.

which the Petitioners are especially qualified are ones which were in the public domain, and about which each Petitioner was already very well acquainted.

iii. Glamis Gold v United States, NAFTA.

Case summary:	**Award: 8 June 2009** **Human Rights issues raised by *Amici-curiae*** **Amici-curiae's demands were accepted**

The case Involved a claim by the firm Glamis Gold relating to mining concessions. Glamis argued that compliance with environmental regulations involving aboriginal land made the value of their investment worthless. Submissions were accepted from the ***Quechan Indian Nation***, as well as various *environmental groups* and the ***National Mining Association.***

Glamis claimed damages in relation to a mining concession with regard to environmental regulations which imposed various obligations to clean up the mining area because it was in the vicinity of Native American sacred sites belonging to the Quechan Indian Nation. Glamis claimed that as a result of these obligations, the mining concession was now worthless. The Tribunal accepted an amicus brief from the Quechan Indian Nation which argued, inter alia, that **the Tribunal is required to interpret provisions of NAFTA in accordance with relevant provisions of international law, including extensive international protections of the rights of native** peoples with regard to their cultural and religious rights and land rights. The submission went on to argue that the tribunal was required to take into account the ways in which **the US Government was required under relevant international human rights law norms to safeguard the rights and interests of the Quechan people**.

The Tribunal gave no reasoned explanation of the grounds on which they were accepting the submission. They merely stated that *it satisfied the principles of the Free Trade Commission's Statement on non-disputing party participation.*

No mention was made of the human rights arguments raised by the petitioners, other than to clarify that the acceptance of the submission. It also did not indicate either agreement or disagreement with the substance of the submission. But given the extensive human rights arguments made by the petitioners in their application for leave to file a non-party submission, the fact that the amicus submission has been accepted should indicate that the human rights framework

utilized was part of a perspective, particular knowledge or insight that is different from that of the disputing parties and therefore valuable to the considerations of the Tribunal.

The original amicus brief, and later supplemental submission in Glamis both argue that the Tribunal is required to interpret provisions of NAFTA in accordance with relevant provisions of international law, including extensive international protections of the rights of indigenous peoples. The Supplemental Submission specifically argues that the Claimant was silent on the applicable international standards for the protection of cultural heritage and sacred places and that the Respondent failed to address these issues fully. The claimant's counter-memorial only mentions relevant UNESCO Declarations on cultural heritage, not any of the indigenous rights instruments which the amici claim are relevant to deciding the claim.

2) "*Amicus Curiae*-rejected" cases

United Parcel Service of America (UPS) v Canada which is considered distinct from the other cases in that it was originally the claimants who raised the human rights issue.

i. Aguas del Tunari S.A. v Republic of Bolivia, ICSID Case No. ARB/02/3 (Netherlands/Bolivia BIT).

Case summary:	letter of the President of the Tribunal: 29 January 2003 **Award on October 21, 2005** **Human Rights issues raised by *Amici-curiae*** **Amici-curiae's demands were rejected**

Useful lessons may also be derived from the attempted privatization of drinking water services in Bolivia's third largest city, Cochabamba. This well-known case began with the signing of a $2.5 billion contract with the Aguas del Tunari consortium, granting the latter an exclusive 40-year operating concession on Cochabamba's newly privatized water delivery and treatment system. In short order, the company raised its rates to the poorest consumers by 43%, causing a popular uprising, strikes and demonstrations. The movement spread throughout the country, leading to widespread denunciations of the country's economic situation. The Bolivian government brought in the army and the police, and even declared a state of emergency in order to repress the opposition and protect the Aguas del Tunari facilities. Hundreds of Bolivians were arrested and a young man was killed in clashes with the army. In April 2000, the company withdrew and the government assigned the concession to a coalition of local NGOs. A little over a year later, Bechtel resorted to the dispute settlement mechanism provided by a bilateral agreement between Bolivia and the Netherlands (the consortium had transferred its head office to that country in the interim). The company demanded $25 million in compensation from the Bolivian government for expropriation of its investments and ensuing loss of potential profits caused by the revocation of its contract.

By privatizing this essential service without ensuring that the company would implement a non-discriminatory pricing policy, Bolivia constrained its capacity to fulfill

its obligations under ICESCR[1] Article 11 (the right to an adequate standard of living) and Article 12 (right to the enjoyment of the highest attainable standard of health) since, as the CESCR recognized in its General Comments No. 6 (1995) and No. 15 (2002), the right to water is essential to the realization of the two articles. More specifically, the state has the obligation "to prevent third parties from interfering in any way with the enjoyment of the right to water" and to "[adopt] the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water." Furthermore, "Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water." When La Paz reversed its decision on privatization in response to the pressure exerted by the population of Cochabamba, the corrective measures it implemented ran counter to its commitments under international investment law.

During the proceedings, on August 29, 2002 a petition by NGOs and people to participate as an intervening party or amici curiae was submitted to the tribunal. On 29 January 2003, a letter by NGO to petition to participate as amici curiae was also submitted to the tribunal. Petitioners argued that International HR principles supported their participation in the arbitration (Art. 14 of International Covenant on Civil and Political Rights) in support to their demand to submit briefs to the Tribunal.

The letter of the President of the Tribunal of 29 January 2003 **refused their demand, concluding that the:**

> *"Requests [of the petitioners] are beyond the power or the authority of the Tribunal to grant".*

He emphasized the **consensual nature** of arbitration and the fact that **the duties of the Tribunal *"derive from the treaties which govern this particular dispute".***

Since neither the applicable treaties nor the consent of the parties provided for the participation of *amici curiae,* the Tribunal found that it did not have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, a fortiori, to the public generally.

[1] The International Covenant on Economic, Social and Cultural Rights (**ICESCR**) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 through GA

When the tribunal in Aguas del Tunari S.A. v Bolivia rejected a petition to submit an amicus brief, the result was ongoing international pressure on Betchel from a range of civil society organisations protesting about the injustice of their action, which led to the settlement of the case for a nominal amount. It may be in the interests of tribunal panels to appear engaged with petitions for, and the content of amicus submissions, while continuing to make their decisions on the basis of the international investment law principles where their expertise lies.

In Aguas del Tunari v. Bolivia, the petitioners argued that international human rights principles supported their participation in the arbitration, referring to Article 14 of the International Covenant of Civil and Political Rights in support of their demand to submit briefs to the Tribunal. The letter of the President of the Tribunal of 29 January 2003 refused their demand, concluding that the “requests of the petitioners are beyond the power or the authority of the Tribunal to grant. He emphasized the consensual nature of arbitration and the fact that the duties of the Tribunal “derive from the treaties which govern this particular dispute.” Since neither the applicable treaties nor the consent of the parties provided for the participation of amici curiae, the Tribunal found that it did not “have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, a fortiori to the public generally”.

ii. *United Parcel Service of America (UPS) v Canada,* NAFTA.

Case summary:	**Award: June 11, 2007** **Human Rights issues raised by *Amici-curiae*** **Amici-curiae's demands were rejected**

A case in which United Parcel Service (UPS), a US courier service, alleged that Canada Post used its monopoly in postal letters to compete unfairly with competitors in courier services, including UPS itself. Amicus submissions were accepted from **the Canadian Union of Postal Workers (CUPW)** and the **Council of Canadians** and the **US Chamber of Commerce**[1]**.**

UPS v Canada (arbitrated under UNCITRAL rules) was rather different from the others, in that it was originally the claimants who raised the human rights issue. UPS claimed that Canada's failure to respect the collective bargaining rights of Canada Post's workers were in breach of its international human rights and labour rights obligations. This therefore led to a breach of Canada's obligations under NAFTA Article 1105 (minimum standard of treatment) because of the unfair competition of the lower costs of a workforce without collective bargaining rights. The claimants refuted these claims on the basis that UPS had no standing to make such claims, that they were made in the wrong forum, and that there was no rule of customary international law prohibiting the anti-competitive behavior that resulted from the lack of collective bargaining rights. The Canadian Union of Postal Workers and the Council of Canadians, in their *amicus* submission examined in more detail the arguments for why it would be inappropriate for the tribunal to find in favor of the claimants for a breach of labor rights and human rights standards in NAFTA proceedings. They argued that UPS should not be able to claim damages through NAFTA on the basis of infringement of international labor and human rights obligations of persons who were not even represented in the proceedings and who would not benefit from the award.

The Panel rejected the human rights and labour rights arguments of the claimant on the basis that UPS had failed to provide a sufficient factual or legal basis

[1] A paper on Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions, Dr. James Harrison, Assistant Professor, University of Warwick page 7.

to succeed in its claim. The tribunal briefly mentioned the petitioners' submission, but made no mention of the human rights and labour rights arguments they raised. Given that it was not the amici who had raised the human rights issues, and the failure of the defendants' case preceded consideration of the human rights arguments, it may seem reasonable that the tribunal did not mention their arguments.

Conclusion

The international relations landscape has undergone a sea change over the past decades. Whether it's the climate change, the people's habits, technology, or the legal order that we live in; it is inevitably changing, and two of the most prominent areas that have been affected by this change are ***international economic law*** and ***international human rights field***. Previously, it was rather irrelative to speak of a direct association between economic law and International Human Rights Law. Even the International Humanitarian Law was rather distant from International Economic Law. Nowadays, and with the changes to our legal order, different systems are interacting, and the print of human rights is realized almost everywhere. Just when we think we've understood the last change to our surrounding system, we are usually faced with a new, more radical, change that affects the basis of our understanding of how The System works. Our now-new modernized world is clearly distinct by the now broad understanding of human rights to include different rights like the social and political rights. The increased attention to Human Rights is also growing as people are now no longer existing in silos. For example, if a child gets beaten-up in any x-country, then the whole virtual world would start objecting, defending and portraying support to the victim. Social Media, and people's wish to portray "their best-possible-perfect-self" to the mass public is certainly fuelling the reactions to Human Rights breaches. And with the easy spread of information regarding any Human Rights' concern or incident, the mass media and the very easy access to news (sometimes with personalized messages from the victims), is putting Human Rights claims under the spotlight every day. Another example is the different calls for "saving our planet"; whether by calling for individual changes or claims for major corporate and government considerations. For corporations to secure their profits, and to secure their most valuable asset in these times – said asset being their reputation – voluntary steps and conscious decisions are now being taken by corporate managements to reflect on their environmental awareness and human rights considerations. A company which is elected as the "best employer of the year" or one which uses environmentally friendly material has much to add to its marketing material and is considered worthy of the higher costs of goods for many consumers.

People now have very little or even zero tolerance to cases showing human rights abuse. From another end, the people are not only portraying dismay or disappointment, as they are taking things in hand. They are rightfully assuming the right to interfere in any and all matters that could (even remotely) affect their given

human rights. This spread of information, along with the people's willingness and enthusiasm to defend Human Rights and to fight for their own rights have touched all sectors; just like globalization have once affected the system of the world.

The People's interference is not limited to voicing their concerns over social media. NGO's have found a way to interfere in different monetary dealings between the government and foreign investors by providing amicus curiae submissions, as "friends to the court". This friendship is ought to protect the tribunal from producing a verdict that could, in turn, indirectly harm thousands of people.

In considering the role to be played by said third-party interveners in investor-State arbitral disputes, it is necessary to remain conscious of the fact that the investment arbitration (and generally all traditional commercial arbitration) regime fundamentally differs in character from Human Rights disputes system. Even within Arbitration itself, the differences between Ad Hoc and Institutional Arbitration are not to be taken lightly. Whilst institutional arbitration gives the reassurance of a qualified institutional control of the procedures and results, ad hoc arbitration greatly depends on the arbitrators themselves.

Despite that, the similarities and the interlocutory linkage that we highlighted in the first part of this dissertation has found its way into the system based on practical needs. The differences between the two matters of laws (Investment Arbitration and Human Rights) starts with the Subject Matter and does not become any more lenient with the Procedural Jurisdiction of the ruling authority. Certain substantive norms, nonetheless, such as the prohibition of discrimination and the protection of property may be common to both Investment and Human Rights Law. In the procedural context, investment law grants more rights to the individual. Many human rights treaties still do not foresee the possibility of individual complaints by private persons, let alone juridical persons. In Investor-State Arbitrations, while arbitrators generally lack the jurisdiction to rule that a human rights law norm has been breached, they may nevertheless be called upon to examine a State's human rights law obligations – and draw their own conclusions as to what these demand in practice and how they may interact with investment law obligations.

This, eventually, meant the interactions of the two laws in different cases in practical life, and it's our foregone conclusion that Arbitrators will now find themselves dealing more and more with amicus curiae cases "intruding" on an Investment Agreement that the State has made, but has later gone sour due to economic or social changes in the country. In Principle, it is imperative for State-

investor arbitration to satisfy high confidentiality to the parties; as this is the essence of arbitration and one of the reasons this system was founded in the first place. From the other hand, Human Rights' claims (especially when raised by an NGO as amicus submissions) are usually characterized by a public demand or a public need. The balance in the Confidentiality requirement has been left to the wit of the arbitrators, who (when accepting amicus submissions) are generally now only accepting the submissions without providing the third parties the right to attend hearings or to get access to the court documents. It is, of course, also necessary to be mindful of the ever-present concern that should the acceptance of amicus briefs in investor-State arbitration become widespread, it could render arbitration less attractive to investors. From the perspective of the coherence and unity of public international law, the acceptance of amicus submissions raising human rights arguments by investment arbitration panels has superficial attractions. Tribunals are thereby recognising the formal requirement to take into account other branches of international law. But lack of engagement with the human rights arguments presented demonstrates the procedural and substantive barriers to meaningful interaction between the two legal regimes through this mechanism. In social justice terms, this reinforces the idea of an international legal system where power about how scarce resources should be distributed is left in the hands of technical and legal experts from one particular regime. This undoubtedly weakens the organisation of international law in the eyes of those outsiders to the regime who seek to engage with it.

At the level of International Investment Agreements / treaties, said agreements can start giving more attention to setting human rights performance standards for foreign investors. For example, the IISD Model Agreement on Investment for Sustainable Development includes a broad provision in this regard:

> "*(B) Investors and investments should uphold rights in the workplace and in the state and community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights."*

Still, International Investment Agreements today have no Human Rights enforcement mechanisms against corporations, as there are no obligations falling upon them; at least not in the legal sense of penalties in cases of breach. As a result,

one suggestion is made that they should be subject to suit by other stakeholders under a similar process to the investor-state arbitration[1].

There may in fact be instances where amicus curiae may represent substantial legal interests that they are mandated to represent, and where their participation could have broader benefits for both the specific arbitration and the system as a whole (keeping in mind our previous comment regarding confidentiality risks). It is then also imperative for the panel to entertain high standards of transparency and openness to non-disputing party participants when the subject touches upon human rights matters without jeopardizing the essentials of the arbitration process.

Looking back at all what was presented and in light of the latest trend in amicus curiae interference in investment arbitration, it is safe to say that the likelihood for arbitrators' engagement with human rights issues is going to increase; hence the increased need for further consideration and analytics on how to deal with said submissions, preferably at an early treaty signature stage where possible. Human rights claims are being raised in a small, but significant, number of ongoing arbitrations. A review of current trends reveals that there is, at present, no formalized or predictable process to address the interplay of these issues. A reassessment of the current frameworks for third-party participation is necessary in order to formalize amicus curiae status in investment arbitration, and thereby promote the procedural and substantive legitimacy of State-investor dispute resolution mechanisms. There are still now many cases awaiting rejection or acceptance of amicus curiae submissions where the arbitral panel is yet to take a stand of the amicus curiae submissions, the matter which will likely have an impact on the outcome of the award itself. Once the decision is taken of acceptance or refusal of the submissions, the tribunal would also determine the question of access to hearings and public knowledge. And regardless what the tribunals would decide, it is undoubted that the ***effect*** of interference of *amicus curiae* raising human rights concerns in the proceedings will likely not stop at the direct effect on the investment agreement between the State and the Investor. The truth is that, in future dealings, the effect of this interference is going to go beyond the specific temporary investment situations, into a full-fledged debate in upcoming International Investment Agreements between countries.

[1] International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, 2008. page 14.

It is important to note that the State is not a target of the blame in any of the arbitrations made and which eventually required amicus curiae interference in support of Human Rights. The State is not to be blamed for the lack of care for human rights; as the scenario presented in all the mentioned cases (and in most of what is currently occurring) is a good investment treaty made, but which has gone sour after some drastic (hard to expect) changes in the economic situation in the country; leading to an imperative requirement to breach the investment treaty. The States are only being forced to breach said treaties under the compelling demand of delivering its standard duties to care for the people (example provide water). This defence of the superiority of Human Rights Norms, above any other economic dealing, is also the reason why amicus curiae submissions are made. To control the risks of said intervention in the future, and to control the risks of unintentional Human Rights abuse due to economic, social, or demographic changes, countries with sound legal advice and proper readings on the happenings in the Legal field will thus be extra cautious to add articles in future investment treaties clarifying the provisions in cases of drastic economic or social changes in the country warranting the cancellation of its obligations in the given agreement. Whilst this does not sound as an attractive agreement for investment, it might be crucial to save the fundamental rights of the people. Policies that promote certain disadvantaged persons in Investment Agreements might just become the new trend. Also, if portrayed properly, these clauses could actually be the investor's Safety Net whereby the cases in which the State would have to breach the agreement could be discussed and agreed upon in advance. After all, the basis of all contracts is the mutual agreement between parties, and if the State could reflect (in the International Investment Agreements or later in the specific contracts) the boundaries to which it would not be able to fulfil its obligations, then this will assure better compliance and expectations from both parties.

As a general rule, it would be too much to expect the contractual parties to draft an arbitration clause that can address all the concerns outlined in this dissertation. The difficulties of defining the rule and its exceptions are by now well-known and, given that the arbitration clause is often a *"midnight clause"* (i.e., added in at the end of the contractual negotiations when neither party would like to spend much time on it) it would be more likely than not that the discussions of dropping the confidentiality clause for example in arbitrary procedures would create more problems than it solved because of insufficient definition of the exceptions so that legitimate breaches of confidentiality would apparently be prohibited by the arbitration

clause. Still, more awareness from the parties is needed as to the risks ahead from not pre-agreeing on those details. Eventually, it is the Investment Tribunals that will have to deal with the result of the agreement(s) and the dispute(s).

Whether international investment tribunals have the capacity, expertise and indeed the mandate to engage questions of essential Human Rights' application are also main areas of concern. So far, and, as in any scholarly dispute, some tribunals and some scholars accepted the new "trend" and went with the flow, whereas others refused the meddling in the essence of Arbitration; and specifically, Confidentiality. **It is important to stress that the tribunals, the latter case, are not breaching any legal obligation in failing to take into account human rights arguments.** There is no general legal principle which gives rise to an obligation upon a tribunal to consider, either explicitly or implicitly, arguments made by *amicus curiae*. More visibly, WTO and NAFTA tribunals are not obliged to give any consideration to *amicus* submissions, while other international courts and tribunals have not felt the need to articulate their obligations towards *amici* once they have made their submissions. It is argued that the practice of the international criminal tribunals and the ECHR suggests that they might view themselves as having stronger obligations to at least consider submissions that have been made. But, as the *UPS* Tribunal[1] stated, *"international law and practice and related national law and practice have either ignored or given a very low priority to third party intervention."* In fact, investment tribunals have appeared far more receptive than, for instance WTO panels to considering the arguments of *amici*. The WTO has been far more openly dismissive of both petitions to submit *amicus* briefs, and the substance of submissions which have been accepted. By contrast, the attitude of the tribunal in *Biwater v Tanzania*[2], in setting out at length the arguments of the *amici* and saying that it had found the submission to be a "useful contribution to these proceedings" is, superficially at least, far more engaged. Beyond this, it would appear to be the prerogative of the tribunal to decide whether or not to engage with the human rights arguments received on the basis of whether or not they have actually found those arguments useful, and to signify this as they see appropriate. To further support our legal order, and to reach a more systematic result across different arbitral panels, a reform of the New York Convention, which has so far broadly contributed to the

[1] United Parcel Service of America (UPS) v Canada, NAFTA, Section II of this dissertation.

[2] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID ARB/05/22, Section II of this dissertation.

adoption and development of arbitration as a method to settle international trade disputes, is now worth considering. An explicit mention of Human Rights breach as grounds for refusal of enforcement of an arbitral award is now essential. The fact that Human Rights is part of Public Policy, which in itself is one of the grounds for refusal of enforcement is not sufficient, and explicit mention of human rights breaches are now required.

By grafting a human rights claim mechanism onto the existing structure of international investment protection treaties, one can both recognise the growing place of the transnational corporation in human rights law and practice and improve upon the effective enforcement of human rights. Through the establishment of an effective enforcement mechanism, voluntary codes of corporate conduct can move from the realm of public relations exercise to the role of educative compliance mechanism. Without effective enforcement, human rights law will remain the weak sibling of international economic law. The citizens of this world deserve better.

Perhaps the most salient conclusion to be drawn here is that the existing International Investment Agreements have become extremely important legal documents, both for their impact in supporting the movement of capital and for the ability of foreign investors to directly enter the realm of international law and enforce their treaty rights.. These cover all areas of investment and all types of government actions and measures. Thus, even while diffuse in origin and while lacking any international institutional structure, the existing international investment law regime is extremely important in today's globalization context, and it continues to expand.

In view of this trend, there has been some discussion as to the advantages and drawbacks of arbitrators finding themselves in the position of ruling in the interference of Human Rights Laws with State Investment Treaties; specifically in the third-party interference reflected by amicus curiae submissions. It is difficult to draw firm conclusions about the value of human rights interventions in amicus curiae submissions in international investment on the basis of a small number of cases, many of which not yet been finally decided. Nonetheless, the reasoning of the tribunals in accepting the submissions does seem to give rise to some fundamental issues about their role and purpose, and therefore introducing new intellectual challenges for the System of Law.

We need to clearly address the question of **confidentiality** in arbitration in order to overcome the difficulty in defining the rules and the exceptions to those rules. While it is certainly desirable to have a clear definition of the general rule and a

list of the more commonly accepted exceptions to that rule, legislators should not make the mistake of locking in the concept of confidentiality by a fixed list of exceptions. A practical solution to this problem is to allow the tribunal to determine on an ad hoc basis whether or not there should be an exception to the principle of confidentiality, and the exact scope of that exception tailored to the case in question. There should be a range of discretion reserved to the tribunal to permit exceptions to confidentiality where the justice of the case requires and where it is otherwise appropriate to do so. This will allow the exceptions to confidentiality to be extended or restricted or otherwise modified by individual tribunals. In short, there cannot be a "one-size-fits-all" definition of the rule or its exceptions. The tribunal may accept an express adoption of an independent third party to resolve difficulties in identifying and defining the exceptions to confidentiality.

A medium-term solution which might address the problem of *amicus curiae* interference and its effect on confidentiality would be for a major arbitration research institution (such as UNCITRAL, the ICC Commission, the Chartered Institute or the International Council for Commercial Arbitration) to develop a model law or a model clause for adoption by arbitration institutions or contracting parties. Ultimately, the solution would be truly ad hoc, but the strength of the solution is that it will allow the parties and tribunals to cope appropriately with the myriad situations (many of which are unforeseeable) which will inevitably arise and which will need to be accommodated so as to override confidentiality to a greater or lesser extent.

Having a proper regulatory infrastructure that is adequate to ensure the protection of human rights and other social values in place prior to the investments is an effective way to foresee and forestall human rights problems. This also reduces the risks of enacting new measures for which an investor may seek compensation. Having a proper regulatory regime in place does not mean that no changes in the law will take place, of course. They will occur over the life of an investment. But by creating both a sound initial regulator platform for the investment and a process within the structure for adopting new laws or regulations, the risk of such new laws attracting a requirement for compensation under IIAs will be reduced.

It may be possible, for example, for human rights claims to be limited to cases in which an investor has itself brought a claim for a breach of the treaty that has resulted in a loss to its investment. In such instances, the treaty could authorize a counterclaim to be brought by the host state on behalf of its citizens who may have suffered losses arising out of illegal conduct by the investment enterprise.

Given the interrelatedness of international and domestic elements, the legal framework applicable to indirect expropriation (for example) is very complex; to date, more precisely, it is far from clear which is the legal regime governing the phenomenon.

Many countries conclude Investment Agreements in order to attract foreign investment and limit at the same time their own scope to exercise national policy. It is a challenge, especially for developing countries, to strike a balance between attracting Foreign Direct Investment (FDI) and retaining policy autonomy. Therefore, the interrelationship of investment and development must be analysed as well as the interrelationship of investment law and investment. To verify the beneficial effects of FDI in a particular state would require considering the conditions prevalent in the state in question as well as the world economy at the decisive time. A differentiation between the types of foreign investment and a clarification of the necessary conduct on the part of the investors is also vital.

It is not a secret to say that cases of human rights breaches due to implementation of an investment agreement can come as a result of improper long-term planning by the government prior to signing off the investment agreement, and/or as a natural consequence to the changes in economic, natural, or even social circumstances in the country of investment. The highest probable risk for human rights' breaches and imbalances, thus lies in third world countries. The lack of an abundant number of cases in this frame may be attributed to (i) the natural confidentiality of arbitration, and/or (ii) the unfamiliarity of the citizens and local NGO's to the new *amicus curiae* means of claims of human rights.

It is thus crucial to study the cases where Human Rights Interference could affect the due course of cases with major effect on the public interest in some selected third world countries. Examples would be, the trash crisis in Lebanon, Water crisis in several countries (Lebanon included). It is also imperative to support in planning for a hopefully Non-Crisis of future Oil and Gaz Extraction from Lebanon shores; by making sure the Investment Agreements take into consideration possible changes in the circumstances governing the Investment Agreement.

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