

# Human Rights and International Investment Arbitration

*Clara Reiner and Christoph Schreuer*

## I. Introduction

Investment arbitration has emerged as the most effective means of resolving investor-state disputes. The popularity of arbitration for this purpose has not only led to a rapid increase in the caseload of arbitration institutions, but has brought with it an array of new issues. As a consequence, investment law is presently being challenged by interactions with other, non-investment, obligations.<sup>1</sup> These are raised by investors, states, and non-party actors alike. In addition to environmental and labour-related issues, references to human rights in the domain of investment arbitration are appearing, yet they remain sparse and infrequent.

It is not impossible for investment protection treaties, such as bilateral investment treaties (BITs), to provide for human rights, but this would be highly unusual. The Model BITs of China (2003), France (2006), Germany (2005), the United Kingdom (2005), and the United States (2004) do not mention them explicitly. Mention of human rights is equally absent from the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), two important multilateral investment treaties.<sup>2</sup> The ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States) 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.

<sup>1</sup> See U Kriebaum, 'Privatizing Human Rights. The Interface between International Investment Protection and Human Rights' in A Reinisch and U Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (2007) 165–189.

<sup>2</sup> See R Dolzer and C Schreuer, *Principles of International Investment Law* (2008) 314 (ECT), 330 (NAFTA), 352 (Chinese Model BIT), 360 (French Model BIT), 368 (German Model BIT), 376 (British Model BIT), 385 (US Model BIT). In its Arts 12 and 13, the US Model BIT does, however, address environmental and labour law.

This suggests that the present role of human rights in the context of investment arbitration is peripheral at best. This contribution will attempt to throw some light on the role of human rights in international investment arbitration, focusing more particularly on the issues relating to jurisdiction, the applicable law, and the invocation of human rights during proceedings.

## II. Jurisdiction over Human Rights Issues

The system of investment arbitration does not generally require the exhaustion of local remedies and places the investor and the state on an equal footing, thus supplanting diplomatic protection. This is somewhat of an anomaly in the larger context of international law. Established on a case-by-case basis, arbitral tribunals draw their jurisdiction to make binding rulings on a dispute solely from the consent of the parties. The tribunal's jurisdiction is consequently both based on and limited to that agreement. Hence, the mere allegation of a human rights violation would not suffice to confer jurisdiction on a tribunal. To determine whether an investment tribunal is competent to decide on human rights issues, the clause establishing jurisdiction is decisive.

It is thus the formulation of the compromissory clause in the treaty or contract which 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'.<sup>3</sup> In the case of NAFTA, Article 1116 effectively delimits NAFTA's applicability to alleged breaches of Section A, namely 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 of jurisdiction 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. However, 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 tribunal's competence, thus providing access to investment arbitration.

In the case of *Biloune v Ghana*,<sup>4</sup> the Syrian investor, Biloune, had been arrested and held in custody for 13 days without charge and finally deported from Ghana to Togo. In the ensuing proceedings, the claimant also sought

<sup>3</sup> LE Peterson and KR Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' (2005), International Institute for Sustainable Development, at 10, available at <<http://www.iisd.org>>.

<sup>4</sup> *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

redress for these alleged violations of his human rights. The UNCITRAL arbitration was based on Article 15(2) of the agreement between the investor and the host state, which provided that '[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise . . . may be submitted to arbitration'.<sup>5</sup>

The tribunal affirmed that customary international law requires states to accord foreign nationals a minimum standard of treatment and that international law endows all individuals, regardless of nationality, with inviolable human rights. However, it held that these rules do not imply that the tribunal is competent to rule upon every type of departure from the minimum standard or violation of human rights. Basing its reasoning on the wording of the consent clause in the agreement, the tribunal ruled that its competence is limited to disputes 'in respect of' the foreign investment and that hence the 'Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights'.<sup>6</sup>

The tribunal's reasoning, based on the interpretation of the agreement's compromissory clause which limits jurisdiction to disputes 'in respect of an approved enterprise', declared that an independent claim for violation of human rights fell beyond the scope of its competence. Yet, while it may indeed not be competent for an independent claim, human rights violations cannot per se be excluded from its jurisdiction. If and to the extent that the human rights violation affects the investment, it will become a dispute 'in respect of' the investment and must hence be arbitrable.

### III. Human Rights Law as Applicable Law

In considering the role of human rights in international investment arbitration, it does not suffice to establish the tribunal's jurisdiction over alleged violations of human rights, since the analysis and evaluation of the breaches will depend upon the applicable substantive standards.

It is not impossible that BITs or multilateral investment treaties contain human rights provisions, but this would be quite exceptional.<sup>7</sup> In the absence of specific human rights norms in investment treaties and given the parties' freedom to select the applicable law, human rights provisions are applicable to the extent to which they are included in the parties' choice of law. It depends on the choice of law provisions whether human rights norms of international or domestic law will be applicable to the case.

Numerous BITs contain composite choice of law clauses, typically including treaty rules, host state law, and customary international law. Under

<sup>5</sup> *Ibid.*, at 188.

<sup>6</sup> *Ibid.*, at 203.

<sup>7</sup> Peterson and Gray, n 3 above.

these provisions, human rights, as a component of international law, are part of the applicable law. For instance, Article 9 of the Chinese Model BIT (2003) provides for the settlement of disputes between investors and a contracting party (namely, the host state) and determines that '[t]he arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law'.<sup>8</sup> The US Model BIT (2004) provides that, in certain cases, 'the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law',<sup>9</sup> whereas in others, international law shall be applicable alongside the law of the respondent state only when the parties do not otherwise agree.<sup>10</sup>

Certain multilateral investment instruments also provide for the applicability of international law, so that relevant human rights rules may also be pertinent in arbitrations based on these instruments. Article 1131 of the NAFTA determines that '[a] tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.<sup>11</sup> Furthermore, the ECT disposes that '[a] tribunal . . . shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'.<sup>12</sup>

Article 42(1) of the ICSID Convention establishes that in the absence of an agreement of the parties on the applicable law, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.<sup>13</sup> The Report of the World Bank Executive Directors specifies that 'the term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes'.<sup>14</sup>

The UNCITRAL Arbitration Rules of 1976 do not envisage the application of international law, giving priority to the parties' agreement. In the event that such an agreement is lacking, they state that 'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.<sup>15</sup> This peculiarity may be explained by the fact that UNCITRAL is primarily an instrument for the settlement of commercial disputes between private actors and hence less prone to applying public international law.

<sup>8</sup> Chinese Model BIT (2003), n 2 above, Art 9(3).

<sup>9</sup> US Model BIT (2004), n 2 above, Art 30(1). <sup>10</sup> US Model BIT (2004), Art 30(2).

<sup>11</sup> NAFTA, n 2 above, Art 1131(1). <sup>12</sup> ECT, n 2 above, Art 26(6).

<sup>13</sup> ICSID Convention, Art 42(1).

<sup>14</sup> See Report of the Executive Directors of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1 ICSID Reports 31, para 40.

<sup>15</sup> Art 33(1) of the UNCITRAL Arbitration Rules 1976, available at <<http://www.uncitral.org>>.

#### IV. Corporate Social Responsibility

When considering whether and to what extent states are bound by human rights duties, it would be inconsistent to disregard obligations that might be incumbent upon the investor. Foreign investment has not always harvested praise, and concern about the role played by multinational enterprises in the protection of fundamental rights has grown. As a response to this, the concept of (international) corporate social responsibility has emerged, endeavouring to apply human rights responsibilities to investors.

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 responsibilities. After all, these are traditionally considered to pertain to the domain of states alone. Yet, Muchlinsky comments that:

at a moral level it would appear that there exists a widening consensus that MNEs [multinational enterprises] should observe fundamental human rights standards. This can be supported by reference to the fundamental need to protect from assaults against human dignity regardless of whether their perpetrators are state or non-state actors.<sup>16</sup>

He also emphasises that '[d]espite this strong theoretical and moral case for extending responsibility for human rights violations to MNEs, the legal responsibility of MNEs for such violations remains uncertain'.<sup>17</sup>

Indeed, in his Interim Report, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, comments that 'with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that [directly bind businesses]'.<sup>18</sup> He goes on to state that 'all existing instruments specifically aimed at holding corporations to international human rights standards ... are of a voluntary nature', and that relevant instruments impose obligations on states, not companies. Yet, he also indicates that:

under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity.<sup>19</sup>

<sup>16</sup> PT Muchlinski, 'Corporate Social Responsibility' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 655 (footnote omitted).

<sup>17</sup> PT Muchlinski, *Multinational Enterprises and the Law* (2007) 517.

<sup>18</sup> J Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006) para 60.

<sup>19</sup> *Ibid.*, para 61.

In the subsequent report, the UN Special Representative notes in a similar vein that '[c]orporations increasingly are recognized as "participants" at the international level, with the capacity to bear some rights and duties under international law'.<sup>20</sup> However, after analysing the Universal Declaration of Human Rights, the two Covenants, and other core UN human rights treaties, the Special Representative concludes that 'it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations'.<sup>21</sup>

Although the current state of international law does not seem to prescribe human rights obligations for investors beyond the extent to which they are incorporated into national legislation applicable to the investor, the debate is ongoing and the conclusions reached will presumably evolve. For the time being, soft law has espoused the role of formulating and developing standards which may, at a later stage, emerge as hard law.

Several international instruments provide codes of conduct for transnational corporations. For instance, the OECD Guidelines for Multinational Enterprises (27 June 2000) are 'recommendations addressed by governments to multinational enterprises [and] provide voluntary principles and standards for responsible business conduct consistent with applicable laws'.<sup>22</sup> The UN Global Compact, 'a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption',<sup>23</sup> encourages companies to adopt certain values derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption.

The UN Norms,<sup>24</sup> which were adopted by the Sub-Commission on the Promotion and Protection of Human Rights in Resolution 2003/16 of 13 August 2003, 'comprise 23 articles . . . which set out human rights principles for companies in areas ranging from international criminal and humanitarian law; civil, political, economic, social, and cultural rights; as well as consumer protection and environmental practices'.<sup>25</sup> There can be no doubt as to their voluntary nature, since at its 56th meeting, while taking note of the UN Norms

<sup>20</sup> J Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* (2007) para 20 (footnotes omitted).

<sup>21</sup> *Ibid.*, para 44.

<sup>22</sup> Preface, para 1, OECD Guidelines for Multinational Enterprises, available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

<sup>23</sup> <<http://www.unglobalcompact.org/AboutTheGC/index.html>>.

<sup>24</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003), approved 13 August 2003 by UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 at 52 (2003), available at <<http://www1.umn.edu/humanrts/links/norms-Aug2003.html>>.

<sup>25</sup> Ruggie, n 18 above, para 56.

document, the Commission on Human Rights affirmed that 'as a draft proposal' the document 'has no legal standing'.<sup>26</sup>

## V. Invocation of Human Rights in Arbitrations

### A. By the Investor

Surprisingly, human rights are rarely invoked by investors in investment arbitrations.<sup>27</sup> This may in part stem from the fact that in most investment arbitrations, the investors involved are not natural, but juridical persons and that only the European Convention for Human Rights provides protection for the property of juridical persons.<sup>28</sup> Another reason may be that the standard of protection provided by human rights instruments is typically lower than the standard contained in investment treaties and contracts.

Even in cases where human rights of the investor could have been relevant, the tribunals did not address the human rights issues. Thus, in *Biloune v Ghana*,<sup>29</sup> the tribunal declared that it lacked jurisdiction to examine the allegations of human rights violations.

In the case of *Patrick Mitchell v DR Congo*, the Decision on Annulment cites an extract of the (unpublished) Award, which describes the dispute as relating to:

the intervention ordered by the Military Court of the Democratic Republic of Congo and executed on March 5, 1999 when the premises housing Mr. Mitchell's firm were put under seals, documents qualified as compromising and other items were seized, the employees of the firm were forced to leave the premises and two lawyers, Mr. Risasi and Mr. Djunga, were put into prison. These individuals remained incarcerated until the day of their release by a decision of the Military Court on November 12, 1999, which also ordered the removal of the seals placed on the premises of Mr. Mitchell's firm.<sup>30</sup>

Clearly, the seizure of property and the incarceration of employees raise human rights issues. Yet, there is no indication that the Award considered these issues and the Annulment Decision fails to mention them at all.

<sup>26</sup> UN Commission on Human Rights, Resolution 2004/116 of 20 April 2004, see also <[http://ap.ohchr.org/documents/E/CHR/decisions/E-CN\\_4-DEC-2004-116.doc](http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc)>.

<sup>27</sup> The international investment arbitration cases cited are available on the ICSID homepage <<http://icsid.worldbank.org>> or on the Investment Treaty Arbitration homepage <<http://ita.law.uvic.ca/>>.

<sup>28</sup> For an analysis of the debate concerning the extension of human rights to juridical persons, see PT Muchlinski, *Multinational Enterprises and the Law* (2007) 509-514.

<sup>29</sup> *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

<sup>30</sup> *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, at para 1, citing para 23 of the Award, 9 February 2004 (not publicly available).

## B. By the Host State

States have to date not introduced claims against investors for breaches of human rights. One of the reasons for this may be procedural: the investor's consent to arbitration is generally expressed in its request for arbitration and hence limited to the substance of the request. Another reason is that active human rights violations by the investor will most likely occur with the complicity of the host state. Moreover, as discussed above, it is uncertain to what extent non-state parties are subject to human rights obligations.

Instead, host states have relied on human rights considerations defensively to justify measures with adverse effects on the investment, arguing that their treatment of an investor was in furtherance of or necessary to protect certain international human rights commitments.<sup>31</sup>

Under international human rights law, the state bears obligations which include not only the prohibition of engaging in human rights violations, but also the duty to prevent the infringement of human rights by others. Failure by the host state to protect its citizens may engage its responsibility. It is in this capacity that states have invoked human rights, in particular in cases involving public utilities, yet with little success.

In *CMS Gas v Argentina*, Argentina argued that the country's economic and social crisis affected human rights and that 'no investment treaty could prevail as it would be in violation of such constitutionally recognized rights'.<sup>32</sup> The tribunal held that when considering the issues disputed between the parties, 'there is no question of affecting fundamental human rights'.<sup>33</sup>

In *Azurix v Argentina*, an ICSID case concerning water and sewage systems, Argentina raised the issue of the compatibility of the BIT with human rights treaties that protect consumers' rights and argued that 'a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of service provider [sic]'.<sup>34</sup> The tribunal found that the matter had not been fully argued and noted that it failed to understand the incompatibility in the specific case seeing that the services to consumers continued without interruption after the termination notice.<sup>35</sup>

In *Siemens v Argentina*, Argentina again claimed that given the social and economic conditions of Argentina, recognizing the property rights asserted by the claimant would disregard human rights incorporated in the Constitution.<sup>36</sup>

<sup>31</sup> Peterson and Gray, n 3 above, 16.

<sup>32</sup> *CMS Gas Transmission Co v Argentina*, ICSID Case No ARB/01/08, Award, 12 May 2005, at para 114. <sup>33</sup> *Ibid.*, at para 121.

<sup>34</sup> *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, at para 254.

<sup>35</sup> *Ibid.*, at para 261.

<sup>36</sup> *Siemens v Argentina*, ICSID Case No ARB/02/08, Award, 6 February 2007, at para 75.

In response to Argentina's argument, the tribunal held that the argument had not been developed and that 'without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case'.<sup>37</sup>

These awards seem to indicate the tribunals' reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves. In an analysis on the interactions between investment and non-investment obligations in international investment law, Hirsch notes that 'structural differences [between public international law and international investment law] have led investment tribunals to grant precedence to the contractual or consensual rules that have been agreed upon by host states and investors'.<sup>38</sup>

Since 'the superior position of the host state regarding influence upon the content of both domestic and international law is glaring ... investment tribunals are inclined to emphasise the obligations included in the investment agreement'.<sup>39</sup>

A perhaps slightly different approach is discernible in the case of *Sempra v Argentina*. Here, the tribunal acknowledged that 'this debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'. Nonetheless, it found that 'the real issue in the instant case is whether the constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation'. It concluded that 'the constitutional order was not on the verge of collapse' and that hence 'legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation'.<sup>40</sup>

### C. By Non-Party Actors

While invocations of human rights obligations by host states have been met with little enthusiasm, tribunals have been more willing to consider human rights issues in another context, namely that of *amicus curiae* submissions. Translated as 'friend of the court', the term *amicus curiae* is used to describe a 'person who is not a party to a lawsuit but ... has a strong interest in the subject matter'.<sup>41</sup>

The human rights issues involved in the participation of non-parties in the arbitration proceedings are twofold. One is procedural, the other is substantive. A procedural right of petitioners to submit *amicus curiae* briefs may be seen as

<sup>37</sup> *Ibid.*, at para 79.

<sup>38</sup> M Hirsch, 'Interactions between Investment and Non-Investment Obligations' in Muchlinski, Ortino, and Schreuer, n 16 above, 154 and 173.

<sup>39</sup> *Ibid.*, 179.

<sup>40</sup> *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007, at para 332.

<sup>41</sup> *Black's Law Dictionary* (7th edn, 1999).

emanating from their right to a fair trial, such as the one enshrined in Article 6 of the European Convention on Human Rights (right to a fair trial) or Article 14 of the International Covenant on Civil and Political Rights.

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.<sup>42</sup> Yet, despite these arguments, the President of the tribunal 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'.<sup>43</sup>

It is doubtful whether the right to a fair trial is suitable to promote *amicus curiae* submissions. It confers rights upon persons 'whose rights and obligations in a suit at law are being determined by a court or tribunal'<sup>44</sup> and concerns the standing as a party to proceedings, rather than the possibility to submit documents and briefs as *amicus curiae*. The standing as a party for those directly concerned, such as the inhabitants of Cochabamba in Bolivia, may be desirable, yet the consensual nature of the arbitration system and its limited jurisdiction would presumably prevent it.

In a second group of cases, the admissibility of *amicus curiae* submissions were considered not so much from the point of view of the petitioners' right to a fair trial, but on substantive grounds. The human rights issues raised by the petitioners were understood to contribute to the special public interest of the arbitration and thus justified the admission of *amicus curiae* briefs.

The NAFTA case of *Methanex v United States* was 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'.<sup>45</sup> 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

<sup>42</sup> *Aguas del Tunari SA v Bolivia*, ICSID Case No ARB/02/3, NGO Petition to Participate as *Amici Curiae*, 29 August 2002, at paras 47 and 48.

<sup>43</sup> *Aguas del Tunari*, Letter from President of Tribunal Responding to Petition, 29 January 2003.

<sup>44</sup> *United Parcel Service of America v Canada* (NAFTA), Decision on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, at para 40.

<sup>45</sup> *Methanex v United States* (NAFTA), Decision on *Amici Curiae*, 15 January 2001, at para 47.

willingness to receive *amicus* submissions might support the process in general and this arbitration in particular'.<sup>46</sup>

In the context of NAFTA arbitration, the competence of tribunals to admit *amicus curiae* submissions was confirmed by the Statement of the North American Free Trade Commission on Non-Disputing Party Participation of 7 October 2003 which clarifies that: 'No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party").'<sup>47</sup> Hence, in the pending *Glamis Gold v United States* (NAFTA) case, the tribunal admitted the Submission of the Quechan Indian Nation since it was of the view that 'the submission satisfies the principles of the Free Trade Commission's Statement on non-disputing party participation'.<sup>48</sup>

The discussion concerning *amicus curiae* evolved slightly differently in the domain of ICSID arbitrations since the Convention provided the relevant framework for procedural decisions. Yet, the NAFTA cases played a role in providing precedent for the conclusions reached by the tribunals.<sup>49</sup>

The tribunal in *Aguas Argentinas*<sup>50</sup> accepted *amicus curiae* briefs in principle since 'Article 44 of the ICSID Convention grants it [the Tribunal] the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases'.<sup>51</sup> It went on to say that:

Courts have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case.

The tribunal noted that:

the factor that gives this case particular public interest is that the 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. Any decision

<sup>46</sup> Ibid., at para 49.

<sup>47</sup> Para A.1. of the Statement of the North American Free Trade Commission on Non-Disputing Party Participation of 7 October 2003, available at <<http://www.ustr.gov>> and <<http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>>.

<sup>48</sup> *Glamis Gold v United States*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, at para 10.

<sup>49</sup> See, eg *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, at para 14; and *Aguas Provinciales de Santa Fé SA, Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentina*, ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, at para 14.

<sup>50</sup> *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona, and Vivendi Universal SA v Argentina*, n 49 above.

<sup>51</sup> Ibid., at para 16.

rendered in this case, whether in favour of the Claimants of the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.<sup>52</sup>

The tribunal in the case of *Aguas Provinciales de Santa Fé*<sup>53</sup> was identical in its composition to that of *Aguas Argentinas* and the proceedings concerned the same subject matter, namely water distribution and sewage systems in an urban area. Again, the tribunal concluded that 'Article 44 of the ICSID Convention grants it [the tribunal] the power to admit *amicus curiae* submissions from suitable non-parties in appropriate cases'<sup>54</sup> and specified that water and sewage systems provide basic public services as a result of which a variety of public and international law questions, including human rights considerations, emerge and that the subject matter is hence appropriate for *amicus curiae* submissions.<sup>55</sup>

The case of *Biwater Gauff v Tanzania*<sup>56</sup> also concerned water privatization. In the Petition for *amicus curiae* status submitted on 27 November 2006, the petitioners emphasized the salient relationship of service delivery to basic human rights and needs in the water sector<sup>57</sup> and stressed that 'the arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights'.<sup>58</sup> In its Procedural Order No 5,<sup>59</sup> the tribunal acceded to the *amicus curiae* petition and expressed the view that:

it [the Tribunal] may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself.<sup>60</sup>

On the basis of the reasoning provided by the tribunals, it appears that in permitting *amicus curiae* briefs, arbitral tribunals seem more moved by efforts to increase transparency and respond to public interest rather than by human rights considerations.

The revision of the ICSID Arbitration Rule 37(2) on 10 April 2006 removed all doubts over the tribunal's power to admit *amicus curiae* briefs. Rule 37(2) now provides:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute . . .

<sup>52</sup> Ibid., at para 19.

<sup>53</sup> *Aguas Provinciales de Santa Fé SA, Suez, Sociedad General de Aguas de Barcelona, and InterAguas Servicios Integrales del Agua*, n 49 above. <sup>54</sup> Ibid., at para 16.

<sup>55</sup> Ibid., at para 18.

<sup>56</sup> *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22.

<sup>57</sup> *Biwater Gauff*, n 56 above, Petition for *Amicus Curiae* Status, 27 November 2006, at p 7.

<sup>58</sup> Ibid., at p 8.

<sup>59</sup> *Biwater Gauff*, n 56 above, Procedural Order No 5 on *Amicus Curiae*, 2 February 2007.

<sup>60</sup> Ibid., at para 50.

#### D. By the Tribunal

The influence of human rights on investment arbitration is also demonstrated by the occasional willingness of tribunals to cite human rights documents as authority for their decisions.

In the *Tecmed* arbitration, the tribunal cited both the European Court of Human Rights and the Inter-American Court of Human Rights as authority for the existence of an indirect de facto expropriation<sup>61</sup> and cited the European Court of Human Rights on the principle of proportionality and the differentiation between treatment of nationals and non-nationals.<sup>62</sup>

In *Saipem v Bangladesh*, the tribunal relied on the European Court of Human Rights' holding that rights under judicial decisions are protected property that can be the object of an expropriation and that court decisions can amount to an expropriation.<sup>63</sup>

Finally, in the NAFTA case of *Mondev v United States*, the tribunal cited the European Court of Human Rights (ECtHR) as authority for the non-retroactivity of criminal legislation and on the issue of state immunity and access to courts.<sup>64</sup> This case deserves particular attention for its demonstration of the far-flung reach of certain human rights instruments: the arbitration involved a Canadian national and the United States, which means that although neither country involved was a party to the European Convention on Human Rights, the tribunal relied on the ECtHR's jurisprudence.

### VI. Conclusion

In some respects, human rights law and investment law are very similar. Ben Hamida observes that certain substantive norms such as the prohibition of discrimination and the protection of property may be common to both investment and human rights law.<sup>65</sup> Moreover, both are fundamental to the process of the emancipation of the individual from the state since they both provide for proceedings between an individual and a state.<sup>66</sup>

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. Equally, the

<sup>61</sup> *Técnicas Medioambientales Tecmed, SA v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, at para 116.

<sup>62</sup> *Ibid.*, at para 122.

<sup>63</sup> *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, at paras 130 and 132.

<sup>64</sup> *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, at paras 138 and 141–144.

<sup>65</sup> W Ben Hamida, 'Investment Arbitration and Human Rights' (2007) *Transnational Dispute Management* 10.

<sup>66</sup> *Ibid.*, 10, referring to G Burdeau.

requirement of the exhaustion of local remedies as a condition for the exercise of jurisdiction by the international body is rare in investment law. The contrary applies to human rights law, where the necessity to exhaust local remedies is the rule.<sup>67</sup>

In other respects, human rights and investment law differ dramatically. 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 BITs founded on the possession of a specific nationality, but to establish the tribunal's jurisdiction the investor must fulfil both positive and negative requirements: the investor must be a national of a state party to a particular investment instrument (be it ICSID or NAFTA). In addition, the investor must not be a national of the investment's host state. This has led to what is termed 'nationality planning'. Beyond the jurisdictional phase of proceedings, the paradoxical nature of nationality becomes apparent: discrimination on the basis of nationality is prohibited thanks to clauses mandating national and most favoured nation treatment.

By contrast, nationality is irrelevant in human rights law. Foreigners and nationals alike are guaranteed rights irrespective of any specific nationality. Transferring this approach to investment law may be possible on the basis of multilateral investment treaties with wide participation. What seems more controversial than the equal treatment of all foreigners is endowing national investors with rights against their own state, since the privileged treatment accorded to foreign investors is generally justified precisely by their quality as aliens and the desire to attract foreign investments.

The differences between the investment law and the human rights system are not restricted to matters of jurisdiction. The substantive issue of expropriation also shows great differences. In investment law, the 'all or nothing' principle is applied.<sup>68</sup> 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 European Court of Human Rights (ECtHR) has developed a more differentiated practice based on a proportionality test which includes the amount of compensation in its considerations.<sup>69</sup> Rather than using the proportionality test 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'.<sup>70</sup> Kriebaum suggests transferring elements from the ECtHR's practice to investment law so as to integrate the level of compensation into the

<sup>67</sup> *Ibid.*, 12.

<sup>68</sup> U Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *Journal of World Investment and Trade* 719, 720.

<sup>69</sup> *Ibid.*, 730.

<sup>70</sup> *loc cit.*

proportionality test and so to prevent the dissatisfying results of an 'all or nothing' approach.<sup>71</sup>

The current trend seems to indicate that the role of human rights in investment arbitration will continue to increase. Whether the arbitral system is the best suited for dealing with breaches of human rights remains a controversial issue. Lack of transparency and legitimacy are perhaps inevitable reproaches<sup>72</sup> and it remains to be seen whether these issues can be resolved.

<sup>71</sup> *Ibid.*, 729–743.

<sup>72</sup> Peterson and Gray, n 3 above, 34.