

FROM INDIVIDUAL TO COMMUNITY INTEREST IN INTERNATIONAL INVESTMENT LAW

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I. Introduction: Whose Interests are Protected by International Investment Law?

In his seminal Hague lectures¹ Bruno Simma tentatively defined community interest as 'a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States'.² As examples of community interests he listed international peace and security, solidarity between developed and developing countries, protection of the environment, the common heritage concept, and, most importantly, international concern with human rights.

The protections granted to investors by international investment law would seem to epitomize individual interests. In fact, some of the criticism directed at investment law and especially investment arbitration is based on the charge that they serve the egoistical interests of big corporations often at the cost of a wider community. The purpose of the present article is to demonstrate that investment law is by no means exclusively governed by individual interests but is also receptive to community interest.

A certain adjustment of the concepts of individual and community interests is necessary for this purpose. Individual interests for our purposes are those of investors. Community interests may be those of the host State and its population or of the international community as a whole.

¹ B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217.

² *Ibid*, 233.

Community interests can become relevant in the context of international investment in several ways. International investments may be conducive to community interests such as development. Investment disputes may raise community interests incidentally when environmental issues arise or when human rights of the investor or of the host State's population are affected.

At present, community interests are not prominent in the reasoning of investment tribunals. Human rights, environmental protection, and development, while not absent from their case law, still play a somewhat peripheral and occasional role. Therefore, their discussion in the context of investment law must still be somewhat tentative.

II. Which Community Interests are Relevant to International Investment Law?

1. Peace and security

Peace and security are not obvious candidates for a discussion on international investment law. Yet it should be kept in mind that economic disputes are not infrequently sources of international conflicts.³ Before the advent of modern investment arbitration investors rarely had direct access to an international remedy. The traditional method of settling disputes on behalf of foreign investors was diplomatic protection. Once the claim was taken up by the investor's home State it became part of the foreign policy process with all the attendant political risks.

Diplomatic protection can seriously disrupt the international relations of the States concerned, sometimes leading as far as the use of force.⁴ Developing countries resent pressure from capital exporting countries, which has been a frequent source of irritation in relations between States.

In the course of the drafting of the ICSID Convention⁵ one of the perceived advantages of the project was to be the removal of disputes from the realm of politics and diplomacy into the realm of law.⁶ In the words of Aron Broches, at the

³ For more detailed treatment see C Schreuer, 'Investment Protection and International Relations' in A Reinisch and U Kriebaum (eds), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing, 2007).

⁴ See the *Cerutti* case (1911) 2 Moore Intl Arbitrations 2117; *Venezuelan Preferential case* (1904) IX UNRIAA 107.

⁵ Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159; 4 ILM 532.

⁶ International Centre for Settlement of Investment Disputes (ICSID), 'History of the ICSID Convention Vol 2' (ICSID) 242, 273, 303, 372, 464. See also IFI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Rev—Foreign Investment LJ 1.

time General Counsel at the World Bank, who chaired the preparatory meetings for the drafting of the Convention:

The Convention would . . . offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.⁷

The availability of investor-State arbitration has transferred investment disputes from the political arena to a judicial forum and has depoliticized the process.⁸ It thus has an important preventive effect for potentially dangerous inter-State disputes.

2. Development

The avowed purpose of most investment protection treaties is the promotion of economic cooperation in the cause of development. The legal security created by these treaties is designed to contribute to a favourable investment climate which is expected to facilitate private investments.⁹ In turn, private foreign investment is seen as the most important stimulus to economic development. Typically, private foreign investment flows are much larger than development aid from States and international organizations.¹⁰

The preambles to investment treaties give prominence to economic cooperation and development as the object and purpose of the respective treaties. For instance, the Preamble to the ICSID Convention starts with the following goal: 'Considering the need for international cooperation for economic development, and the role of private international investment therein.'¹¹

⁷ ICSID (n 6) 464.

⁸ Under the ICSID Convention (Art 26) consent to arbitration excludes any other remedy. In particular, consent to arbitration rules out diplomatic protection unless a State has failed to comply with an award (Art 27).

⁹ Cf CF Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation' (1976) 9 *Vanderbilt J Transnational L* 793, 794; A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours* 331, 342; P Kahn, 'The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes' (1968) 44 *Indiana LJ* 1; IFI Shihata, 'Promotion of Foreign Direct Investment—A General Account, with Particular Reference to the Role of the World Bank Group' (1991) 6 *ICSID Rev—Foreign Investment LJ* 484; R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 22; JW Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 35–6.

¹⁰ According to the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investment (FDI) inflows in 2007 amounted to US\$1.7 trillion: UNCTAD, 'World Investment Report 2009: Transnational Corporations, Agricultural Development and Production' [2009] *WIR* xvii <http://www.unctad.org/en/docs/wir2009_en.pdf> accessed 25 August 2010. OECD statistics for 2007 indicate that total net official development assistance (ODA) in 2007 was US\$ 103.5 billion: OECD, 'Aid Target Slipping out of Reach?' (OECD statistical overview 2007) <<http://www.oecd.org/dataoecd/47/25/41724314.pdf>> accessed 25 August 2010.

¹¹ The Report of the Executive Directors accompanying the Convention at paras 9 and 12 also contains references to the goal of economic development and to a larger flow of international investment capital: (1993) 1 *ICSID Rep* 25.

Bilateral investment treaties (BITs) also invoke the economic benefits expected from the protection of investments. For instance, the US Model BIT of 2004 in its preamble recognizes:

... that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties.

Similarly the French Model BIT of 2006 in its Preamble expresses the view:

... que l'encouragement et la protection de ces investissements sont propres à stimuler les transferts de capitaux et de technologie entre les deux pays, dans l'intérêt de leur développement économique.

Tribunals share this view. The Tribunal in *Amco v Indonesia* explained that ICSID arbitration is in the interest not only of investors but also of host States. It concluded:

Thus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.¹²

The conclusion that investment law is apt to contribute to the host State's development is based on two assumptions that have not remained uncontested. The first is that the protection of investments will stimulate FDI.¹³ The second is that FDI will invariably lead to economic growth and development.¹⁴

The debate about the development dimension of international investment law has shown its repercussions in the discussion about a definition of protected investments. Under the ICSID Convention jurisdiction is limited to disputes arising directly out of an investment. But the Convention lacks its own definition of the concept of investment. Tribunal practice has developed a set of criteria for the existence of an investment that includes contribution to the host State's development.¹⁵ In *CSOB v Slovakia* the Tribunal, after quoting the passage from the preamble dealing with economic development, said:

This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a

¹² ICSID *Amco Asia Corp v Republic of Indonesia* (1983) (Decision on Jurisdiction) (1984) 23 ILM 351, para 23. See also ICSID *Amco Asia Corp v Republic of Indonesia* (1984) (Award) (1986) 1 Intl Arbitration Rep 601, para 249.

¹³ See the contributions to KP Sauvart and LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009).

¹⁴ M Irandoust, 'A Survey of Recent Developments in the Literature of FDI-led Growth Hypothesis' (2010) 11 J World Investment & Trade 275.

¹⁵ The other criteria are a certain duration, the existence of risk, and a substantial commitment. These criteria are usually referred to as the 'Salini test' named after one of the first cases that applied them: ICSID *Salini Costruttori v Kingdom of Morocco* (2001) (Decision on Jurisdiction) (2003) 42 ILM 609, paras 52–8.

Contracting State may be deemed to be an investment as that term is understood in the Convention.¹⁶

Some tribunals have rejected the relevance of a beneficial effect on development for the existence of an investment under the ICSID Convention¹⁷ while others have endorsed it.¹⁸ Even in some non-ICSID cases a contribution to the host State's economic development was considered as relevant to the tribunals' jurisdiction.¹⁹

Some tribunals have required a showing of benefits for the host State's development together with a narrow, purely economic concept of development. Thus the activities of a law firm²⁰ and an operation to salvage historical objects from an ancient shipwreck²¹ were not accepted as investments since they did not demonstrably contribute to the State's economic development. Both decisions have been criticized as adopting inappropriately narrow definitions of development.²²

¹⁶ ICSID *CSOB v Slovakia* (1999) (Decision on Jurisdiction) 14 ICSID Rev—Foreign Investment LJ 251, para 64.

¹⁷ ICSID *LESI-DIPENTA v Algeria* (2005) (Award) 19 ICSID Rev—Foreign Investment LJ 426, para II(13)(iv); ICSID *LESI & Astaldi v Algeria* (2006) (Decision on Jurisdiction) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC528_Fr&caselId=C48> accessed 25 August 2010, para 72(iv) *in fine*.

¹⁸ ICSID *Fedax v Republic of Venezuela* (1997) (Decision on Objection to Jurisdiction) 5 ICSID Rep 186, para 43; ICSID *RFCC v Kingdom of Morocco* (2001) (Decision on Jurisdiction) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC612_Fr&caselId=C193> accessed 25 August 2010, paras 65–6; ICSID *Salini Costruttori v Kingdom of Morocco* (2001) (Decision on Jurisdiction) 42 ILM 609, para 57; ICSID *Bayindir v Islamic Republic of Pakistan* (2005) (Decision on Jurisdiction) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC523_En&caselId=C27> accessed 25 August 2010, para 137; ICSID *Helnan v Arab Republic of Egypt* (17 October 2006) (Decision on Jurisdiction) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC773_En&caselId=C64> accessed 25 August 2010, para 77; ICSID *Kardassopoulos v Georgia* (2007) (Decision of the Tribunal on Objections to Jurisdiction) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC773_En&caselId=C64> accessed 25 August 2010, para 117.

¹⁹ London Court of International Arbitration (LCIA) *Société Générale v Dominican Republic* (2008) (Decision on Jurisdiction) <<http://ita.law.uvic.ca/documents/SGJurisdiction.pdf>> accessed 25 August 2010, paras 33–5; Permanent Court of Arbitration (PCA) *Romak v Uzbekistan* (2009) (Award) <<http://www.pca-cpa.org/upload/files/ROMAK-UZBEKISTAN%20Award%2026%20November2009.pdf>> accessed 25 August 2010, paras 173–232.

²⁰ ICSID *Mitchell v Democratic Republic of the Congo* (2006) (Decision on Annulment) 20 ICSID Rev—Foreign Investment LJ 587, paras 28–39.

²¹ ICSID *Malaysian Historical Salvors v Malaysia* (2007) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC654_En&caselId=C247> accessed 25 August 2010, paras 113–14. The Award was subsequently annulled: ICSID *Malaysian Historical Salvors v Malaysia* (2009) (Decision on Annulment) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caselId=C247> accessed 25 August 2010.

²² W Ben Hamida, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control: Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo' (2007) 24 J Intl Arbitration 287; A Rigo Sureda, 'Investment Arbitration and Economic Development: The World Bank Connection' in MA Fernández-Ballesteros et al (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010) 1033; A Rigo Sureda, 'Arbitraje de Inversion y Desarrollo Económico. La Relación con el Banco Mundial' (2010) III Arbitraje. Revista de arbitraje comercial y de inversiones 357.

3. Protection of the environment

Environmental considerations are likely to arise in many investment projects. It is primarily for the host State's authorities to protect the environment on the basis of domestic and international standards. It is therefore not surprising that in existing cases environmental concerns were invariably invoked by States.

In *Santa Elena v Costa Rica*,²³ the host State had expropriated an area because of its exceptional importance for biodiversity. The area was part of a larger area that Costa Rica wanted to nominate for the World Heritage List.²⁴ The Tribunal's treatment of environmental issues was terse. It acknowledged that the environmental concerns underlying the expropriation were acceptable as a public purpose necessary for the expropriation's legality. But this did not affect the State's duty to pay compensation.²⁵ The Tribunal said:

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.²⁶

In *Metalclad v Mexico*²⁷ the federal government had granted a permit for the construction of the investor's hazardous waste disposal landfill and represented that no further licence would be required. However, municipal authorities denied a construction permit stating environmental concerns.²⁸ Furthermore, the area was declared an ecological preserve by the provincial governor. The Tribunal held that the obscure decision-making process had led to a violation of the fair and equitable treatment standard²⁹ and to an indirect expropriation³⁰ of the investment. The Tribunal also found that the municipality had acted *ultra vires* since it was not the proper authority to decide upon environmental matters.³¹ The Award offers no discussion of the environmental arguments put forward to justify the denial of the permit or the creation of the ecological preserve.

In *SD Myers v Canada*³² the government was unsuccessful with the invocation of environmental law to justify its action. Canada had issued a temporary ban on

²³ ICSID *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (2000) (Award) 5 ICSID Rep 157.

²⁴ *Ibid*, para 46.

²⁵ *Ibid*, para 71.

²⁶ *Ibid*, para 72.

²⁷ ICSID *Metalclad Corp v Mexico* (2000) (Award) 5 ICSID Rep 212.

²⁸ *Ibid*, para 106.

²⁹ *Ibid*, para 101.

³⁰ *Ibid*, para 107.

³¹ *Ibid*, paras 86, 106.

³² ICSID *SD Myers v Government of Canada* (2000) (First Partial Award) 8 ICSID Rep 18. See also R Pavoni, 'Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal' in PM Dupuy et al (eds), *Human Rights in International Investment Law and*

the export of polychlorinated biphenyl wastes intended for disposal in the United States. Canada alleged that the ban was enacted for environmental reasons and that it was obliged to do so under its treaty commitments. The Tribunal took account of the Basel Convention³³ but found that the measure was not primarily motivated by the protection of the environment.³⁴ In addition, it found that Canada had several means at its disposal to comply with its treaty obligations and had not opted for the measure least restrictive to foreign investment.³⁵ The Tribunal said:

... where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.³⁶

In *Tecmed v Mexico*³⁷ the Mexican authorities refused to renew an existing federal operating licence for a landfill for hazardous toxic waste stating environmental concerns. The Tribunal found this to be in violation of the fair and equitable treatment standard and to be an expropriation.³⁸ To establish whether an expropriation had occurred, the tribunal balanced the public interest in closing the landfill against the investor's interests.³⁹ Although there had been violations of the terms of the licence by the investor, the Tribunal found that these were not sufficiently grave to endanger the environment or the health of the population.⁴⁰ It also found that factors other than non-compliance with environmental protection laws were decisive for the decision not to renew the licence. Therefore, the Tribunal took environmental concerns into consideration but found the landfill not to be of such high environmental concern to justify the deprivation of a foreign investor of its investment without compensation.⁴¹

In *Maffezini v Spain*,⁴² the claimant complained about the additional cost caused by an environmental impact assessment (EIA) undertaken by the authorities after construction had commenced. The Tribunal pointed out that an EIA procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This was required not only by Spanish and EEC law,

Arbitration (Oxford University Press, 2009); M Hirsch, 'Interactions between Investment and Non-Investment Obligations' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 154, 163–6.

³³ Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (Basel Convention) paras 105–7, 210–15.

³⁴ *Ibid*, paras 162, 193–5.

³⁵ *Ibid*, paras 215, 221, 255, 298.

³⁶ *Ibid*, para 221.

³⁷ ICSID *Técnicas Medioambientales Tecmed SA v Mexico* (2003) (Award) 10 ICSID Rep 130.

³⁸ *Ibid*, paras 151, 174.

³⁹ *Ibid*, para 122.

⁴⁰ *Ibid*, para 124.

⁴¹ *Ibid*, para 147. For a critique of the reasoning see R Pavoni, 'Environmental Rights' (n 32) 525, 555.

⁴² ICSID *Emilio Agustín Maffezini v Kingdom of Spain* (2000) (Award) 5 ICSID Rep 419.

but also increasingly under international law.⁴³ Spain had only insisted on the strict application of EEC and Spanish environmental law. Therefore, there was no responsibility on the part of the host State in connection with the EIA.⁴⁴

In *Methanex v United States*⁴⁵ the Californian government had banned the sale and use of methyl tertiary butyl ether (MTBE), a gasoline oxygenate additive. California cited environmental reasons, especially prevention of underground water contamination. Methanex argued that the purpose of the Californian measures was not to protect the environment, but rather to favour the domestic ethanol industry at the expense of foreign methanol and MTBE producers.⁴⁶ The Tribunal decided that methanol and ethanol producers were not in like circumstances. Therefore, it found that no discrimination had occurred.⁴⁷ With regard to the environmental legislation the Tribunal pointed out that it had been adopted in a transparent way and had been supported by sufficient scientific evidence.⁴⁸ The Tribunal denied any violation of the investment obligations under the North American Free Trade Agreement (NAFTA) as well as the existence of an expropriation.⁴⁹

*Glamis Gold Ltd v United States*⁵⁰ concerned US federal and Californian measures with respect to open-pit mining operations. The measures were designed to mitigate the damage to the environment and to cultural sites of the Quechan Indian Nation. Glamis claimed that the measures resulted in the expropriation of its investment and in unfair and inequitable treatment. The government successfully relied on federal and state laws which accord protection to tribal sacred sites and other tribal resources.⁵¹ The Tribunal found that no expropriation had occurred since the measures did not have a sufficient economic impact on the investment to amount to an expropriation.⁵² The Tribunal also denied a violation of the fair and equitable treatment standard after setting a particularly high threshold for the violation of this standard.⁵³

⁴³ Ibid, para 67.

⁴⁴ Ibid, paras 69–71.

⁴⁵ *Methanex Corporation v United States* (2005) (Arbitration Tribunal) <<http://www.state.gov/documents/organization/51052.pdf>> accessed 25 August 2010.

⁴⁶ Ibid, Part I, Preface, paras 1–5; Part II, ch B, para 4; Part II, ch D, paras 26–8; Part IV, ch B, paras 3–7, 26; Part IV, ch C, paras 2, 8.

⁴⁷ Ibid, Part IV, ch B, paras 28, 29, 38.

⁴⁸ Ibid, Part III, ch A, paras 101, 102; Part IV, ch D, para 15.

⁴⁹ Ibid, Part IV, ch B, para 38; Part IV, ch C, para 27; Part IV, ch D, para 18.

⁵⁰ *Glamis Gold Ltd v United States of America* (2009) (Arbitration Tribunal) <<http://www.state.gov/documents/organization/125798.pdf>> accessed 25 August 2010.

⁵¹ See, eg, *Glamis Gold Ltd v United States Of America* (2005) (Statement of Defense of Respondent United States of America) <<http://www.state.gov/documents/organization/45118.pdf>> accessed 25 August 2010, paras 18, 28; *Glamis Gold Ltd v United States Of America* (2006) (Counter-Memorial of Respondent United States of America) <<http://www.state.gov/documents/organization/73686.pdf>> accessed 25 August 2010.

⁵² *Glamis Gold* (n 50) para 536.

⁵³ Ibid, paras 598–830.

4. The 'common heritage' concept

Occasionally, issues concerning cultural heritage arise before investment tribunals. Host States will justify their action by reference to the protection of cultural heritage. In *SPP v Egypt*,⁵⁴ a project for the construction of a tourist complex had been approved when Egypt ratified the UNESCO Convention for the Protection of World Cultural and Natural Heritage. In 1978 the project was stopped by governmental measures and in 1979 the construction site was made a World Heritage site.⁵⁵ The Tribunal found that an indirect expropriation had occurred but that from the date of the site's acceptance as protected property by UNESCO, a continuation of the investor's activities would have been unlawful from the international point of view.⁵⁶ Therefore, damages could only be awarded for the period before the decisive date in 1979. The Tribunal said:

From that date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.⁵⁷

In *Parkerings v Lithuania*⁵⁸ the dispute arose from a 1999 agreement on the management of the city's parking system, including the construction of multi-storey car parks. Ultimately the agreement was terminated by the municipality.⁵⁹ Parkerings claimed that its rights to most-favoured-nation treatment had been violated since another foreign investor, allegedly in like circumstances, had been authorized to build a parking facility. In 1994 the Old Town of Vilnius had been included in the UNESCO World Heritage List. In its decision on whether the two investors were in like circumstances the tribunal considered the impact of the two projects on the zone listed in the World Heritage List. Since Parkerings' project extended significantly further into that zone than the other project the tribunal found that the two investors were not in like circumstances.⁶⁰ Therefore, the 'in like circumstance' test was influenced by the impact of the investment on areas protected by the World Heritage Convention.⁶¹

⁵⁴ ICSID *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (1992) (Award) 3 ICSID Rep 189.

⁵⁵ *Ibid*, paras 63–5.

⁵⁶ *Ibid*, para 154.

⁵⁷ *Ibid*, para 191.

⁵⁸ ICSID *Parkerings-Compagniet AS v Lithuania* (2007) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252> accessed 25 August 2010.

⁵⁹ *Ibid*, paras 188–93.

⁶⁰ *Ibid*, paras 392, 396.

⁶¹ See also *ibid*, paras 290, 291. See also Pavoni, 'Environmental Rights' (n 32) 543–4.

5. International concern with human rights

Human rights issues can arise in the context of investment law in a number of ways.⁶² Foreign direct investment has the potential to promote and protect human rights.⁶³ It is capable of generating economic growth, reducing poverty, increasing demand for the rule of law, and in that way contributing to the realization of human rights.⁶⁴ Economic and social rights of the population in particular may be enhanced by well-managed foreign investment.

The protection of foreign investments may also have positive side effects on the introduction of good governance in host States. Investment protection treaties require that the rule of law is respected with regard to foreign investors. This may have a positive spillover also in the internal legal system. The prohibition of arbitrary and discriminatory measures and of denial of justice with respect to foreign investors may also change the administrative and judicial culture with regard to national investments. Therefore, investment protection treaties may in that way indirectly be fostering the human rights of the population of the host State. But it must be admitted that in the absence of empirical data, conclusions of this kind are still somewhat speculative.

A different perspective is the possible invocation of human rights by the investor against the host State. In fact, investment law has certain similarities with human rights law in that it protects an individual or corporate investor against infringements by a State often supported by direct standing before an international forum. But there are also important differences.⁶⁵ Unlike human rights protection, the protection of investors only exists for certain 'privileged' foreigners, nationals of

⁶² For discussion of the relationship of investment law and human rights see LE Peterson and KR Gray, 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration' (2003) <http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf> accessed 25 August 2010; 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* (Eleven International Publishing, 2007); L Liberti, 'Investissements et Droits de l'Homme' in P Kahn and T Wälde (eds), *New Aspects of International Investment Law* (Brill, 2007); W Ben Hamida, 'Investment Arbitration and Human Rights' (2007) 4 *Transnational Dispute Management*; B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology' in C Binder et al (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009); U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 *J World Investment & Trade* 653; Dupuy, *Human Rights in International Investment Law* (n 32).

⁶³ UNCHR 'Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment' (2003) UN Doc E/CN.4/Sub.2/2003/9, 2.

⁶⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J Ruggie, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) UN Doc A/HRC/8/5, 3.

⁶⁵ For detailed analysis see U Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' in Dupuy, *Human Rights in International Investment Law* (n 32).

States parties to the relevant treaties.⁶⁶ The investor's nationality is decisive for the jurisdiction of an arbitral tribunal as well as for the applicability of the substantial protection standards. Another difference is that international procedures for the protection of human rights require the exhaustion of local remedies whereas investment arbitration does not.

Human rights are rarely invoked by investors in investment arbitration. Apart from the nature of the rights pursued, this is also due to the fact that in the majority of cases the investors are juridical persons. In *Biloune v Ghana*,⁶⁷ the individual investor had been arrested, held in custody without charge, and finally deported. The claimant, in addition to his typical investment claims, also sought redress for these alleged violations of his human rights. The Tribunal found that its competence was limited to commercial disputes and declined to decide upon the human rights issue.⁶⁸

In *Mitchell v Democratic Republic of the Congo*⁶⁹ the claimant's premises were invaded, documents were seized, and two employees were imprisoned. Yet there is no indication that the (unpublished) Award considered the resulting human rights issues and the subsequent Decision on Annulment fails to mention them.

Yet another scenario sees the investor as a potential or actual perpetrator of human rights violations in the host State. In a situation of this kind, the host State would be under an obligation to intervene and safeguard the local population's human rights.

In a number of cases Argentina has attempted to justify measures that had adverse effects on investments by relying on human rights considerations. Argentina argued that these measures involving public utilities were in furtherance of or necessary to protect certain international human rights commitments.⁷⁰ The tribunals found that no genuine human rights issues were before them⁷¹ and that the human rights argument had not been properly developed.⁷²

⁶⁶ On nationality issues in investment law see, eg, A Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitrations' (2005) 20 ICSID Rev—Foreign Investment LJ 357; R Wisner and R Gallus, 'Nationality Requirements in Investor-State Arbitration' (2004) 5 J World Investment & Trade 927; C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009) 264–337; C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration* (Oxford University Press, 2007) 131–62; R Dolzer and C Schreuer, *Principles on International Investment Law* (Oxford University Press, 2008) 46–56.

⁶⁷ UNCITRAL *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1989) (Award on Jurisdiction and Liability) 95 ILR 184.

⁶⁸ Ibid, 203.

⁶⁹ ICSID *Patrick Mitchell v Democratic Republic of Congo* (2006) (Decision on Annulment of the Award) <<http://ita.law.uvic.ca/documents/mitchellannulment.pdf>> accessed 25 August 2010.

⁷⁰ ICSID *CMS Gas Transmission Company v Argentina* (2005) (Award) 44 ILM 1205, para 114; ICSID *Siemens v Argentina* (2007) (Award) 14 ICSID Rep 518, para 75.

⁷¹ *CMS Gas* (n 70) para 121.

⁷² *Siemens* (n 70) para 79.

Azurix v Argentina dealt with water and sewage systems. Argentina raised the issue of the compatibility of the BIT with human rights treaties that protect consumers' rights. Argentina's expert 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 a service provider.⁷³ 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 had continued without interruption.⁷⁴

Sempra v Argentina concerned the distribution of gas. In its discussion of necessity and emergency under the Argentinian Constitution the Tribunal acknowledged that '[t]his debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'.⁷⁵ However, the Tribunal did not pursue the human rights aspect of the case any further.

In *Biwater Gauff v Tanzania*⁷⁶ the government's reliance on human rights was, at best, very indirect. It justified its interference with a water concession by reference to the vital importance of water and sanitation services and its obligation to protect such services.⁷⁷ An amicus curiae submission invoked access to clean water as a basic human right.⁷⁸ The Tribunal summarized the submission in the following terms:

The *Amici* submit that human rights and sustainable development issues are factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations as between the investor and the host State. They conclude that foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development (such as the project here), have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law. This is precisely because such investments necessarily carry with them very serious risks to the population at large.⁷⁹

The Tribunal did not enter into a discussion of human rights but stated that it had taken the submissions into account.⁸⁰

⁷³ ICSID *Azurix v Argentine Republic* (2006) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5> accessed 25 August 2010, para 254.

⁷⁴ *Ibid.*, para 261.

⁷⁵ ICSID *Sempra Energy International v The Argentine Republic* (2007) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8> accessed 25 August 2010, para 332.

⁷⁶ ICSID *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (2008) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67> accessed 25 August 2010.

⁷⁷ *Ibid.*, para 434.

⁷⁸ *Ibid.*, para 379.

⁷⁹ *Ibid.*, para 380.

⁸⁰ *Ibid.*, para 601.

The typical sanction for a grave violation of human rights by an investor would be the withdrawal of legal protection. In *Phoenix Action v Czech Republic*,⁸¹ the Tribunal gave the following *obiter dictum*:

To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.⁸²

Particularly sensitive issues are likely to arise where a government seeks to take affirmative action to remedy past injustices to its population. In doing so, it may infringe upon rights of foreign investors guaranteed through investment protection treaties. In *Funnekotter v Zimbabwe*,⁸³ the claimants had been deprived of their land in the course of a land acquisition programme. The government did not invoke human rights explicitly but stated that its Land Reform Resettlement Programme was necessary 'to change the unjust land ownership in favour of the masses of Zimbabwe' and that it had acquired land to address the needs of the landless and of liberation war veterans.⁸⁴ The Tribunal found that Zimbabwe had violated its obligation to pay compensation for the expropriation and awarded damages accordingly.⁸⁵

*Foresti v South Africa*⁸⁶ concerned South Africa's affirmative action programme to overcome the apartheid legacy. From the information that is publicly available it appears that the mineral rights of investors were taken away but can be restored in the form of licences. Compliance with black economic empowerment is one of the requirements to be eligible for the licences. Affirmative action is covered by Article 1(4) of the UN Convention on the Elimination of Racial Discrimination (CERD).⁸⁷ The central issue in the case was an alleged conflict of these measures with the rights of foreign investors under a BIT. The case was discontinued.

⁸¹ ICSID *Phoenix Action, Ltd v Czech Republic* (2009) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1033_En&caseId=C74> accessed 25 August 2010.

⁸² *Ibid*, para 78.

⁸³ ICSID *Funnekotter v Zimbabwe* (2009) (Award) <<http://ita.law.uvic.ca/documents/ZimbabweAward.pdf>> accessed 25 August 2010.

⁸⁴ *Ibid*, paras 55, 84.

⁸⁵ *Ibid*, paras 96–140.

⁸⁶ ICSID Additional Facility *Pietro Foresti, Laura De Carli v Republic of South Africa* (2010) (Award) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90> accessed 25 August 2010. For more information on the case see an article by the claimants' lawyers, M Coleman and K Williams, 'South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?' (2008) 9 *Business L Intl* 56. See also *Agri South Africa and Annis Mohr Van Rooyen v Minister of Minerals and Energy* [2009] ZAGPPHC 2 (High Court of South Africa).

⁸⁷ Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Art 1(4): 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,

III. Jurisdiction and Applicable Law

An investment tribunal's ability and willingness to take account of community interests, such as those described above, will depend, at least in part, on the scope of its jurisdiction and on the applicable law. Investment arbitration is not designed primarily for the vindication of rules on environmental protection, common heritage, and human rights. But as the cases outlined above indicate, community interests may arise incidentally before investment tribunals and may influence their decisions.

The jurisdiction of investment tribunals varies in scope. Many BITs in their consent clauses contain phrases such as 'all disputes concerning investments' or 'any legal dispute concerning an investment'. These provisions do not restrict a tribunal's jurisdiction to claims arising from the BITs' substantive standards.⁸⁸ By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself. They would include disputes dealing with community interests such as the environment, cultural and natural heritage, and human rights provided these disputes are closely connected to an investment.

Other jurisdictional clauses in treaties are narrower. Often they cover only violations of the BIT's substantive standards. Under Article 1116 NAFTA the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA. Also, under Article 26(1) of the Energy Charter Treaty (ECT) the scope of the consent is limited to claims arising from alleged breaches of the ECT. These narrower clauses, while excluding claims that are based on obligations extraneous to the treaty, do not exclude the incidental application of rules on environmental protection, cultural heritage, and human rights.⁸⁹

The law applicable by investment tribunals⁹⁰ is also relevant to the applicability of community interests in investment arbitration. Community interests are not reflected in most of the treaties providing for the substantive guarantees. Where such clauses exist, they often refer to specific areas of human rights protection, like

provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

⁸⁸ For discussion of wide jurisdictional clauses of this kind see ICSID *Salini Costruttori SpA et Italstrade SpA v Royaume du Maroc* (2001) (Decision on Jurisdiction) 6 ICSID Rep 400, para 61; ICSID *Compañía de Aguas del Aconquija, SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (2002) (Decision on Annulment) 6 ICSID Rep 340, para 55; ICSID *SGS v Philippines* (2004) (Decision on Jurisdiction) 8 ICSID Rep 518, paras 131–5.

⁸⁹ M Hirsch, 'Interactions between Investment and Non-Investment Obligations' in Muchlinski, Ortino, and Schreuer, *Oxford Handbook of International Investment Law* (n 32) 154–81.

⁹⁰ See, generally, O Spiermann, 'Applicable Law' in *ibid*, 89–116.

labour and health standards.⁹¹ Often they refer to the fact that closer economic and business ties can foster respect for workers' rights or raise living standards. The NAFTA refers to environmental protection in its preamble and in its Article 104.⁹² Some of the South African BITs⁹³ have carve-outs from national and most-favoured-nation treatment with regard to measures taken to overcome past discrimination. The Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area provides for an institution which shall make recommendations to the Council of Ministers of COMESA on the development of common minimum standards relating to investments in areas such as environmental impact, social impact, labour standards, respect for human rights, conduct in conflict zones, and corruption.⁹⁴

⁹¹ For US treaties that have references to workers' rights in their preamble see, eg, Treaty between the government of the United States of America and the government of the Republic of Albania concerning the encouragement and reciprocal protection of investment (adopted 11 January 1995, entered into force 4 January 1998) S Treaty Doc 104-19; Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (adopted 14 November 1991, entered into force 20 October 1994) S Treaty Doc 103-2; Treaty between the United States of America and the Republic of Armenia concerning the Reciprocal Encouragement and Protection of Investment (adopted 23 September 1993, entered into force 29 March 1996) S Treaty Doc 103-11; Treaty between the government of the United States of America and the government of the Republic of Azerbaijan concerning the encouragement and reciprocal protection of investment (adopted 1 August 1997, entered into force 2 August 2001) S Treaty Doc 106-47; Treaty between the government of the United States of America and the government of the Republic of Bolivia concerning the encouragement and reciprocal protection of investment (adopted 17 April 1998, entered into force 6 June 2001) S Treaty Doc 106-26; Treaty between the United States of America and the Republic of Bulgaria concerning the Encouragement and Reciprocal Protection of Investment (adopted 23 September 1992, entered into force 2 June 1994) S Treaty Doc 103-3; Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (adopted 27 August 1993, entered into force 11 May 1997) S Treaty Doc 103-15; Treaty between the government of the United States of America and the government of El Salvador concerning the encouragement and reciprocal protection of investment (adopted 10 March 1999, entry into force pending) S Treaty Doc 106-28; Treaty between the government of the United States of America and the government of the Republic of Estonia concerning the encouragement and reciprocal protection of investment (adopted 19 April 1994, entered into force 16 February 1996) S Treaty Doc 103-38; Treaty between the United States of America and the Republic of Kazakhstan concerning the Reciprocal Encouragement and Protection of Investment (adopted 19 May 1992, entered into force 12 January 1994) S Treaty Doc 12; Treaty between the government of the United States of America and the government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment (adopted 19 February 2008, entry into force pending) <http://www.bilaterals.org/IMG/pdf/US-Rwanda_BIT.pdf> accessed 25 August 2010.

⁹² North Atlantic Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 297.

⁹³ See, eg, Agreement between the government of the Republic of Mauritius and the government of the Republic of South Africa for the Promotion and Reciprocal Protection of Investments (adopted and entered into force 17 February 1998) <http://www.unctad.org/sections/dite/ia/docs/bits/mauritius_southafrica.pdf> accessed 25 August 2010, Art 3(4)(c); Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments (adopted 14 December 1998, entry into force pending) <http://www.unctad.org/sections/dite/ia/docs/bits/czech_southafrica.pdf> accessed 25 August 2010, Art 3(3)(c).

⁹⁴ Investment Agreement for the COMESA Common Investment Area (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar,

Even if a primarily applicable treaty on investment protection does not refer to human rights and other community interests, the governing law may include treaties and customary rules dealing with these matters. Agreements between the parties on applicable law often include international law as well as host State law.⁹⁵ Under the ICSID Convention the parties may specify the law to be applied by a tribunal. In the absence of an agreement on applicable law the tribunal is to apply host State law and international law.⁹⁶ Many of the treaty provisions that offer investor/State arbitration, such as NAFTA, the Energy Charter Treaty, and some BITs, also contain provisions on applicable law. Some clauses in treaties governing the applicable law in investment disputes refer to the particular treaty as well as to international law in general. The NAFTA (Article 1131) and the ECT (Article 26(6)) direct tribunals to apply the respective treaties and applicable rules of international law. Some BITs in provisions dealing with applicable law combine the host State's domestic law with international law.⁹⁷

Even if a tribunal is restricted to examining claims on the basis of an investment treaty it may include other relevant parts of international law in its analysis. In *AAPL v Sri Lanka*,⁹⁸ the Tribunal pointed out that general international law was part of the treaty's wider juridical context:

...it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.⁹⁹

Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe) (adopted 22/23 March 2007, entry into force pending) <http://programmes.comesa.int/index.php?option=com_content&view=article&id=82&Itemid=66&lang=en> accessed 25 August 2010, Art 7(2)(d).

⁹⁵ See already the Deeds of Concession concluded between Libya and two American companies between 1955 and 1968 in *Texaco v Libya* (1977) (Arbitration Tribunal) 53 ILR 389, 404. See also *LIAMCO v Libya* (1977) (Arbitration Tribunal) 62 ILR 141, 172; *British Petroleum v Libya* (1973) (Arbitration Tribunal) 53 ILR 297, 303; ICSID *AGIP v Congo* (1979) (Award) 1 ICSID Rep 306, para 18; ICSID *Kaiser Bauxite v Jamaica* (1975) (Decision on Jurisdiction) 1 ICSID Rep 296, para 12; ICSID *CSOB v Slovakia* (2004) (Award) <http://www.biicl.org/files/3916_2004_csob_v_czech_republic.pdf> (Case Summary) accessed 25 August 2010, paras 58–63.

⁹⁶ Art 42(1) ICSID Convention: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, 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.'

⁹⁷ See Art 9 China's Model BIT of 2003 in W Shan and N Gallagher, *Chinese Investment Treaties: Policies and Practices* (Oxford University Press, 2009) 433; Art 30 US Model BIT of 2004 <<http://www.state.gov/documents/organization/117601.pdf>> accessed 25 August 2010. See also ICSID *Antoine Goetz v Burundi* (1999) (Award) 6 ICSID Rep 3, paras 95, 98.

⁹⁸ ICSID *AAPL v Sri Lanka* (1990) (Award) 4 ICSID Rep 246.

⁹⁹ *Ibid*, para 21.

In terms of harmonizing investment protection and international human rights, Bruno Simma and Theodore Kill have set out the methodology that will enable investment tribunals to integrate the 'external rules' on human rights in their work. The relevant techniques include a presumption of compliance of investment treaties with other norms of international law and their interpretation in the context of any relevant rules of international law (Article 31(3)(c) of the Vienna Convention on the Law of Treaties).¹⁰⁰

Another method to take account of community interest is the application of host State law including its rules on the protection of the environment and fundamental rights. In this way, clauses in investment protection treaties that require that investments be 'in accordance with host State law' offer additional possibilities to take community interests into account. Where international law is incorporated into domestic law its relevant provisions are also applicable. In a number of cases tribunals denied investment protection to illegal investments.¹⁰¹ Tribunals have found that where they had to apply a BIT that contained such a clause an investment that was in violation of host State law did not enjoy the protection of the BIT.¹⁰² Even without a treaty provision of this kind a tribunal may refuse to afford protection to investments that are contrary to host State law.¹⁰³

Therefore, in most cases investment tribunals have the power to take account of community interest. Their jurisdiction as well as the governing law gives them ample discretion to take account of environmental concerns and human rights.

IV. Conclusion

The discussion of community interests has been infrequent and mostly peripheral in investment arbitration. This is not a consequence of jurisdictional

¹⁰⁰ Simma and Kill, 'Harmonizing Investment Protection' (n 62) 678–707. See also T Wälde, 'Interpreting Investment Treaties: Experience and Examples' in Binder, *International Investment Law for the 21st Century* (n 62) 724, 772–5; R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 260–75; C McLachlan, 'Investment Treaties and General International Law' (2008) 57 *Intl & Comparative LQ* 361; ILC, 'Report of a study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, paras 410–80; C McLachlan, 'The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention' (2005) 54 *Intl & Comparative LQ* 279.

¹⁰¹ A Carlevaris, 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9 *J World Investment & Trade* 35; C Knahr, 'Investments "in Accordance with Host State Law"' (2007) 4 *Transnational Dispute Management* no 5; U Kriebaum, 'Illegal Investments' (2010) *Austrian Arbitration Ybk* 307.

¹⁰² ICSID *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (2007) <<http://ita.law.uvic.ca/documents/FraportAward.pdf>> accessed 25 August 2010; ICSID *Inceysa Vallisoletana SL v Republic of El Salvador* (2006) (Decision on Jurisdiction) <<http://ita.law.uvic.ca/documents/InceysaDescription.pdf>> accessed 25 August 2010, paras 203–7, 239, 257, 339.

¹⁰³ ICSID *Plama Consortium Limited v Bulgaria* (2008) (Award) <<http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf>> accessed 25 August 2010, para 138.

constraints or of the strictures of the governing law. Tribunals have considerable latitude when it comes to considering environmental questions, human rights issues, or the protection of cultural heritage.

A restraining factor in the consideration of community interests is the origin of investment arbitration in commercial arbitration. Not infrequently tribunals are focused on the settlement of the particular dispute without regard for the wider repercussions of their decisions. Moreover, arbitrators are prone to reacting to the parties' submissions who will invoke community interests only when it serves their particular interests. It would be untypical for a tribunal to investigate and promote community interests on its own initiative.

The cases discussed above demonstrate that the system is perfectly capable of taking community interests into account. Whether this actually happens depends primarily on the parties. If an investor has violated norms for the protection of the environment or of human rights and the State can argue credibly that it has stepped in to stop the abuse, it is unlikely that a tribunal will find that an investment protection treaty has been violated. On the other hand, if the host State condones or conspires in the violation of community interests, investment law is unlikely to offer a remedy.

A more active role of arbitrators in raising community interests with the parties and encouraging argument may go some way towards improving the situation. The increasing admission of *amicus curiae* submissions may support this development.

FROM
BILATERALISM
TO COMMUNITY
INTEREST

Essays in Honour of Judge Bruno Simma

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