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The role of civil society in investment treaty arbitration : status and prospects

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4. Civil society participation: Where procedure intertwines with substance

Investor-state tribunals are *solely* concerned with adjudicating international treaty rights of foreign investors, as well as the obligations of host states under international law as set out under IIAs and BITs.[582] This research does not purport to suggest otherwise – a fundamental point to note for the ensuing discussion on environmental protection and human rights. Notwithstanding this widely recognized fact, civil society petitions have sought to put forward before investor-state tribunals issues that are underlying to the *'broader' public interest* and/or *'direct' interests* of third parties. If looked at through the prism of human rights, the discourse on civil society participation in investor-state arbitration is therefore not about advancing the adjudication of human rights before investor-state tribunals 'at the expense' of the adjudication of foreign investors' rights.[583] Rather, it is about recognizing that the human rights of third parties to investor-state disputes, whether recognized under municipal law or international law instruments, either 'hard' or 'soft', could nonetheless translate into third party *interests* at the investor-state

[580] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 731, at 2 (our emphasis).
[581] See, as mentioned, Chevron and Texaco v. Ecuador, *supra* note 561, at para 17-20; Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555, at para 30-34; see also Section 5.1.
[582] In addition, depending on the drafting of the relevant treaty, contractual obligations as well.
[583] C.E. Côté, *La participation des personnes privées dans le règlement des différends internationaux économiques : L'élargissement du droit de porter plainte à l'OMC* (2007), at 416, 419.

dispute level.[584] These *interests* only become worthy of consideration by investor-state tribunals if and when they are relevant to the adjudication of a given dispute. Indeed, the adequacy of accepting factual and legal arguments concerning these *interests* primarily depends on the facts and circumstances of each case.[585]

As an independent third party to an investor-state dispute, an *amicus* is expected to present factual and legal arguments that the parties do not make before the tribunal. Although civil society's *amicus* participation is generally perceived as supporting host states against claimants, civil society petitioners have nonetheless raised specific arguments on public health, environmental, human rights or other public policy issues underlying the *'broader' public interest* and/or *'direct' interests* of third parties that were not necessarily asserted by host states. Host states could deliberately omit such arguments because of tactical considerations, e.g. by focusing on raising jurisdictional objections to foreign investors' claims, or out of reluctance to shed light on their shortcomings in addressing these *interests* – as reflected for instance by the previously mentioned *Metalclad v. Mexico* and *Aguas del Tunari v. Bolivia* cases. Accordingly, host states do not systematically favour transparency or, for that matter, civil society participation in investor-state disputes.[586]

Against this background, it is necessary to take a closer look at civil society's arguments as *amicus curiae* as this sheds light on its role in not only addressing the *'broader' public interest* at issue in investor-state disputes, but also in raising, asserting, and defending the *'direct' interests* of affected third parties.[587] This section will consider substantive arguments put forward in relation to the protection of the environment (**Section 4.2)** and human rights, including most notably the promotion of the human right to water (**Section 4.3**), as well as indigenous and ethnic minority rights (**Section 4.4**) – these three systematically appear in public interest-related investor-state arbitration, they

[584] It is important to note that this section refers interchangeably to rights and obligations contained in both 'hard' and 'soft' law instruments, such as for instance the human right to water.
[585] See procedural analysis above, Part II – Section 3.
[586] In particular, see Mexico's request to the *Metalclad* tribunal to order the parties to 'limit public discussion of the case to a minimum'. See Metalclad Corporation v. United Mexican States, *supra* note 273. See also, T. Ishikawa, *supra* note 108, at 393. See Part I – Section 1.4.2; Chevron and Texaco v. Ecuador, *supra* note 561, at para 17-20.
[587] A more elaborate analysis will also be undertaken on this point in the wake of the analysis of the scope and regulation of a proposed third party intervenor role for civil society, and whether such role should be subject to third party *interests* or *rights* (that would be potentially at stake in investor-state disputes). See Part III – Section 3.1.

are therefore worthy of a closer look. That said, a preliminary discussion over the debate on the relevance of such issues to investor-state arbitration is merited (**Section 4.1**).

4.1 Are environmental protection and human rights issues relevant to the adjudication of investor-state disputes?

The debate over the relevance of environmental and human rights issues to investor-state disputes is an immense subject that could easily exceed the scope of this research. There is nonetheless a need to address this debate, particularly in light of the arguments raised by civil society as *amicus curiae*. If environmental and human rights issues are deemed irrelevant to the adjudication of host state responsibility towards foreign investors; then, the idea of civil society participation in investor-state disputes becomes altogether obsolete.[588] Investor-state disputes involving both environmental or human rights issues and civil society are arguably limited in number.[589] Many practitioners often regard the relevance of human rights issues to the international law on foreign investment as overstated.[590]

If human rights issues are raised, these would often relate to rights such as, for instance, the human right to access water. It is argued that, in any event, international human rights obligations are solely incumbent upon states.[591] Host states have an international duty to, *inter alia*, 'respect, protect, and provide' the economic and social

[588] This section is not concerned with the human rights violations that may be claimed by foreign investors. Denial of justice vis-à-vis foreign investors is discussed under Part III – Section 2.2.1. See also the examples of Antoine Biloune (Syria), Marine Drive Complex Ltd (Ghana) v. Ghana Investments Centre, the Government of Ghana, UNCITRAL, *Awards of 27 Oct 1989 and 30 June 1990*; Mr. Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7), *Award of 9 February 2004* cited in C. Schreuer, U. Kriebaum, *infra* note 617, at 1090. On the relevance of human rights to foreign investors' claims, see also J. Levine, *infra* note 758, at 109.

[589] 13 investor-state disputes in total as previously mentioned, see *supra* note 167. Although it is worthy to note that civil society actors have only gained limited access to arbitral tribunals – through the *amicus curiae* procedure – recently, and therefore their seemingly limited involvement should be placed into perspective.

[590] B. Simma, *supra* note 196, at 578.

[591] International human rights jurisdictions generally reassert the state's duties in protecting human rights, and their positive obligations to protect individuals and groups against private actors. Therefore, it is argued that a host state should be the primary respondent when multinationals commit violations since it is primarily responsible for the protection of human rights within its realm. See A. Nienaber, *infra* note 928, at 543; C. Schreuer and U. Kriebaum, *infra* note 617, at 1085.

rights of their citizens. This makes it arguably futile to address wrongdoing or harm, or even abuses, allegedly committed by foreign investors before investor-state tribunals.[592]

States have a concomitant international duty to promote and protect foreign investments. Investor-state tribunals are essentially mandated with censoring a host state's performance of its international obligations under IIAs or BITs, i.e. they are not adequate fora to deal with allegations of environmental or human rights abuse nor accept civil society participation. It is therefore argued that the proper fora for civil society participation should be rooted in the domestic court system, before international human rights jurisdictions, other non-judicial avenues such as the OECD National Contact Points,[593] or the various consultation mechanisms set forth under IIAs such as the NAFTA National Administrative Offices and Commission for Labor Cooperation.[594]

There are various counter-arguments to these contentions. Judge Bruno Simma submits that solely emphasizing the scarcity of such cases is a 'myopic way' of viewing the matter.[595] The attraction by host states of substantial sums of foreign capital, as well as the need to supply an exponential global demand in natural resources, requires an increasingly complex balancing exercise with local community rights and concerns as

[592] B. Simma, *supra* note 196, at 579.

[593] As mentioned previously, the grievance mechanism set forth through the OECD National Contact Points is concerned with the application of the OECD Guidelines for Multinational Enterprises. Several scholars have promoted the OECD National Contact Points as a suitable forum for individuals and civil society to assert environmental, and human rights concerns linked to foreign investors' activities. It has in fact an effervescent case inventory where civil society organizations are increasingly representing local stakeholders in disputes with multinationals, including: *Frente de Defensa Miguelense Coalition* v. Goldcorp, Final statement of 3 May 2011, OECD National Contact Point Canada; *The LEAD Group* v. *Innospec*, Final statement of 1 February 2012, OECD National Contact Point United States of America; *Centro de Derechos Humanos y Ambiente et al.* v. Nidera, Final statement of 2 March 2012, OECD National Contact Point Netherlands; *Sakhalin Environment Watch and Stroitel* v. *Royal Dutch Shell, Standard Charter, Barclays, and Royal Bank of Scotland*, Claim filed 31 July 2012, OECD National Contact Point United Kingdom; *European Center for Constitutional and Human Rights et al.* v. *Louis Dreyfus Commodities Suisse SA*, Final statement of 29 February 2012, OECD National Contact Point Switzerland. For a further analysis, see P. Protopsaltis, *supra* note 89, at 255; and D. Collins, '*Alternative Dispute Resolution for Stakeholders in International Investment Law*', (2012) 15 Journal of International Economic Law 673.

[594] The NAALC set forth a mechanism whereby each NAFTA party maintains a National Administrative Office (NAO) within its labor ministry, which receives and responds to public communications regarding labor law matters arising in another NAFTA country. It is nonetheless heavily criticized for its ineffectiveness. See HRW, 'NAFTA Labor Accord Ineffective: Future Trade Pacts Must Avoid Pitfalls', 16 April 2001, available at: http://www.hrw.org/news/2001/04/15/nafta-labor-accord-ineffective (last accessed 06 October 2014). See NAALC, *supra* note 225.

[595] B. Simma, *supra* note 196, at 578-579.

reflected for instance by the impact of mining activities on water sources and local agriculture.[596]

Civil society has sought access not only to international human rights jurisdictions, but also to investor-state tribunals, where it seeks to uphold the validity of environmental and human rights principles contained under a vast array of international norms and separate international legal regimes or even under municipal law.[597] It is to be recalled that the impact of an investor-state tribunal's decision inexorably binds the host state and could potentially cause adverse repercussions on the host state's population.[598] In such cases, investor-state tribunals would have to weigh between both these populations' rights and foreign investors'.[599] This raises several difficult questions:

> Once a tribunal has before it the applicable human rights norms, it must decide whether or how these rules affect the arguments advanced by the parties… Are a State's obligations to its own population to be weighed against investor rights under BITs? How can we harmonize the host State's obligations under the two regimes? This will always be a difficult exercise and sometimes compliance with both set of obligations will be virtually impossible.[600]

The dynamics of foreign investment necessarily set the finality of host state measures as defenses by host states that have interfered in allegedly harmful investments.[601] In this light, it is argued that the protection guaranteed to foreign investors under IIAs or BITs should be reduced if (i) cases of harm or abuses are

[596] It is worthy to note here that water is used by the mining industry for processing and transport of ore and waste, minerals separation, dust suppression, washing of equipment, and human consumption at sites. Furthermore, the direct disposal of mining waste and wastewater has the potential of causing widespread water contamination – and numerous examples of such occurrences exist. See D. Kemp, et al. 'Mining, Water, and Human Rights: Making the Connection', (2010) 10 Journal of Cleaner Production 1553, at 1554. See also the Dongria Kondh indigenous community of Eastern India discussed above, *infra* note 695. See also G. Akpan, 'Litigation Problems that Arise from Natural Resources Exploitation in Foreign Courts: Impediments to Justice', (2002) 20 Journal of Energy and Natural Resources Law 55, at 78.

[597] The major difference between both types is that the latter render internationally enforceable decisions, whereas the former do not. The benefit of intervening in jurisdictions such as ICSID tribunals and obtaining a favourable decision appear evident: the binding and enforceable character of the decision is crucial in providing adequate relief. On the distinction between 'first' and 'second generation' tribunals, see G. Born, 'A New Generation of International Adjudication', (2012) 61 Duke Law Journal 775, at 810. See also I. Feichtner, 'The Waiver Power of the WTO: Opening the WTO for a Political Debate on the Reconciliation of Competing Interests', (2009) 20:3 European Journal of International Law 615, at 615-616; see also E. Tramontana, 'Civil Society Participation In International Decision Making: Recent Developments and Future Perspectives in the Indigenous Rights Arena', (2012) 16 the International Journal of Human Rights 173, at 174; and M. Wells-Sheffer, *supra* note 206, at 491

[598] G. Akpan, *supra* note 596, at 77-78.

[599] Judge Bruno Simma argues that pressing calls for balance in the international investment regime are no longer solely associated with anti-globalization movements, they presently stem from a wide array of actors. See B. Simma, *supra* note 196, at 573-574.

[600] Ibid., at 591.

[601] Ibid., at 577.

established before investor-state tribunals; and (ii) host states take adverse measures towards them for such reason.[602] This is manifestly reflected in the *Metalclad v. Mexico* case – as mentioned previously. Although it was established that Metalclad's subsidiary had dumped 20,000 tons of untreated toxic waste near the Guadalcazar community, Metalclad still successfully obtained damages from Mexico due to the discretionary and inequitable treatment it allegedly suffered as a result of state and municipal authority measures.[603] But again, Mexico never grounded its defense on the basis of its duty to protect the environment of the Guadalcazar community.[604] How could it credibly do so if it had granted Metalclad various federal environmental approvals? The more fundamental question is: should the dumping of 20,000 tons of untreated toxic waste by a foreign investor be considered relevant by an investor-state tribunal adjudicating the rights of that foreign investor and the obligations of the host state towards it under international law? The answer to this question is heavily dependent on the facts and circumstances of each case.

Indeed, in response to an objection by the host state against the consideration of human rights issues affecting the claimant's executives, the *Hulley Investments v. Russia* tribunal explicitly said that it 'recognizes that it is not a human rights court'.[605] However,

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[602] Sornarajah further asserts that the creation of competing objectives of protecting human rights and the environment from the abuse of multinational corporations leads to a recognition of the regulatory right of the host state to interfere in circumstances where the former abuses human rights such as labour rights or causes environmental damage. The increasing recognition of such a regulatory right should contribute to balance the aim of investment protection and require the recognition that a host state has the right to intervene in an investment that poses a danger to the environment or involves an abuse of human rights. In practice, however, with FDI being prescribed as a key instrument to economic development and progress, few host states are inclined, or are in fact in a position, to step up such a confrontation with foreign investors or multinationals. In general, quite the contrary occurs, it is recognized that host states, particularly developing ones, are rather in a staunch competition amongst each other to attract FDI and multinationals to their economies. M. Sornarajah, *supra* note 221, at 78, 147

[603] United Mexican States v. Metalclad Corporation, *supra* note 314.

[604] Rather, Mexican federal authorities had approved the Metalclad project, from an environmental standpoint, all along. This situation echoes with Pogge's idea on 'the human rights of the global poor'. According to Pogge, the widespread violation of human rights also plays a decisive role in explaining the global deficit in civil and political human rights which demand democracy, due process, and the rule of law. He asserts that poor citizens from developing and least-developing states are often physically and mentally stunted due to malnutrition in infancy, illiterate due to lack of schooling, and much preoccupied with their family's survival – and can cause little harm or benefit to the state officials who rule them. Such rulers therefore have far less incentive to attend to the interests of their constituents compared with the interests of agents more capable of reciprocation, including foreign governments, companies, and tourists. See T. Pogge, 'Recognized and Violated by International Law: the Human Rights of the Global Poor', (2005) 18 Leiden Journal of International Law 717, at 718, 727. See also See NAFTA Article 1114, *supra* note 170.

[605] 'Respondent observes that "the alleged violations of the human rights of Messrs. Khodorkovsky, Lebedev and others . . . are outside the scope of this Tribunal's jurisdiction, unless Claimants can establish that any such

it found that the alleged human rights violations constituted relevant factual evidence to conclude that the expropriation of the claimant's investments was not done in accordance with the 'due process of law' as required by the Energy Charter Treaty.[606] The *Hulley* tribunal's findings here were specific to a set of facts and circumstances that may not be relevant to other cases. Yet, the tribunal clearly articulated how issues that typically fall outside investor-state tribunals' jurisdiction – such as human rights issues – may nonetheless remain relevant to the adjudication of foreign investors' claims.[607]

Against this backdrop, civil society is often viewed as an essential actor that could potentially raise, assert, or defend relevant non-jurisdictional issues that are underlying to the *'broader' public interest* and/or the *'direct' interests* of third parties before investor-state disputes – as will be shown directly below.

4.2 The *leitmotiv* of environmental protection

A substantial number of civil society actors consider environmental protection as their *leitmotiv*. These actors have been particularly active as *amici curiae* at the WTO, but also other jurisdictions such as the IACtHR or ACHPR.[608] This is also true for investor-state disputes, as particularly manifested by the *Methanex v. the United States* case. Aside from its procedural importance, the *Methanex* case was also a case that presented

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violations directly impaired the management or operation of their investments."… *The Tribunal recognizes that it is not a human rights court*. Nevertheless, it is within the scope of the Tribunal's jurisdiction to consider the allegations of harassment and intimidation as they form part of the factual matrix of Claimants' complaints that the Russian Federation violated its obligations under Part III of the ECT. The Tribunal's task includes determining whether the Russian Federation "in any way impair[ed] by unreasonable or discriminatory measures [Claimants'] management, maintenance, use, enjoyment or disposal" of its investment, or subjected Claimants' investment to measures having the effect equivalent to an expropriation. In the context of that inquiry, the Tribunal will set out the evidentiary record with respect to the alleged "campaign of harassment and intimidation."'. See Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, *Final award of 18 July 2014*, at para 764-765 (our emphasis).

[606] Ibid., at 1583-1585; Energy Charter Treaty, 2080 UNTS 95; 34 ILM 360 (1995), available at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

[607] For a more elaborate discussion on the human rights dimension of the *Yukos* arbitrations, see E. De Brabandere, 'Yukos Universal Limited (Isle of Man) v The Russian Federation Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals' (2015), 30:2 ICSID Review 345.

[608] See Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 1030; Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Product*, *supra* note 1027.
Centre for Minority Rights Development (Kenya) and *Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, Decision of 4 February 2010, ACHPR (276/2003); and *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, *supra* note 1066; and *SERAC and Center for Economic and Social Rights v. Nigeria*, *infra* note 931.

complex environmental issues that merit further scrutiny. The *Methanex* case will serve as an example that illustrates civil society's quest in promoting the protection of the environment before investor-state tribunals. Prior to that, it is worthy to briefly discuss the issue of environmental protection from a general normative perspective as prelude to the case analysis.

4.2.1 The environment: An exclusive affair for states?

A detailed look at the applicable law on environmental protection would largely exceed the scope of the present research. The purpose here is to further articulate the previously mentioned inter-play between environmental protection and investor-state arbitration. Indeed, international environmental treaties cover, *inter alia*, enhancing access to environmental information (the Aarhus Convention),[609] restrictions on greenhouse gas emissions (most notably the Kyoto Protocol),[610] persistent organic pollutants (the Stockholm Convention),[611] international trade in hazardous chemicals (the Rotterdam Convention),[612] or the control of transboundary movements of hazardous waste and their disposal (the Basel Convention).[613] There are also a myriad of environmental norms contained in non-binding instruments.[614] In equal importance, each state adopts its own domestic environmental regulations or measures, which could be the subject of investor-state tribunals' scrutiny. Domestic environmental regulations or measures such as, for instance, requirements for environmental impact assessments on

[609] See Aarhus Convention, *supra* note 119.
[610] Kyoto Protocol to the United Nations Framework Convention on Climate Change, entry into force 16 February 2005, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).
[611] Stockholm Convention on Persistent Organic Pollutants, entry into force 17 May 2004, 2256 UNTS 119; 40 ILM 532 (2001).
[612] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, entry into force 24 February 2004, 2244 UNTS 337; 38 ILM 1 (1999) ('Rotterdam Convention').
[613] Basel Convention, *supra* note 295. In fact, the tribunal in the previously mentioned *S.D. Myers Inc. v. Canada* dispute extensively scrutinized the Convention, see Part I – Section 1.3.3. See also S.D. Myers Inc. v. Canada, *supra* note 277.
[614] Although contained in non-binding instruments, it is also argued that, there is a substantive obligation on host states to impose environmental impact assessments in order to ensure that economic activity is not carried out at the expense of the environment. They are also held to be consistent with BITs when contained in domestic legislation. For instance, the rigorous application of environmental impact assessment requirements by the Spanish authorities was held to be perfectly consistent with the applicable Argentina-Spain BIT. See *Maffezini v. Spain*, *supra* note 145. See also N. Craik, *The International Law of Environmental Impact Assessments* (2008), at 87.

mining activities[615] or noise-control in oil pipeline construction aimed at protecting belugas and caribous[616] have been, or could potentially be, scrutinized before investor-state tribunals.

That being said, there are a plethora of stakeholders who have an interest in upholding environmental protection at all levels, including before investor-state tribunals. The environment has progressively emerged as a 'common concern of humanity' or an *intérêt general*.[617] Environmental protection imposes duties on society as a whole and each of its individual members.[618] In fact, any person from the 'public', including civil society, is deemed to have an 'interest' in promoting environmental protection under international law as reflected by the Aarhus Convention.[619] Climate change for instance, a primary environmental concern, has become one of the main contemporary societal challenges.[620] Along with other compellingly urgent environmental concerns, climate change brings environmental protection to the fore of international law.[621]

Finally, as *public interest* concerns, environmental protection and human rights issues overlap in significant ways.[622] International environmental law and human rights law are two distinct realms, particularly because human rights focus on protecting human beings from environmental degradation, rather than protecting the environment *in se*.[623] Yet, the overlap between them is most notably evidenced by the numerous references to

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[615] Vito G. Gallo v. The Government of Canada, *supra* note 172.
[616] CBC News, 'Quebec denies TransCanada approval to resume work in Cacouna: Environment ministry says it's not persuaded pipeline company will respect noise levels to protect belugas', 15 October 2014, available at: http://www.cbc.ca/news/canada/montreal/quebec-denies-transcanada-approval-to-resume-work-in-cacouna-1.2799981 (last accessed 05 January 2015).
[617] D. Shelton, *supra* note 400, at 37; C. Schreuer, U. Kriebaum, 'From Individual to Community Interest in International Investment Law' in U. Fastenrath, et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 1080.
[618] D. Shelton, *supra* note 400, at 37.
[619] The Aarhus Convention defines the 'public' as 'one or more natural or legal persons, and…their associations, organizations or groups'; and the 'public concerned' as the: 'public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, *non-governmental organizations promoting environmental protection…shall be deemed to have an interest*'. See Articles 2(4) and 2(5) of the Aarhus Convention, *supra* note 119 (our emphasis).
[620] R. Bratspies, 'Human Rights and Environmental Regulation' (2012), 19 New York University Environmental Law Journal 225, at 243.
[621] R. Rayfuse, and S. Scott, 'Mapping the Impact of Climate Change on International Law', in R. Rayfuse, and S. Scott (eds.), *International Law in the Era of Climate Change* (2012), at 19.
[622] G. Alfredsson, 'Human Rights and the Environment' in D. Leary, and B. Pisupati (eds.), *The Future of International Envrionmental Law* (2010), at 127. See also A. Boyle, 'Human Rights and the Environment: Where Next?', (2012) 23 European Journal of International Law 613, at 614.
[623] It is in this regard that human rights law is viewed as 'anthropocentric'. See R. Bratspies, *supra* note 620, at 245.

environmental protection in international human rights instruments relating to the rights to life, food, water, health, home, property, political participation, freedoms of information, association and expression, in addition to cultural rights including those of indigenous peoples.[624] In fact, one of the earliest and most reflective instruments of this duality is the 1972 Stockholm Declaration.[625] It is also well-manifested under the Banjul Charter;[626] and indeed, in the subsequently discussed case of *SERAC v. Nigeria*.[627] Also, the right to a healthy environment is enshrined in several constitutions.[628] The Bolivian constitution for instance provides that 'persons have a right to a healthy, protected, and balanced environment'.[629]

[624] See Ibid., at 128-129 citing those mentioned rights set forth under the ICCPR, ICESCR, CEDAW, UN Convention on the Rights of the Child, UNESCO Convention. See ICCPR, *supra* note 93; ICESCR, *supra* note 672; CEDAW, *infra* note 675; UN Convention on the Rights of the Child, *infra* note 673; and the Convention Concerning the Protection of the World Cultural and Natural Heritage, entry into force 15 December 1975, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972) ('UNESCO Convention').

[625] Principle 1 provides that: 'Man has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality* that permits a life of dignity and well-being, *and he bears the solemn responsibility to protect and improve the environment* for present and future generations'. See Declaration of the United Nations Conference on the Human Environment, dated 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972) (our emphasis). See also R. Bratspies, *supra* note 620, at 245.

[626] Article 24 provides that 'All peoples shall have the right to a general satisfactory environment favorable to their development.'. See Banjul Charter, *infra* note 845.

[627] In this case, the ACHPR ordered Nigeria to undertake significant clean-up measures to remedy the environmental harm suffered by the Ogoni People. Notwithstanding those arguably close inter-linkages, some argue that there is no generally recognized human right to a healthy environment under international law. See *SERAC and Center for Economic and Social Rights v. Nigeria*, *infra* note 931; see also R. Bratspies, *supra* note 620, at 239.

[628] Constitutionalization is often viewed a signal that a given state has accepted the validity of a human right norm. For instance, there have been repeatedly unsuccessful efforts to implement an amendment to the US Constitution to the effect that 'every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right'. In fact, it is worthy to mention that US courts have shown reticence with respect to admitting environmental wrongs as violations of the law of nations. See Ibid., at 232.

[629] Article 33 goes on to provide that 'the exercise of such right should enable individuals and collectivities of present and future generations, in addition to other living creatures, to develop in a normal and permanent manner'. It is worthy to note as well that Article 34 further enables any individual or collectivity to engage legal proceedings in defense of the right to a healthy environment. In addition, Article 312(III) provides that all forms of economic organizations have the obligation to protect the environment. In fact, the constitution is unique in referring to the concept of 'Pachamama', or in other words, 'Mother Earth' – which holds significant value to indigenous peoples from the Andes region. Similar provisions exist in the Ecuadorian and Venezuelan constitutions. These constitutions cannot, however, be viewed as reflective of general state practice on the matter. See *Constitución Política del Estado*, *infra* note 724; Venezuela's constitution, Chapter IX 'Environmental Rights', *Constitución de La Republica Bolivariana de Venezuela* (1999), *Gaceta Oficial Extraordinaria N° 36.860 de fecha 30 de diciembre de 1999*.

4.2.2 NAFTA's sustainable development goal – The example of *Methanex*

Previously discussed from a procedural standpoint,[630] it is worthy to revisit the *Methanex* case in a more substantive light as it clearly manifests those issues relating to environmental protection that are susceptible of arising in investor-state disputes. The dispute was highly complex and extensively discussed scientific and technical evidence with respect to the potentially adverse effects of MTBE on public health and the environment.

The US had considered the Californian ban on MTBE as a measure to protect public health as well as the environment. California in fact enacted the ban following a scientific evaluation by the University of California. Methanex on the other hand considered that there was no valid environmental, health, or safety justification for the MTBE ban. Methanex denounced the ban as a protectionist measure in the following terms: 'local interests often try to use pseudo-environmental measures to disguise the more favourable treatment they seek vis-à-vis foreign competitors'.[631] Indeed, it alleged that California sought to replace the use of MTBE with ethanol-based additives (ETBE), which can also serve as octane and oxygenate for gasoline just like MTBE except that they are manufactured from biomass feedstocks. A competitor of Methanex, Archer Daniels Midland, a major US-based producer of ethanol, is alleged to have made significant contributions to the election campaign of the Governor of California around the time of the ban.[632]

Against this background, Methanex argued that the ban was meant to grant preferential treatment to manufacturers of 'like products'. It thus submitted a NAFTA Chapter XI claim on the basis of a violation of the right to national treatment (Article

[630] See Part I – Section 2.1.2.
[631] Methanex Corporation v. United States, *Final award on jurisdiction and merits of 03 August 2005*, at 13.
[632] Ibid., at 5.

1102),[633] fair and equitable treatment (Article 1105)[634] and compensation as a result of expropriation (Article 1110).[635]

i. Amicus allegations and arguments

The International Institute for Sustainable Development (IISD), the Communities for a Better Environment and the Earth Island Institute submitted separate petitions for leave to file *amicus curiae* briefs:

> on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region.[636]

The IISD asserted that there was 'an increased urgency in the need for *amicus* participation' in light of the *Metalclad* award,[637] which – according to the IISD – failed to consider 'environmental and sustainable development goals'.[638] It also argued that Chapter XI of NAFTA should reflect legal principles underlying the concept of sustainable development and that its submission aims to assist the tribunal in that regard. It finally pointed out that given the absence of any right of appeal under investment arbitration, the tribunal should ensure that there should be no errors 'resulting from the lack of a fresh and relevant perspective' which IISD could provide with respect to the underlying environmental protection and sustainable development issues.[639] Communities for a Better Environment and the Earth Island Institute asserted that the dispute raised issues of 'constitutional importance' where (a) governmental authority to implement environmental regulations and (b) property rights had to be balanced. As previously discussed, this argument echoes the idea that investor-state arbitration presents aspects of 'Global Administrative Law', i.e. where the accountability, and decisions, of domestic regulatory bodies have ramifications of a global instead of a domestic nature.[640] The *amici* thus placed the Californian measures in a wider context of environmental

[633] The Article provides that: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in *like circumstances*, to its own investors…'. See NAFTA Article 1102, *supra* note 170 (our emphasis).
[634] See Article 1105 of NAFTA, *supra* note 263.
[635] See Article 1110 of NAFTA, *supra* note 232.
[636] Methanex Corporation v. United States, *supra* note 428, at para 5.
[637] Metalclad Corporation v. United Mexican States, *supra* note 257.
[638] Methanex Corporation v. United States, *supra* note 428, at para 6.
[639] Ibid., at para 5.
[640] Ibid., at para 8. See also Part II – Section 1.5.2 for a review of the analysis on the 'Global Administrative Law' aspects of investor-state arbitration.

protection and raised the issue of the host state's right to protect the environment and promote sustainable development.[641]

Both civil society organizations subsequently submitted detailed *amicus* briefs that directly tackled Methanex's arguments. On the alleged violations of national treatment and fair and equitable treatment, the IISD essentially asserted that Methanex's arguments were construed to establish environmental protection as an exception to international foreign investment rules. This would amount to incorrectly incorporate certain trade law rules into Chapter XI, as well as to incorrectly impose the limitations set forth under the exceptions of Article XX of the GATT and NAFTA itself into Chapter XI, which deals with investment-related as opposed to trade-related obligations of host states.[642] This would go, so the IISD argued, against a clear recognition of environmental protection and sustainable development in NAFTA's preamble, which should guide the interpretation of NAFTA provisions. The IISD further posited that the environmental goals and objectives of NAFTA were reconfirmed in the NAAEC.[643] This should thus influence the interpretation of NAFTA provisions pursuant to Article 31(2)(a) of the Vienna Convention.[644]

With respect to Methanex's allegation that a ban on MTBE was meant to favour US ETBE manufacturers, the IISD argued that Methanex's interpretation of NAFTA in light of WTO law and practice is misappropriated, particularly in light of its interpretation of Article 1102 on national treatment. Methanex should not be viewed as 'in like circumstances' with producers of other gasoline oxygenates such as ETBE.[645] In addition, 'circumstances' cannot be limited to the physical characteristics of a product produced by a foreign investor or constitute an investment *in se*. The IISD contended that

[641] T. Ishikawa, *supra* note 108, at 402.
[642] Methanex Corporation v. United States, *IISD amicus submission of 09 March 2004*, at 23.
[643] According to the IISD, the NAAEC explicitly *reconfirms* the importance of environmental protection the following terms of its preamble: 'Reconfirming the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection'. See NAAEC, *supra* note 226.
[644] Article 31(2)(a) provides that: '2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'. See Vienna Convention, *infra* note 1051.
[645] Methanex Corporation v. United States, *supra* note 642, at para 33-36.

investments are not only physical 'things', but also leave a 'footprint' on the ground in terms of impacts on the environment and the community.[646]

On the last point relating to expropriation, the IISD noted that there is a source of concern about 'the disputed notion' of regulatory measures, whereby the diminution of economic value due to a regulation that protects the public interest becomes the basis for a finding of expropriation.[647] The IISD rebuked Methanex's reliance on the previously discussed *Santa Elena v. Costa Rica* case.[648] It argued that the substantive issues of the latter are not relevant given that the tribunal in that case was faced with a prior determination by both parties that an expropriation had effectively taken place. The tribunal therefore did not scrutinize whether there was expropriation, but solely adjudicated upon the amount of compensation due; and accordingly, it ruled that once an expropriation had taken place, compensation is due even if it is for an environmental purpose. In turn, the IISD posited that *bona fide* public health and welfare measures fall outside the concept of expropriation, i.e. they are not expropriations of any kind, and are therefore not subject to compensation.[649] This position is in fact in line with the US's response to Methanex's claim.

ii. The tribunal's response

In its final award, the tribunal scrutinized in great detail the scientific and technical evidence presented by both parties, including the study prepared by the University of California. It noted that the study involved more than 60 researchers and comprised 17 papers covering ten distinct topics including – *inter alia* – (i) an assessment of the risks and benefits to human health and the environment of MTBE and its combustion byproducts found in air, water and soil, and a comparison of those risks and benefits to ETBE and ethanol which could be used as a replacement of MTBE in gasoline; and (ii) an evaluation of the scientific peer-reviewed research and literature on the human health and environmental effects of MTBE.[650] Although there was no evidence that air quality was significantly affected by the use of MTBE as a fuel additive, the study found

[646] Ibid., at para 39.
[647] Ibid., at para 82.
[648] Ibid., at para 87-89. See also Santa Elena v. Costa Rica, *supra* note 245.
[649] Ibid., at para 86.
[650] Methanex Corporation v. United States, *supra* note 631, at 160.

that there were important risks and costs associated with water contamination due to the use of MTBE. Various public hearings and consultations were in fact subsequently held to discuss the findings of the University's study. The tribunal then noted that Californian authorities had detected water contaminations in South Lake Tahoe, Santa Monica, Los Angeles, San Francisco, Santa Clara, and other locations, as well as low levels of MTBE in drinking water; and finally, acknowledged the existence of widespread public support for a ban on MTBE.[651]

The tribunal then had to consider Methanex's allegations of discriminatory treatment. It found that political contributions to candidates for office in the US are not prohibited. Equally, there were no allegations by Methanex that ADM's contributions were made illegally. A long regulatory process on the MTBE ban had started long before the Governor's election. More fundamentally, the ban's implementation was subject to the findings of the scientific study of the University of California, which was followed by public hearings, public testimony and peer review. The tribunal thus asserted that the Governor '(whoever he or she might have been)' had no discretion to deviate from the results and recommendations of the study. From a substantive standpoint, the tribunal dismissed Methanex's claim with respect to national treatment (Article 1102) given that the MTBE ban irrespectively applied to all manufacturers, i.e. it did not receive treatment less favorable than US investors in 'like circumstances' – as set forth under Article 1102.[652] In this light, it also dismissed Methanex's claim under Article 1105 on fair and equitable treatment. With regards to expropriation (Article 1110), the tribunal found that there is no expropriation decree or a creeping expropriation, i.e. a 'taking' in the sense of any property of Methanex being seized and transferred; nor was the Californian ban 'tantamount to expropriation'. In order to be successfully claimed, the latter requires the establishment of discriminatory conduct towards foreign investors in the following terms:

> an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, *a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable* unless specific commitments had been given by the regulating government to the then putative

[651] Ibid., at 173.

[652] The term 'like circumstances' was also held not too cover 'like goods' or 'products'; thereby dismissing Methanex's argument with regards to the preferential treatment afforded to producers of ETBE – which may be considered under a 'like product' interpretation consistent with WTO law. See Ibid., at 253, 260.

> foreign investor contemplating investment that the government would refrain from such regulation.[653]

It is worthy to finally note that the tribunal did not revisit procedural aspects nor summarize the content of the *amici*'s submission. However, it noted the IISD's 'carefully reasoned Amicus submission' in which it argues against Methanex's contention that 'trade law approaches can simply be transferred to investment law'.[654]

Civil society organizations such as the IISD viewed the decision favorably.[655] Particularly in light of the tribunal's finding that government measures (i) aimed at ensuring a public purpose; (ii) that are non-discriminatory; and (iii) enacted 'in accordance with due process', are in principle not deemed as expropriatory and compensable. This finding was in line with the IISD's *amicus curiae* arguments. A more detailed assessment of the *amici*'s impact on the tribunal's final award will be undertaken further below.[656]

4.3 Civil society as a human rights advocate

Human rights issues have been raised in in a number of investor-state disputes, particularly those relating to both the Argentine financial crisis of 2001 and access to water. This section looks at three cases: *Aguas del Tunari SA v. Bolivia*, *Sociedad General de Aguas de Barcelona, S.A. v. Argentina*, and *Biwater Gauff v. Tanzania*.[657]

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[653] Ibid., at 278 (our emphasis). It is worthy to note that the principle set out by the *Methanex* tribunal was confirmed in a similar NAFTA dispute. The dispute concerned a ban on the sale of lindane pesticide by the Pest Management Regulatory Agency of Canada (PMRA). In this respect, the tribunal stated that '[it] considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation'. See Chemtura Corporation v. Government of Canada, *supra* note 134, at para 266.

[654] Ibid., at 258.

[655] Mann argues that 'the Methanex Tribunal has applied a modern regulatory approach to the police powers concept, an approach long argued for by IISD and other civil society groups'. See H. Mann, 'The Final Decision in Methanex v United States: Some New Wine in Some New Bottles', International Institute for Sustainable Development, August 2005, available at: http://www.iisd.org/pdf/2005/commentary_methanex.pdf (last accessed 06 October 2014).

[656] See Part I – Section 5.2.

[657] Aguas del Tunari SA v. Bolivia, *infra* note 716, Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542, and Biwater Gauff v. Tanzania, *infra* note 740. Other disputes not addressed include: Azurix Corp. v. The Argentine Republic, *infra* note 658.

These were seminal, and some of the first, arbitrations dealing directly with issues related to the human right to access water.

4.3.1 The need for foreign investment in water distribution

As a human rights issue, access to water is a manifest example of transcendent public interests and, incidentally, it has been the subject matter of a number of investor-state disputes of importance to this research.[658] 884 million people lack access to safe drinking water and more than 2.6 billion do not have access to basic sanitation.[659] Enhancing access to water is part of the UN Millennium Development Goals,[660] which are *in se* multi-stakeholder concerns.[661] Although considered as a public good, water may be deemed as an economic good as well due to its increasing '*marchandisation*'. Private corporations may profit from states delegating the provision of water distribution services, the outright privatization of such services, or the acquisition of water resources and rights.[662] Privatization is often linked to World Bank and IMF loans or structural adjustment programs – as reflected for instance in the cases of *Aguas del Tunari v.*

[658] Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533; Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542; Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic, *infra* note 378; and Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12), and Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 741.

[659] UN General Assembly, Resolution 64/292, 'The Human Right to Water and Sanitation', dated 28 July 2010, *infra* note 689.

[660] Target 7.C sets a goal to 'halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation'. See UN Millennium Development Goals, *infra* note 682. In order for states to achieve viable solutions to this problem, they require – *inter alia* – the technology, know-how, experience, and more fundamentally, the capital of private corporations; as well as the support of inter-state organizations and donors, but also civil society organizations such as those representing affected communities or those working directly with them 'at the bottom of the pyramid'. For instance, it is estimated that the EU is channelling more than two-thirds of its relief aid through NGOs. This fact reflects the advantages for civil society of working 'at the bottom of the pyramid'. See L. Logister, *supra* note 118, at 167.

[661] It is widely recognized that multi-stakeholder efforts, and not just state or inter-state ones, are required in order to achieve those goals. As reflected by initiatives such as the UN Global Compact, Business Call to Action, or CEO Water Mandate. Those widely endorsed initiatives bring together multiple stakeholders including companies, states, civil society, and international organizations. They are most notably aimed at the respect and promotion of sustainable development goals and human rights by companies in general, and multinationals in particular. All of which are UN-endorsed initiatives. See UN Global Compact, available at: http://www.unglobalcompact.org/ (last accessed 06 October 2014; Business Call to Action, available at: http://www.businesscalltoaction.org/about/about-us/ (last accessed 06 October 2014); and CEO Water Mandate, available at: http://www.ceowatermandate.org/ (last accessed 06 October 2014). See also in W. Benedek, 'Multi-Stakeholderism in the Development of International Law' in U. Fastenrath, et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 203.

[662] See Ibid., at 592. Also, A. Taithe, *L'eau. Un bien? Un droit?* (2008), at 40.

Bolivia and *Biwater Gauff v. Tanzania*.[663] That said, private corporations' investments constitute a much-needed component for the enhancement of water access and, thus, development.[664] As an example, it is estimated that Suez, the French parent company and majority shareholder of the claimants in the case of *Sociedad General de Aguas de Barcelona v. Argentina*,[665] invested $1.7 billion between 1993 and 2002 on water distribution and treatment infrastructure in Buenos Aires.[666] Some corporations in the water 'business' distribute water to over 100 million persons worldwide.[667] These corporations are, for the most part, quintessentially 'multinational' and inherently engage in foreign investments. Yet, privatization is often perceived as symptomatic of the '*state's retreat*'.[668] The privatization of basic public services such as water distribution implies that private corporations may replace states in this regard and, as a result, overshadow states' duty to 'respect, protect, and fulfil' the 'right to access water'.[669] Foreign investment in privatized basic public services raises serious concerns in light of

[663] *Aguas del Tunari, S.A. v. The Republic of Bolivia*, *supra* note 533; and *Biwater Gauff v. Tanzania*, *infra* note 740.

[664] The United Nations Conference on Environment and Development (UNCED)'s Agenda 21 in many ways does confirm such recognition. See clause 2.34 of Agenda 21: 'It is necessary to establish … economic policy reforms that promote the efficient planning and utilization of resources for sustainable development through sound economic and social policies, foster entrepreneurship and the incorporation of social and environmental costs in resource pricing, and remove sources of distortion in the area of trade and investment.' See Agenda 21, *infra* note 99. See also J. Letnar Černič, *infra* note 695, at 306. On the World Bank's role in promoting such an approach, see V. Petrova, *supra* note 668, at 578, 582, 585; C. Schreuer and U. Kriebaum, *supra* note 617, at 1082.

[665] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544.

[666] This sum was equivalent to two to three times the average capital expenditure made by the Argentinian state entity previously in charge of the project. See A. Taithe, *supra* note 662, at 45.

[667] Out of 15 companies servicing water to more than 13 million persons each, 7 engage in cross-border activities, including most notably the French multinationals Veolia Environnement (servicing 131,260,000 persons), and Suez Environnement (servicing 117,350,000 persons) – both of which are affiliated to the claimants in Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542 (discussed below). For further details regarding those statistics, see: Pinsent Masons, Water Yearbook Report (2012-2013), available at: http://wateryearbook.pinsentmasons.com/ (last accessed 06 October 2014). See also J. Letnar Černič, *infra* note 695, at 307; V. Petrova, *supra* note 668, at 578, 590; M. Sornarajah, *supra* note 8, at 333; and M. Majlessi, *supra* note 110, at 82.

[668] This expression is inspired by the title of a book published in 1990s. See S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996). The 'state's retreat' is also seen as linked to Washington Consensus policies, a term designating a set of 10 policies that the US government and the World Bank and IMF promoted to increase global economic growth. See WHO, 'Trade, Foreign Policy, Diplomacy, and Health: the Washington Consensus', available at: http://www.who.int/trade/glossary/story094/en/ (last accessed 06 October 2014). On the IMF and the World Bank's promotion of privatizations through structural adjustment loans and other debt programmes, see also V. Petrova, 'At the Frontier for the Rush for Blue Gold: Water Privatization and the Human Right to Water', (2006) 31 Brooklynn Journal of International Law 577, at 578; M. Majlessi, *infra* note 110, at 95; E. De Brabandere, *infra* note 699 at 3.

[669] States' obligation to protect, respect, and fulfill socio-economic and cultural human rights was first articulated by the UN Special Rapporteur, Asbjørn Eide, in his 1987 report. See Report prepared by Asbjørn Eide, *The Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1987/23. See also J. Letnar Černič, *infra* note 695, at 334; V. Petrova, *supra* note 668, at 593; E. De Brabandere, *infra* note 699 at 3.

the constraints it could potentially pose on state regulatory powers, particularly when promoted and protected under the umbrella of an IIA or BIT. [670]

4.3.2 Is there a 'human right to water'?

A human right to access water is considered as an embryonic and widely contested human right. [671] It is solely enshrined explicitly in 'soft' international law instruments. Few human rights instruments treat the right to water as a human right *per se*. [672] The 1989 Convention on the Rights of the Child[673] is the first such instrument to explicitly mention water, environmental sanitation, and hygiene. [674] Other international instruments include the Convention on the Elimination of all Forms of Discrimination

[670] An academic statement of 'concern about the international investment regime' – the Osgoode Statement – points to 'the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability'. The signatories include, *inter alia*, M. Sornarajah, Peter Muchlinski, Sol Picciotto, Gus Van Harten, and David Schneiderman. See York University – Osgoode Hall Law School, Public Statement on The International Investment Regime, dated 31 August 2010, available at: http://www.osgoode.yorku.ca/public_statement (last accessed 06 October 2014) ('the Osgoode Statement'). In the same vein, a recent UNCTAD report points that investor-state claims and awards 'can still exert significant pressures on public finances and create potential disincentives for public-interest regulation, posing obstacles to countries' sustainable economic development'. See UNCTAD 2013 Report, *supra* note 210, at 3.

[671] For an overall view of the historic development of the human right to water and the debate surrounding its recognition, see V. Petrova, *supra* note 668, at 593; M. Gavouneli, 'A Human Right to Groundwater' (2011), 13 International Community Law Review 305, at 318.

[672] It is not explicitly mentioned in the UN Universal Declaration of Human Rights. However, it could fall within the scope of Article 25(1), which provides that: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…'. See UN General Assembly, Universal Declaration of Human Rights, dated 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html (last accessed 15 December 2013). The same applies to the ICESCR, although the right to water was considered to fall within the scope of Article 11(1): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. See UN General Assembly, ICESCR, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html (last accessed 15 December 2013). For further details on this issue, see F. Marrella, *infra* note 693, at 338.

[673] Article 24(2) provides that: 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: …(c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution…'. See UN General Assembly, Convention on the Rights of the Child, dated 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html (last accessed 15 December 2013) ('UN Convention on the Rights of the Child').

[674] UN-Water Decade Programme on Advocacy and Communication, 'The Human Right to Water and Sanitation: Milestones' (2011), available at: http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf (last accessed 14 December 2013).

against Women ('CEDAW'),[675] the Convention on the Rights of Persons with Disabilities;[676] and regionally, the European Charter on Water Resources,[677] the African Charter on the Rights and Welfare of the Child,[678] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.[679] International humanitarian law instruments also allude to the right to water.[680]

Numerous declarations and resolutions, which are inherently non-binding, later built up on the notion.[681] Access to water was included in the Millennium Development Goals under 'Goal 7 – Ensure Environmental Sustainability'.[682] Interestingly, the *Biwater*

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[675] See Article 14(2)(h) which states that: 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right… To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.'. See UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, available at: http://www.refworld.org/docid/3ae6b3970.html (last accessed 26 February 2014).

[676] Article 28(a) provides that: 'States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures…To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs'. See UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the UN General Assembly, dated 24 January 2007, A/RES/61/106, available at: http://www.refworld.org/docid/45f973632.html (last accessed 26 February 2014).

[677] Article 5 provides that: 'Everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene…'. See Council of Europe, dated 17 October 2001, available at: https://wcd.coe.int/ViewDoc.jsp?id=231615 (last accessed 26 February 2014).

[678] Article 14(2)(c) states that: 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures…to ensure the provision of adequate nutrition and safe drinking water'. See Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, dated 11 July 1990, CAB/LEG/24.9/49 (1990), available at: http://www.refworld.org/docid/3ae6b38c18.html (last accessed 26 February 2014).

[679] Article 15 provides that: 'States parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: provide women with access to clean drinking water.' See African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, dated 11 July 2003, available at: http://www.refworld.org/docid/3f4b139d4.html (last accessed 26 February 2014).

[680] These most notably include the Geneva Convention. Article 26(3) states that: 'Sufficient drinking water shall be supplied to prisoners of war…'. See Convention Relative to the Treatment of Prisoners of War, dated 12 August 1949, 75 U.N.T.S. 135. Generally, for an exhaustive account of reference to the human right to water, see J. Letnar Černič, *infra* note 695, at 311-314.

[681] Ibid.

[682] Target 7.C sets a goal to 'halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation'. In order to achieve this goal, five normative criteria for the full realization of the right to water have been identified: availability, accessibility, quality/safety, affordability, and acceptability; with five-cross cutting ones: non-discrimination, participation, accountability, impact, and sustainability. See F. Marrella, *infra* note 693, at 340. See also UN Millennium Development Goals, available at: http://www.un.org/millenniumgoals/environ.shtml (last accessed 01 September 2013).

Gauff tribunal explicitly mentioned this – as will be further discussed below.[683] Other instruments most notably include the CESCR's General Comment No. 15 on the right to water on the basis of Articles 11 and 12 of the ICESCR.[684] Article I.1 states that 'the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights'.[685] Comment No. 15 also defined the right to water as including *available* and *affordable* water for personal and domestic uses.[686] The CESCR articulated the need to 'respect, protect, and fulfil' the human right to water by ensuring its availability, accessibility, and affordability.[687] In a similar vein, there is also a three-pronged procedural component to the right to water relating to the right to information, the right to participate in policy and decision-making, and the right to effective judicial remedies.[688]

The human right to water was further supported by a UN General Assembly resolution of 28 July 2010, in which the Assembly '*recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*'.[689] The right to water has also gained further impetus as a result of its constitutionalization by an increasing number of states, particularly from Latin

[683] See *infra* note 838.
[684] Article 12 states that: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness'. See ICESCR, *supra* note 672.
[685] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Art. 11 and 12 of the Covenant)*, 11-29 November 2003, E/C.12/2002/11, available at: http://www.refworld.org/docid/4538838d0.html (last accessed 17 December 2013).
[686] See 12(a) 'Availability': 'The water supply for each person must be sufficient and continuous for personal and domestic uses…'; and 12(c)(ii) 'Economic Accessibility': 'Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights'. Ibid.
[687] J. Letnar Černič, *infra* note 695, at 306.
[688] Article 55 of General Comment 15 states that: 'Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels'. See *General Comment No. 15: The Right to Water*, *supra* note 686. See also V. Petrova, *supra* note 668, at 596.
[689] UN General Assembly, Resolution 64/292, 'The Human Right to Water and Sanitation', dated 28 July 2010, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292 (last accessed 01 September 2013) (our emphasis).

America and Africa, which more recently included Tunisia.[690] Ecuador's constitution is apposite, it provides that 'the human right to water is fundamental and inalienable. Water constitutes a national strategic patrimony of public use, [that is] inalienable, imprescriptible, indefeasible and essential for life'.[691] It is worthy to note as well that such constitutional measures often cover the protection of other essential public services from privatization.[692] In such cases, the right to water would not be considered as merely hortatory given that the privatization of water distribution would be unequivocally illegal under municipal law, thereby ensuring that access to water remains *public*.

States have a duty to protect, respect, and fulfil – *inter alia* – the human right to water. Conversely, states bound by IIAs or BITs are seemingly compelled to undertake their human right to water duties in a manner that is consistent with foreign investors' right to due process and predictability, rule of law, fair and equitable treatment, and compensation in the event of expropriation, amongst other potentially relevant international investment protection obligations.[693] The human right to water thus fits within the challenge states face in promoting economic development in general, and foreign investments in particular, while abiding by their human rights obligations.[694] There is, however, an underlying problem for states in addressing both. The right to water may often conflict with economic development such as mining for instance.[695] Foreign

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[690] Uruguay and Ecuador have actually unconstitutionalized the privatization of water services. Other states' constitutions that have referred to the right to water include – *inter alia* – Bolivia, Laos, Ethiopia, Gambia, Guatemala, Panama, Uganda, South African, Venezuela, and Zambia. For instance, the Article 27 of the South African Constitution states that: '(1) Everyone has the right to have access to… (b) sufficient food and water… (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'. See Constitution of the Republic of South Africa (No. 108 of 1996), available at: http://www.gov.za/documents/constitution/1996/a108-96.pdf (last accessed 06 October 2014). Tunisia's recently promulgated constitution provides under Article 44 that: '*Le droit à l'eau est garanti. La préservation de l'eau et son utilisation rationnelle sont un devoir pour l'Etat et la société*.' See *Constitution de La République Tunisienne*, dated 26 January 2014, available at: http://www.marsad.tn/fr/constitution# (last accessed 02 February 2014). See also F. Marrella, *infra* note 693, at 339, and J. Letnar Černič, *infra* note 695, at 320-321 for an exhaustive analysis of state constitutions mentioning access to water.

[691] Article 12, *Constitución de la Republica de Ecuador* (2008), *Registro Oficial 449 de 20 Octubre 2008*.

[692] For instance, in 2009, Bolivia passed a new constitution in which it enshrines the 'right of every person to universal and equal access to drinking water, sanitation, electricity, domestic gas, postal, and telecommunications basic services'. See Article 20(I), *Constitución Política del Estado*, *infra* note 724. See also V. Petrova, *supra* note 668, at 580.

[693] See F. Marrella, 'On the Changing Structure of International Investment Law: the Human Right to Water and ICSID Arbitration', (2010) 12 International Community Law Review 335, at 335, 336.

[694] This is in continuation to the discussion initiated under Introduction – Section 1.

[695] Černič gives the example of the Dongria Kondh indigenous community, inhabiting the Niyamgiri Hills in Eastern India, where the Indian government approved a project to mine bauxite which is widely reported to have

investors – or corporations in general – may, through their actions or omissions, ultimately undermine the human right to water. For instance, they may deprive individuals of their access to water through contamination (in the case of mining activities), the excessive use of water,[696] or substantially increase the price of water (in the case of privatized water supply and services),[697] which could potentially lead to preventing the poorest segments of a given population of their right to access water.[698]

Addressing these problems is incumbent upon states since it is clearly established, under international law, that human rights cannot be enforced against corporations in general as no binding international instrument imposes human rights obligations on them.[699] Human rights obligations are quintessentially directed at states – the primary subjects of international law[700] – and include the duty to protect against human rights violations through adequate 'policies, legislation, regulations, and adjudication'.[701] Having said that, there is an increasing recognition that corporations have a responsibility to respect human rights, such as the right to water, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts caused by their activities.[702] This due diligence obligation is clearly reflected in the *Biwater Gauff v. Tanzania* case.[703]

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serious adverse effects on fresh water sources from the Hills. See J. Letnar Černič, 'Corporate Obligations under the Human Right to Water', (2011) 39 Denver Journal of International Law 303, at 303-304.

[696] See the case of *Perumatty Grama Panchayat* v *State of Kerala*, which involved Coca Cola's activities in the Indian state of Kerala; and more specifically, its allegedly excessive use of fresh groundwater in its manufacturing processes. *Perumatty Grama Panchayat v State of Kerala*, High Court of Kerala, India, W.P. (C) No. 34292 of 2003, Judgement of 16 December 2003.

[697] See Aguas del Tunari SA v Bolivia, *infra* note 716, Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 542, and Biwater Gauff v Tanzania, *infra* note 740 cases, which will be discussed further below. See also Ibid., at 317.

[698] Ibid., at 306.

[699] Ibid., at 310. See also E. De Brabandere, 'State-Centrism and Human Rights Obligations: Challenging 'Stateless' Approaches towards Direct Corporate Responsibility', *International Law Association – Research Seminar on Non-state Actors* (March 2009), at 14.

[700] James Crawford explains that 'there is an expanding range of actors in the international system, but states very much remain the key-holders and gate-keepers of personality'. See J. Crawford, *supra* note 74, at 211.

[701] See for instance the UN Guiding Principles on Business and Human Rights, which state that: '[the] Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms'. See UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, dated 21 March 2011, UN General Assembly A/HRC/17/31, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 02 February 2014). See also J. Letnar Černič, *supra* note 695, at 325.

[702] This is not only reflected in the UN Guiding Principles on Business and Human Rights, but also the OECD Guidelines which state that: 'Enterprises should… Respect the internationally recognised human rights of those

Against this backdrop, it is posited that the realization of the human right to water requires responsive and accountable institutions, with a clear designation of responsibilities and coordination between different entities involved. In cases of violations – be it by state organs or non-state actors – states have to provide accessible and effective judicial or other appropriate remedies at both national and international levels. Victims of violations should be entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition.[704] Yet, concessions on the privatization of water services for instance do not include the 'privatization' of a given state's international obligations in terms of protecting, respecting, and fulfilling human rights, 'including the right to water of the people'.[705] Indeed, foreign investors often find themselves engaged in activities involving sensitive human rights obligations incumbent upon states.[706] In order to attract foreign investments, host states have allowed multinationals to charge higher bills to citizens for water with the result of potentially undermining human rights. Faced with growing discontent, governments have then often been compelled to issue administrative measures (such as price-freezing) to the detriment of foreign investors, resulting in potential breaches of international investment obligations.[707]

In sum and *in concreto*, notwithstanding the fact that the right to water is ambiguously regulated under international law, it could be deemed in any event, whether it is recognized as 'soft' or 'hard' law under international law, as a 'legally protectable interest' that could potentially justify the intervention of third parties in investor-state arbitrations.[708]

4.3.3 Privatizations, protests, and problems – A look at some of the key decisions

i. Aguas del Tunari v. Bolivia

affected by their activities'. See Ibid., at 4, and Principle II.2 of the OECD Guidelines. See also Letnar Černič, *supra* note 695, at 327.
[703] Biwater Gauff v. Tanzania, *infra* note 740.
[704] F. Marrella, *supra* note 693, at 342.
[705] Ibid., at 342.
[706] C. Schreuer and U. Kriebaum, *supra* note 617, at 1085.
[707] Ibid., at 348.
[708] The definition of 'legally protectable interest' is addressed in Part III – Section 4.1.2.

This is the first investor-state dispute that dealt with the polemical issue of access to drinking water. It is also the first ICSID case in which both the third-party intervention (or standing) and *amicus curiae* issues have arisen. It is therefore a highly publicized case; the underlying events were coined as the 'Water War' where for the first time a conflict over water did not oppose two states or peoples; but rather, a multinational and those local citizens opposed to its operations.[709]

As mentioned, the case involved Aguas del Tunari, a subsidiary of Bechtel – a major American infrastructure company – which had been granted a 40-year water and sewage services privatization concession by the government of Bolivia for the city of Cochabamba.[710] The government of Bolivia revoked the concession following a steep increase in water prices and ensuing widespread protests by the local population. As a result, Aguas del Tunari filed an ICSID claim against Bolivia pursuant to the Netherlands-Bolivia BIT.

a. Amicus allegations and arguments

From the outset, civil society organizations including the *Coordinadora para la Defensa del Agua y la Vida* and the *Federación Departamental Cochabambina de Organizaciones Regantes*,[711] sought standing as parties to the dispute or alternatively as *amici curiae*.[712] Petitioners mainly argued that they had a 'direct' interest in the dispute. The *Coordinadora* is a coalition of community organizations, labour groups, human rights organizations, farmers' associations, students and other broad-based civil society networks from the region of Cochabamba. It opposed AdT's concession from the outset and had also carried out a public *consulta*, a common form of popular consultation process in Latin America, whereby 60,000 people voted against the concession. The Bolivian government even involved the Coordinadora during the AdT concession negotiations to represent those opposed to the privatisation process.[713] It was also actively involved in the protests that ultimately lead to AdT's exit from Bolivia. As for the

[709] A. Taithe, *supra* note 662, at 13.
[710] In fact, it is worthy to mention here that Bechtel is engaged in a myriad of projects including civil infrastructure, energy, mining, oil and gas, and water – which has become one of the world's largest industries.
[711] Meaning 'the Cochabamba Federation of Irrigators' Organizations'.
[712] These were SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado.
[713] Ibid., at para 5.

Federación Departamental Cochabambina de Organizaciones Regantes, it is an association of small-scale farmers from the Cochabamba region aimed at protecting customary water usage rights and practices, as well as the access and management of local water irrigation sources.

The petitioners' aim was essentially to demonstrate that (i) Bechtel's subsidiary increased water prices by an average rate of 50%; and (ii) thereby significantly restricted Cochabamba's residents' access to water, particularly poorer ones.[714] They have also contended that their position is distinct from the Bolivian government's as the latter might be 'encumbered by conflicting objectives' given the 'strong pressure to attract foreign investment', and that it does not 'fully represent Petitioners' interests in this arbitration'.[715] Again, this is a situation similar to the *Metalclad* case where the Mexican federal government approved the construction of the hazardous chemical waste landfill, whereas the local community surrounding the project vehemently opposed it. Here, the Bolivian government approved the privatization of water services in favour of Bechtel's subsidiary, despite widespread opposition from the citizens of Cochabamba. Indeed, Bolivia would not have raised factual and legal arguments against AdT's claim by asserting 'the right of its citizens' to water' as an exception to AdT's international foreign investment rights when it had initially agreed to privatize water distribution to the benefit of AdT. According to the petitioners, Bolivia only revoked the concession at a much later stage that followed a failure to control protesters, including a week long general strike which entirely shut down the city of Cochabamba, through an imposed state of emergency and suspension of constitutional rights, as well as repression that lead to the death of a seventeen year-old protester and the injury of a hundred others.[716] In several ways, the result of the 'Water War' was not only perceived as a defeat for Bechtel and AdT, but also for Bolivia, which was compelled to concede to Cochabamban civil society's demands.[717] It is worthy to note here that the petition to intervene had

[714] Ibid., at para 35.
[715] Ibid., at para 36.
[716] The concession was granted in September 1999 and ceased to be effective in April 2000. See Aguas del Tunari, S.A. v. The Republic of Bolivia (ICSID Case no. ARB/02/3), *Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002*, at para 1 (the 'Bechtel Case' or 'Bechtel v. Bolivia').
[717] This was the perception of some civil society organizations. See L. Sanchez Gomez, and P. Terhorst, 'Cochabamba, Bolivia: Public-Collective Partnership after the Water Water', available at: http://www.tni.org/sites/www.tni.org/archives/books/watercochabamba.pdf (last accessed 06 October 2014).

galvanized widespread support. Over 300 civil society organizations from Bolivia, the Netherlands, the US, and 38 other countries sent letters to the tribunal to express their concerns towards AdT's claims and urge the tribunal to allow the petitioners to intervene.[718]

b. The tribunal's response

Having said that, the tribunal responded to the petitioners by a letter in 2003 – considered unfavorable – as previously mentioned.[719] The tribunal did not have the chance to examine any further *amicus* petitions nor the merits of the case as Bechtel's subsidiary ultimately dropped its claim and both parties settled the dispute.[720] The tribunal only managed to issue a decision rejecting Bolivia's objection to jurisdiction in 2005, which was essentially based on the following arguments: (i) Bolivia did not consent to ICSID jurisdiction; and (ii) AdT is not a Dutch national as defined by the Netherlands-Bolivia BIT.[721]

It is worthy to mention here that, following the election of Evo Morales, the country's first indigenous president, who personally criticized ICSID, Bolivia withdrew from the ICSID Convention (the withdrawal took effect as of November 2007) and terminated its BIT with the Netherlands in 2009.[722] A move that was later followed by both Ecuador and Venezuela, while other states such as Nicaragua as well as Argentina have been contemplating to follow suit.[723] In 2007, Bolivia also revoked a concession granted to the French multinational – Suez, which is involved in the subsequently discussed case of *Sociedad General de Aguas de Barcelona v. Argentina* – for water

[718] Ibid., at para 4.
[719] See Part I – Section 1.3.2.
[720] It is worthy to note that Bechtel's claim was portrayed as a telling sign of the 'evils of globalisation'. The fact that it dropped the case has been portrayed by civil society organizations as 'victory'. See Earthjustice, 'Victories: Bechtel Drops Case in Bolivia Water Case', available at: http://www.earthjustice.org/our_work/victory/?issue=&region=&office=27410256 (last accessed 06 October 2014). See also J. Stiglitz, *supra* note 101, at 187; and IISD, 'Bolivian water dispute settled, Bechtel forgoes compensation', Investment Treaty News, available at: www.iisd.org/pdf/2006/itn_jan20_2006.pdf (last accessed 06 October 2014).
[721] Aguas del Tunari, S.A. v. The Republic of Bolivia (ICSID Case no. ARB/02/3), *Decision on Respondent's Objections to Jurisdiction of 21 October 2005*, para 5.
[722] UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor State Claims', IIA Issues Note No. 2 (December 2010), available at: http://www.unctad.org/en/docs/webdiaeia20106_en.pdf (last accessed 15 December 2013), at 1.
[723] IISD, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve', available at: http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ (last accessed 10 December 2013).

distribution in the capital, La Paz. In addition, in 2009, Bolivia passed a new constitution in which it enshrined the 'right of every person to universal and equal access to drinking water, sanitation, electricity, domestic gas, postal, and telecommunications basic services'.[724] Water concessions and privatizations have also been un-constitutionalized.[725]

ii. Sociedad General de Aguas de Barcelona v. Argentina

The case involved a number of companies and their shareholders concerning their investments in a 30-year privatization concession for water distribution and wastewater treatment services in the city of Buenos Aires and its 10 million inhabitants.[726] This case is considered as a landmark investor-state dispute, not only because it dealt with complex international law questions, but also it presented the first instance in which an ICSID tribunal accepted to receive *amicus curiae* submissions, as mentioned above.

a. The facts

The concession granted to Suez, the French parent company and majority shareholder of the claimants,[727] was, back in 1993, the largest privatization concession of its kind.[728] The country's financial crisis starting in 2000 led Argentina to enact 'price-freezing' measures across a wide range of sectors, which included water distribution. The claimants alleged that Argentina's refusal to apply previously agreed incremental tariff adjustments, including the ensuing termination of their concession, essentially amounted to expropriation, and violations of their right to the full protection and security of their investments as well as fair and equitable treatment.[729] The case was regarded in the same vein as *Bechtel* as it raised fundamental issues in relation to human rights and access to

[724] Article 20(I). See *Constitución Política del Estado* (February 2009), *Gaceta Oficial del Estado Plurinacional de Bolivia*, available at: http://www.gacetaoficialdebolivia.gob.bo/normas/view/36208 (last accessed 15 December 2013).
[725] Article 20(III). Ibid.
[726] The claims were therefore made pursuant to the France, Spain and United Kingdom BITs entered into with Argentina. Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Decision on liability of 30 July 2010*, *supra* note 544, at para 2.
[727] It is also noteworthy that Suez is the world's largest water distribution multinational and services water to more than 117 million persons worldwide. Suez Environnement services 117,350,000 persons worldwide. For further details regarding those statistics, see Pinsent Masons, Water Yearbook Report (2012-2013), *supra* note 667.
[728] A. Taithe, *supra* note 662, at 41.
[729] Ibid., at para 127.

water. Indeed, Argentina's responsibility and obligation to secure its citizens' right to access water was at issue.

b. Amicus allegations and arguments

Five civil society organizations,[730] including local grassroots Argentine associations such as the *Asociación Civil por la Igualdad y la Justicia* and *Centro de Estudios Legales y Sociales*, filed a 'Petition for Transparency and Participation as Amicus Curiae' on the basis of 'the right of every person to participate and make their voices heard in cases where decisions may affect their rights'.[731] The *amici* clearly intended to put forward crucial issues related to, and arguments in favor of, Argentina's domestic and international obligations to uphold the human right to water. In their joint *amicus curiae* submission, the *amici* cited General Comment No. 15 and contended that the right to water is essential for sustaining human life and is protected under Article 11(1) of ICESCR.[732] They also cited the recommendation of the CESCR to the effect that water must at all times be available, of acceptable quality, and accessible in both the physical and economic sense. The *amici* then contended that Argentina has ratified most international human rights instruments covering the human right to water, including most notably the ICESCR. These were fully incorporated into, and conferred 'constitutional hierarchy' under, Argentine law. Argentina was, therefore, both domestically and internationally compelled to positively protect the right to water.[733]

c. The tribunal's response

In its decision on liability, the tribunal noted the *amici*'s contentions to the effect that Argentina's measures sought to secure its citizens' access to water as a human right:

> Human rights law…required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law. Since human rights law provides a rationale for the crisis

[730] The remaining three were the Center for International Environmental Law, *Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria*, and *Unión de Usuarios y Consumidores*.
[731] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005*, at para 2.
[732] Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic (ICSID Case no. ARB/03/19), *Amicus curiae submission of 04 April 2007*, at 4. See General Comment No.15, *supra* note 685.
[733] Ibid., at 10.

> measures, they argue that this Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question.[734]

Although noting that the Argentine financial crisis was 'undoubtedly one of the most severe in its history', the tribunal asserted that, however, the severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations, i.e. the applicable BITs.[735] The tribunal reiterated that customary international law on the matter, as enshrined by Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, sets forth strict conditions in order for states to succeed in upholding a defense of necessity.[736] It also asserted that it was important for states to abide by such conditions; otherwise, violations of their international obligations risk destabilizing the 'very fabric of international law' and 'the system of international relations'. More specifically, and in looking at the conditions of Article 25 of the ILC Articles, the tribunal first found that Argentina had other available, and more flexible, means in order to safeguard an essential interest – i.e. the provision of water and sewage services to the metropolitan area of Buenos Aires, which was vital to the health and well-being of nearly ten million people – without violating the claimants' right to fair and equitable treatment. Because Argentina refused to abide by the tariff adjustment procedure set forth under its concession agreement with the claimants, forced the renegotiation of, and ultimately terminated, the latter, it violated the fair and equitable treatment standard it owes the claimants as protected foreign investors.[737] The legitimate expectations of the latter were key to the tribunal's analysis. The claimants had, according to the tribunal, the legitimate expectation that Argentina, and its organs, would exercise regulatory authority and discretion within the rules of the detailed legal framework that Argentina had itself established under the concession.[738] Second, it

[734] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544, at para 256.
[735] Ibid., at para 257-258.
[736] Article 25 'Necessity' provides that: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity. See Ibid., at para 249, 259. See also ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *infra* note 833.
[737] Ibid., at 246.
[738] Ibid., at 237.

concluded that Argentina had not violated the essential interests of other states, and that the applicable BITs concluded with France, Spain, and the UK did not explicitly exclude a defense on the basis of necessity; thereby, asserting Argentina's fulfilment of the second and third conditions of Article 25. However, with respect to the fourth condition, it was of the opinion that Argentina contributed to the financial crisis it faced, which – according to the tribunal – cannot be solely accounted on external factors.[739] It thus failed on the first and fourth tests, and was held responsible for violations of its respective BIT obligations but solely under the breach of the fair and equitable treatment.

Having said that, the tribunal's decision on damages is still not public and it remains unclear whether the human rights considerations might have any effect on issues of quantum.

iii. Biwater Gauff v. Tanzania

The *Biwater Gauff*[740] is important because it delved in quite significant detail into human rights questions in general, and extensively scrutinized *amicus* arguments in particular.

a. The facts

The case revolves around a concession granted to an Anglo-German consortium for the management and operation of a water supply and sanitation project in the Tanzanian capital Dar es Salam. The government of Tanzania subsequently revoked the concession due to numerous complications in the implementation of the project by Biwater Gauff (which claimed that those were directly or indirectly caused by the government of Tanzania), most notably including a decline in the availability of water in many parts of Dar Es Salam.[741] The case was regarded in the same vein as the *Bechtel*

[739] The tribunal cited the following factors as evidence of Argentina's contribution to the crisis: excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. See Ibid., at para 264.
[740] Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22.
[741] It is worthy to note that the appointment of a private operator was a condition to a World Bank, African Development Bank, and European Investment Bank funding of USD 140,000,000. Following the revocation of its concession, Biwater Gauff submitted a claim to ICSID pursuant to the United Kingdom-Tanzania BIT. See Ibid., at para 3.

and *Sociedad General de Aguas de Barcelona* cases since it raised fundamental issues in relation to human rights and access to water. *Amicus curiae* petitions were made by five civil society organizations[742] including renowned international civil society organizations such as the IISD, but also local Tanzanian grassroots organization such as the Tanzania Gender Networking Programme.

b. Amicus allegations and arguments

The *amici* argued that when engaging in activities that might entail serious risks for a given population at large, foreign investors then have the 'highest level of responsibility to meet their duties and obligations'. In this case, because of the subject matter of the dispute, human rights and sustainable development considerations impact the balance of rights and obligations between foreign investors and the host state. The alleged significant decline in the availability of water in many parts of Dar es Salaam originated in Biwater Gauff's lack of business competence, and ultimately amounted to a failure to uphold the human rights and sustainable development goals underlying to the implementation of the water distribution project.[743]

In concreto, the joint *amicus* brief first suggested that foreign investors have three main responsibilities consisting of the duty to (i) apply proper business standards to the investment process, including proper due diligence procedures that involve background checks and an adequate assessment of investment risks in developing country economies such as Tanzania's; (ii) observe the principle of *pacta sunt servanda*; and (iii) act in good faith both prior to and during the investment period.[744] Accordingly, the claimant's apparent strategy of making a low bid and then forcing concession renegotiation was a violation of these responsibilities. Biwater Gauff's business failure should only be attributed to it, and in this regard, the applicable UK-Tanzania BIT should not be resorted to by the claimant as an 'insurance policy'.[745] On the issue of access to water, the *amici* cited the objectives set forth under the Millennium Development Goals[746] and the World

[742] The Lawyers' Environmental Action Team, the Legal and Human Rights Center, the Tanzania Gender Networking, the Center for International Environmental Law, and the International Institute for Sustainable Development.
[743] Ibid., at para 379-383.
[744] Biwater Gauff v. Tanzania, *Amicus curiae submission of 26 March 2007*, at para 9.
[745] Ibid., at para 16.
[746] UN Millennium Development Goals, *supra* note 682.

Summit on Sustainable Development.[747] What is crucial here is that the *amici* provided evidence that Biwater Gauff itself explicitly represented its:

> willingness to work with all stakeholders to contribute to the achievement of the MDGs… Biwater is already working to increase provision of safe and affordable access to clean water and sanitation, which is not only a Millennium Development Goal – it's our core business.[748]

The *amici* then asserted that access to clean water is an independent basic human right as recognized by General Comment no. 15.[749] Again, a fact explicitly recognized by Biwater Gauff in its corporate publications in the following terms 'every man, woman and child has the right to a reliable system of clean water and good sanitation'. According to the *amici*, such international and corporate recognition should be afforded legal significance. Foreign investors operating in this sector have 'the highest level of responsibilities' because of risks associated with failures in the provision of water access, particularly with respect to vulnerable segments of the population including the poor, women, and children – both of which are also protected by specific treaties which mention access to water, as previously discussed.[750]

Although the *amici*'s arguments would lead to uphold Tanzania's termination of Biwater's concession in order to ensure that its affected citizens had access to water, the *amici* clearly emphasized that their arguments should not be construed as mitigating factors of host state liability if violations of BIT obligations are established. They rather suggest that human rights and sustainable development issues must be factors that 'condition the nature and extent' of the foreign investors' responsibilities, and equally, the balance of rights and obligations between foreign investors and host states.[751] Foreign investors should therefore ensure the abidance by the 'highest level of responsibilities' prior to seeking the protection of international law in front of investor-state tribunals.

c. The tribunal's response

[747] The Declaration of the Summit states that: 'We welcome the focus of the Johannesburg Summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity'. See Johannesburg Declaration on Sustainable Development, dated 4 September 2002, UN Doc. A/CONF.199/20, available at: http://www.un-documents.net/jburgdec.htm (last accessed 06 October 2014).
[748] Ibid., at para 47.
[749] *General Comment No. 15: The Right to Water* , *supra* note 686.
[750] Ibid., at para 50. See also CEDAW, *supra* note 675; UN Convention on the Rights of the Child, *supra* note 673.
[751] Ibid., at para 51, and A. Kawharu, *supra* note 393, at 292.

The tribunal extensively revisited the *amici*'s contentions with respect to the human right to water, a right which was explicitly acknowledged by Biwater Gauff. The former mentioned as well the target set by the Millennium Development Goals to reduce by half the number of people without access to potable water.[752] Indeed, the tribunal extensively scrutinized the arguments raised by the *amici*.[753] It noted their contention as to foreign investors' duties in conducting due diligence, applying proper business standards, including a responsibility of carrying out proper risk assessments, to observe the principle of *pacta sunt servanda*, as well as to act in good faith.[754] It further reiterated that foreign investors are also bound by the highest level of responsibility to meet their duties and obligations as their investments carry 'very serious risks' to the population affected by their investments.[755] More fundamentally, the tribunal also mentioned the *amici*'s contention with respect to the failure by foreign investors to meet their contractual obligations – in a privatization context – puts the welfare of citizens at risk, which the privatization was actually mandated to enhance.[756] Although the tribunal found that Tanzania expropriated the claimant's investment, it nonetheless concluded that the latter failed to establish any of its claims on damages.[757]

4.4 Representing the under-represented: Civil society and indigenous groups

Issues related to indigenous peoples' and minority rights have been raised in investor-state disputes.[758] This section will primarily focus on the cases of *Glamis Gold v. the United States*, *Piero Foresti and others v. South Africa*, and more recently, *Chevron and Texaco v. Ecuador*. These were seminal and some of the first arbitrations directly dealing with issues related to indigenous peoples' rights and interests.

[752] See Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741, at para 379.
[753] It dedicated roughly 10 pages for a substantive analysis of those arguments. See Ibid., at para -370-392.
[754] Ibid., at para 374.
[755] Ibid., at para 380. See also T. Ishikawa, *supra* note 108, at 407.
[756] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741, at para 377. Ibid., at para 377.
[757] Again in this case, the impact of the *amici* arguments on the tribunal's award will be discussed subsequently. See Part I – Section 5.2.
[758] J. Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), at 106-107.

4.4.1 Legal principles on the protection of indigenous peoples

Both municipal law [759] and international law are increasingly extending protections to indigenous peoples.[760] The landmark UN Declaration on the Rights of Indigenous Peoples (UNDRIP), recently entered into force following years of elaborate negotiations,[761] is an example of such robust international protections.[762] It is argued that the UNDRIP marks a 'tremendous advance in international human rights because collective rights of indigenous peoples are now recognized as human rights'.[763] It provides key provisions on – *inter alia* – land and resource rights, the protection of indigenous peoples' territorial integrity,[764] as well as their right to free, prior, and informed consent:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[765]

The right to free, prior and informed consent is also emphasized in Article 6 of the ILO Convention concerning Indigenous and Tribal Peoples, which entered into force years prior to the UNDRIP.[766] This right is crucial because, in a foreign investment

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[759] Nicaragua is an example of such national jurisdiction recognizing indigenous rights at a constitutional level. Article 5 of the Political Constitution of Nicaragua (1995) stipulates that 'the state recognizes the existence of indigenous peoples, who have rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands, in accordance with the law. An autonomous regime is established in the Constitution for the communities of the Atlantic Coast'. See also L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 500-501, 503.

[760] J. Crawford, *supra* note 74, at 209-210. For an exhaustive survey of such protections, see J. Levine, *supra* note 758, at 111.

[761] According to Karen Engle, these negotiations elapsed over a period of two decades of preparatory work. Carried under the auspices of the UN Working Group on the Rights of Indigenous Populations, established in 1982, the negotiations involved indigenous peoples, their representatives (including civil society organizations), and states. See K. Engle, 'On Fragile Architecture: the UN Declaration on the Rights of Indigenous Peoples in Context of Human Rights', (2011) 22 European Journal of International Law 141, at 143.

[762] United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 Sept. 2007 (UNDRIP), available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 06 October 2014).

[763] One of the first rights recognized, perhaps concomitantly the most pivotal and most controversial, is the right to self-determination (Article 3). Innovative provisions include the right not to be subjected to forced assimilation (Article 8), and the right to indigenous spirituality (Article 34). See also K. Engle, *supra* note 761, at 147-148.

[764] Respectively, Articles 26 and 10, UNDRIP. See also K. Engle, *supra* note 761, at 146.

[765] Article 32(2), UNDRIP.

[766] '1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration

context, the consent and approval of the host state may simply be insufficient.[767] Also in a foreign investment context, the environmental degradation resulting from natural resource exploitation could have potentially devastating effects on indigenous peoples' rights including the right to the enjoyment of the communal property of ancestral lands.[768]

That said, regional human rights instruments such as the Banjul Charter are hailed as granting extensive rights to indigenous peoples, such as the right of peoples to 'freely dispose of their wealth and natural resources'. [769] Indigenous peoples increasingly turn to regional human rights jurisdictions, not only to assert their rights to their lands, cultures, identity, and ultimately their survival, but also to safeguard their natural resources rights.[770] In fact, the ACHPR and IACtHR have articulated indigenous people's rights in

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is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'. *See* Article 6, International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, online at: http://www.unhcr.org/refworld/docid/3ddb6d514.html (last accessed 29 September 2012). See K. Sing'Oei, 'Engaging the Leviathan: National Development, Corporate Globalisation and the Endorois' Quest to Recover their Herding Grounds', (2011) 18 International Journal on Minority and Group Rights 515, at 520. It is worthy to note that the World Bank does no longer finance projects unless the state has engaged in 'free, prior, and informed consultation' with potentially affected indigenous communities. See Pasqualucci, *supra* note 46, at 87.

[767] The author cites the example of the World Bank's Operational Directive 4.10, which mandates the development of an indigenous peoples' development plan as a prelude to any investment in land occupied by an indigenous group. See K. Sing'Oei, *supra* note 766, at 537. This was also reflected by the case of *Burlington Resources Inc. v. Republic of Ecuador* where the claimant alleged that protests and threats by indigenous communities in opposition of its activities resulted in violations of Ecuador's BIT obligations. The tribunal did not extensively delve into the interplay between foreign investment protection and indigenous rights given that the part of the claim that was most relevant to indigenous opposition was dismissed on jurisdictional grounds. Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), *Decision on jurisdiction of 02 January 2010*, at paras 30-34; and *Decision on Liability of 14 December 2012*. See also J. Levine, *supra* note 758, at 113-114.

[768] G. Alfredsson, *supra* note 622, at 133; K. Sing'Oei, *supra* note 766, at 532-533.

[769] The Banjul Charter indivisibly recognizes rights such as the right to 'personal liberty and protection from arbitrary arrest' (Article 6), the right to 'freedom of association' (Article 10), the right of peoples to 'freely dispose of their wealth and natural resources' (Article 21), as well as the right of peoples to 'their economic development' (Article 22), and all of which are relevant to indigenous peoples. From a procedural standpoint, it has shown innovativeness by unprecedentedly allowing video-testimony, therefore, 'bringing the voices of an oppressed community many miles away to the halls of justice'. However, serious procedural impediments might arise that could affect the procedural integrity of the trial such as the impossibility of cross-examining a witness whose testimony was already recorded. See Ibid., at 531.

[770] L. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Awas Tingni v. Nicaragua', (2007) 24 Arizona Journal of International and Comparative Law 609, at 609, 617.

the context of the degradation caused by oil and gas or mining activities.[771] A quick look at an example from the case law is merited directly below given that the *amici curiae* in *Glamis v. United States* and *Chevron and Texaco v. Ecuador* in fact referred to the practice of regional human rights jurisdictions on the matter.[772]

In the case of *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*, the ACHPR applied the UNDRIP's Article 26 ('recognition of indigenous peoples right to ancestral lands'), and Article 27 ('implementation by states of a fair process to adjudicate rights pertaining to these lands') in order to stress the importance of indigenous peoples participation as 'active stakeholders' in development processes.[773] The ACHPR found that the mining exploitation of red rubies severely affected the community's access to clean drinking water, and that such exploitation should have been preceded by prior and informed good faith-consultations, as well as ensuing compensation.[774] By also relying on the IACtHR's case law, the ACHPR found that with the eviction of the Endorois from the area of Lake Bogoria, and restricting their access to the same, Kenya had violated their right to freely dispose of their wealth and natural resources (Article 21)[775] as well as their right to development (Article 22).[776] This

[771] Indeed, cases at international human rights jurisdictions, including the ACHPR, adjudicating indigenous peoples' rights involved foreign investment activity. Now, this section looks at the inverse; i.e. cases adjudicating foreign investors' rights involving indigenous peoples' rights. See also L. Alvarado, *supra* note 770, at 614; K. Sing'Oei, *supra* note 766, at 532-533.

[772] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955. See Glamis Gold Ltd v. United States, *infra* note 496; and Chevron and Texaco v. Ecuador, *supra* note 141. Indeed, the IACtHR has come up with criteria applicable to the facts of each case allowing it to judge on the exploitation of natural resources in indigenous lands. This has meant that the IACtHR has not simply and plainly chosen to trump indigenous or human rights over trade, investment, or property rights of foreign investors. See *Saramaka People* v. *Suriname*, *supra* note 776. J. Pasqualucci states that 'the right to property under the American Convention is not absolute', see Pasqualucci, *supra* note 46, at 82, 84.

[773] The evidence presented by civil society to the ACHPR includes reports that mining activities caused heavy pollution to the Wasseges River, an important source of fresh water to the Endorois, due to the heavy metals and chemicals used to treat the extracted minerals, which allegedly caused widespread sickness, vomiting, and diarrhea. *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283. See also K. Sing'Oei, *supra* note 766, at 522.

[774] Ibid., at 534.

[775] The ACHPR was of the view that indigenous peoples have the right to natural resources contained within their traditional lands, and therefore the Endorois can claim the protection provided by Article 21. This right is not absolute. States benefit from the exception provided under Article 14, which states that: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. See *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para 267.

[776] In deciding on this issue, the ACHPR referred to the IACtHR's landmark decision in *Saramaka* v. *Suriname*, and applied its three-pronged test on state exploitation of natural resources on indigenous peoples' ancestral lands: 'that the specific natural resource falls outside the traditional and cultural use of the indigenous community; that the exploitation and exploration does not imperil the survival, development and continuation of

decision incidentally makes the ACHPR the first international jurisdiction to decide on the right to development and its violation.[777]

4.4.2 'Extracting the sacred' – Examples of the dilemma of protecting indigenous peoples in the wake of investments in extractive industries

i. Glamis Gold v. United States

Glamis Gold[778] is a NAFTA Chapter XI dispute involving an apparent conflict between mining activities conducted by foreign investors and indigenous cultural rights. It opposed Glamis, a Canadian mining company and a subsidiary of Goldcorp, a major Canadian mining multinational, and the US.

a. The facts

Glamis challenged legislation and regulations adopted by California that required, *inter alia*, financially burdensome backfilling of all open pits and recontouring of the land following the cessation of mining activities. It alleged that these measures constituted a violation of the fair and equitable treatment (Article 1105) and amounted to expropriation (Article 1110). The US argued that these measures were intended to: (a) ensure that mined lands are returned to a usable condition and pose no danger to public health and safety; and (b) provide protection to Native American sacred sites. The Quechan Indian Nation, which is a federally recognized tribe in the US, sought to intervene in the dispute as *amicus curiae*. Friends of the Earth, the National Mining Association, and Sierra Club and Earthworks also made submissions.

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an indigenous groups' way of life; and where the natural resources are not relevant to traditional livelihoods their exploitation within indigenous territories may negatively affect the integrity of and access to other resources that are significant to the cultural life and survival of the community'. See Ibid., at 534 citing *Saramaka People* v. *Suriname*, Judgement of 28 November 2007, Inter-American Court of Human Rights (series C) No. 72 (2007), para 120-126.

[777] The ACHPR found that: 'the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development'. Also, the ACHPR cited Article 22 of the Banjul Charter which provides that: '1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development'. See Ibid., para. 277. See also G. Lynch, *supra* note 910, at 26.

[778] Glamis Gold Ltd v. United States, *infra* note 496.

b. Amicus allegations and arguments

The Nation, Friends of the Earth, the Sierra Club and Earthworks submitted three separate *amicus* briefs. The first, and most relevant here, put forward two main arguments to the effect that (i) the preservation and protection of indigenous rights in ancestral land is an obligation under customary international law which must be observed, by both the NAFTA parties and the arbitral tribunal, in accordance with the principle of good faith; and (ii) NAFTA investors seeking compensation for an alleged expropriation of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.[779] Indeed, the Nation alleged that Glamis had ample notice of the presence of sacred sites in question. It even commissioned its own cultural surveys, which confirmed the sacred character of this land; and thereby, cannot possibly claim that its legitimate expectations were breached as a result of the US measures. Indeed, the Nation asserted that expropriation requires:

> only vested rights, for which a legitimate expectation of the enjoyment of property exists, are capable of expropriation, whether direct or indirect. An expectation to enjoy the profits of a mining development that endangers or destroys sacred indigenous land controlled by a State — where that State is obligated under international law to safeguard that land for the benefit of the indigenous peoples — is not per se "reasonable" under international law.[780]

It thus contended that Glamis could not possibly claim a legitimate expectation that would allow it to, *grosso modo*, destroy or damage those sites, deny the Nation access to them, or prohibit the Nation from engaging in its longstanding cultural, spiritual or religious practices related to those sites.

The Nation then argued that customary international law norms with respect to indigenous rights should be held as relevant in the interpretation of NAFTA pursuant to Article 38(1) of the ICJ Statute.[781] Although acknowledging that a great deal of those norms concerning the protection of indigenous peoples and their cultural rights are set forth under non-binding declarations, e.g. the UNDRIP, the Nation argued that they may nonetheless constitute international practice that contributes to the generation of custom which is expressive of international law principles.[782] Indeed, in asserting the need to

[779] Glamis Gold Ltd v. United States, *Submission of the Quechan Indian Nation of 16 October 2006*.
[780] Ibid., at 10.
[781] See Article 38 of the ICJ Statute, *supra* note 94.
[782] Ibid., at 2.

protect indigenous sacred sites, cultural, and land rights, the Nation namely cited the UNDRIP as well as various international instruments such as – *inter alia* – the UN Universal Declaration of Human Rights, ICCPR, ILO Convention concerning Indigenous and Tribal Peoples and UNESCO Convention.[783] The Nation also referred to the World Bank and the International Finance Corporation's various policies and standards to that effect. In addition, it referred to the IACtHR's practice on the matter.[784] The Nation posited that NAFTA tribunals are required to settle NAFTA Chapter XI provisions in accordance with NAFTA rules and applicable rules of international law.[785] Therefore, in their interpretation of NAFTA provisions on the fair and equitable treatment (Article 1105) and expropriation (Article 1110), NAFTA tribunals should give careful consideration to other international norms. This would avoid requiring certain host state conduct that could conflict with international norms on the protection of indigenous peoples in general, and the Quechan Tribe in particular.

c. The tribunal's response

The tribunal did not revisit the *amici*'s arguments. It did note, however, that the Nation had repeatedly raised concerns regarding the potential adverse effects of gold mining on the tribe itself, its cultural resources and beliefs (including the network of sacred trails running through the project area), wildlife habitats, groundwater and air quality.[786] Having said that, the tribunal found that California's various acts and measures affecting Glamis were not egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. It asserted that a violation of NAFTA Article 1105 on the fair and equitable treatment requires the establishment of host state acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination.[787] As to the expropriation claim under Article 1110, the tribunal undertook an extensive valuation analysis in order to assess the impact of the backfilling measures on Glamis' project and found that a post-

[783] Articles 18 and 27 of the ICCPR, *supra* note 93; Article 11, 25 and 26 of the UNDRIP, *supra* note 762; Article 5(d) of the UNESCO Convention, *supra* note 624; and Article 5 of the ILO Convention concerning Indigenous and Tribal Peoples, *supra* note 766.
[784] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *infra* note 955.
[785] Article 1131(1) of NAFTA, *supra* note 170.
[786] Glamis Gold Ltd v. United States, *infra* note 496, at 48.
[787] Ibid., at 353.

backfilling valuation exceeded $20 million. It found that Glamis could not claim that those measures had a sufficiently adverse impact on its investments that would amount to expropriation and require compensation.[788] In sum, the tribunal dismissed the entirety of Glamis' claims.

ii. Piero Foresti et al. v. South Africa

The *Piero Foresti*[789] case involved a claim for expropriation by a number of Italian foreign investors and a Luxembourg-incorporated entity against the Republic of South Africa.[790] Both the Italy-South Africa and Belgium Luxembourg Economic Union (BLEU) South Africa BITs governed the dispute. The case was eventually discontinued, however, it remains nonetheless important in reflecting some of the key issues discussed in this research.

a. The facts

The claimants[791] alleged that the effects of the 'affirmative action measures' contained in the South African Mineral and Petroleum Resources Development Act (MPRAD) and the Broad-Based Black Economic Empowerment (BEE) objectives of the Mining Charter ultimately led to the expropriation of their existing mineral rights and their replacement with less valuable rights.[792]

b. Amicus allegations and arguments

[788] Ibid., at 230.
[789] It is worthy to note nonetheless that the parties agreed that the dispute be governed by the ICSID Additional Facility Rules as South Africa is not a party to the ICSID Convention, the ICSID Arbitration Rules were therefore not applicable. See Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1), *Award of 04 August 2010*.
[790] The claim was therefore filed pursuant to both the Italy-South Africa BIT and the Belgo-Luxembourg Economic Union-South Africa BIT. The claimants alleged expropriation by the Republic of South Africa through the Mineral and Petroleum Resources Development Act 28 of 2002 on 1 May 2004, which extinguished certain putative old order mineral rights allegedly held by the claimants; and secondly, by the coming into effect of the MPRDA, when combined with the Mining Charter dated 13 August 2004, which introduced compulsory equity divestiture requirements with respect to the claimants' shares in their operating companies. See Ibid., at para 53.
[791] Although not representing a major multinational mining company, the claimants are a group of individual foreign investors who were believed to control – at the time of the dispute – around 80% of South Africa's stone exports. See M. Wells-Sheffer, *supra* note 206, at 498.
[792] J. Brickhill and M. Du Plessis, *supra* note 427, at 156.

Four civil society organizations sought to intervene as *amici curiae*, including two organizations based in South Africa – the Legal Resources Centre and the Centre for Applied Legal Studies.[793]

By highlighting the permissibility of 'special measures' under international human rights law, the *amicus* petition aimed to emphasize the public importance of the MPRDA, the validity of which was being challenged by the claimants, for the following over-arching reasons:

> human rights advancement, and in particular the pursuit of substantive equality; sustainable development; environmental protection; sound and prudent stewardship of the nation's natural resources; and the need proactively to redress the apartheid history of exploitative labour practices, forced land deprivations, and discriminatory ownership policies which previously characterised South Africa's mining sector for decades.[794]

More specifically, the *amici* alleged that the government operates under constitutional obligations to bring about the realization of substantive equality in South Africa, including through the enactment of the MPRDA.[795] They further noted that such 'special measures' solely aimed at securing adequate advancement of certain racial or ethnic groups or individuals, i.e. without discrimination, was recognized by international treaties such as the Convention on the Elimination of all Forms of Racial Discrimination – to which South Africa is a contracting party.[796] In the same vein, the *amici* also cited references to the ICCPR, the ICESCR, the CEDAW, and the Banjul Charter with respect to states' duties in undertaking affirmative action measures. [797]

The *amici* posited that human rights law is relevant in determining whether South Africa breached its fair and equitable treatment obligation and the expropriation claims

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[793] The remaining two are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.
[794] J. Brickhill and M. Du Plessis, *supra* note 427, at 157.
[795] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *Petition for Limited Participation as Non-Disputing Parties of 17 July 2009*, at para 4.6.
[796] Article 1.4 of the Convention states that '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, 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'. See UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html (last accessed 06 October 2014).
[797] See Article 1(2) of the ICCPR, *supra* note 93; Article 2 of the ICESCR, *supra* note 672; Article 4 of the CEDAW, *supra* note 675; and Article 14 of the Banjul Charter, *infra* note 845.

made by the foreign investors. A consideration of South Africa's legal obligations under human rights law – both domestic and international – is directly pertinent to the question of whether the regulatory scheme promulgated by the MPRDA may be considered to have been enacted arbitrarily, in bad faith, or in a discriminatory fashion – which are essential in determining BIT violations.[798] Finally, the *amici* called on the tribunal to adopt an 'interconnected approach' to international law aimed at avoiding irreconcilable conflict between the relevant BITs and South Africa's constitutional and human rights obligations.[799]

These arguments were never put to the test as the case was discontinued and an actual *amicus* brief was not submitted. The tribunal's final award essentially covered the issue of costs. The discontinuance of the case is in several ways a source of lament since it could have provided a clear example of the interplay between international human rights law and international investment law.[800]

iii. Chevron and Texaco v. Ecuador

The case of *Chevron and Texaco v. Ecuador* is a highly complex investor-state dispute governed by the US-Ecuador BIT.[801]

a. The facts

Chevron's claims against Ecuador most notably relate to contesting Ecuadorian court decisions in the Lago Agrio litigation, and their enforcement, on nearly $18 billion of damages to be paid by Texaco (acquired by Chevron, both US-based multinationals) to indigenous groups inhabiting the Oriente region in Ecuador, as well as others inhabiting the downstream area in Peru. These damages relate to environmental and personal injuries that allegedly resulted from Texaco's exploitation, through a consortium involving the Ecuadorian oil state company, of the Lago Agrio site from 1964 to 1992.

[798] Ibid., at 4.13.
[799] Ibid., at 4.14-15.
[800] B. Simma, note 196, at 585.
[801] Chevron and Texaco v. Ecuador, *supra* note 141.

The case is also heavily influenced by developments in other related cases in front of US, Argentine, and Brazilian courts in which decisions on enforcement are still pending.[802]

Two civil society organizations, IISD and *Fundación Pachamama*, jointly submitted an *amicus curiae* brief that was dismissed in light of the early stage of the proceedings.[803] Various admissibility, jurisdictional, and interim measure awards have been rendered to date, however, a final award and settlement of the dispute is still pending.[804]

b. Amicus allegations and arguments

The *amici* started by summarizing some of the key orders sought by the claimants, which most notably include a request for the arbitral tribunal to declare that, pursuant to a settlement agreement entered into with Ecuador, the claimants have:

> no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium.[805]

The *amici*'s arguments essentially focused on jurisdictional issues and the justiciability of the claim. They contended that the claimants' were seeking interference on the part of the arbitral tribunal in the Lago Agrio litigation in front of Ecuadorian courts, in which the government of Ecuador was not party to; and to preempt the enforcement of any resulting decisions in other jurisdictions.[806] The *amicus* submission raised important issues with respect to human rights and indigenous rights that were directly linked to Chevron's claim. By referring to the increasing recognition in international law of the need to protect indigenous peoples from the 'disproportionate losses and damages' caused by oil and gas, mining, and other extractive activities, and including some of the landmark IACtHR decisions;[807] the *amici* requested the tribunal to

[802] See Jota v. Texaco, *supra* note 141, at para 156; and Ashanga v. Texaco Inc., *infra* note 1336.
[803] Chevron and Texaco v. Ecuador, *Submission of amici of 05 November 2010*.
[804] The latest award was rendered in 27 September 2013. For further details on the successive awards rendered to date, see the Investment Treaty Arbitration Website Portal, available at: http://www.italaw.com/cases/257 (last accessed 06 October 2014).
[805] Ibid., at para 2.1.
[806] Ibid., at para 2.2-2.3.
[807] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *infra* note 955.

respect indigenous groups' right to access justice in front of Ecuadorian courts, and to uphold Ecuador's duty to fulfill such right by not undermining in the Lago Agrio litigation.[808] The *amici* also cited relevant international instruments on the right to access justice including the Universal Declaration of Human Rights, the ICCPR, and the IACHR.[809] They referred to the ILO Convention concerning Indigenous and Tribal Peoples[810], and particularly to Article 40 of the UNDRIP which provides that:

> indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes…as well as to effective remedies for all infringements of their individual and collective rights.[811]

Ecuador would thus be under a clear obligation – both domestic and international – to afford its indigenous citizens meaningful avenues to secure remedies and relief for violations of their rights. Accordingly, the *amici* plainly argued that if the *Chevron* tribunal accepted jurisdiction, and affords the claimants the remedies sought, it would be effectively removing the rights of indigenous citizens to have their own case heard in Ecuador, i.e. accepting jurisdiction would conflict with Ecuador's domestic and international law obligations with respect to the protection of its indigenous citizens.[812]

c. The tribunal's response

As mentioned, a final award has not been rendered yet where the bulk of substantive human rights issues are likely to be addressed in more detail. Again, the *amici*'s brief was not taken into account by the tribunal in its decision on jurisdiction for a variety of reasons that were previously discussed.[813] The main premise for such dismissal, however, was the fact that the tribunal had been looking into jurisdictional issues – which, as will be shown below, is generally understood to be out of the scope of *amicus curiae* involvement.

[808] Collective rights of indigenous peoples in Ecuador had only been constitutionally recognized in 1998. Ibid., at para 4.8.
[809] Those provisions will be further detailed within the discussion over civil society's access to justice in Part III – Section 2.1.
[810] ILO Convention concerning Indigenous and Tribal Peoples, *supra* note 766.
[811] Article 40 of the UNDRIP, *supra* note 762.
[812] Chevron and Texaco v. Ecuador, *supra* note 803, at 4.13, 5.20.
[813] See Part I – Section 3.1