Human Rights and Bilateral Investment Treaties

Mapping the role of human rights law within investor-state arbitration

By Luke Eric Peterson

Rights & Democracy
International Centre for Human Rights and Democratic Development

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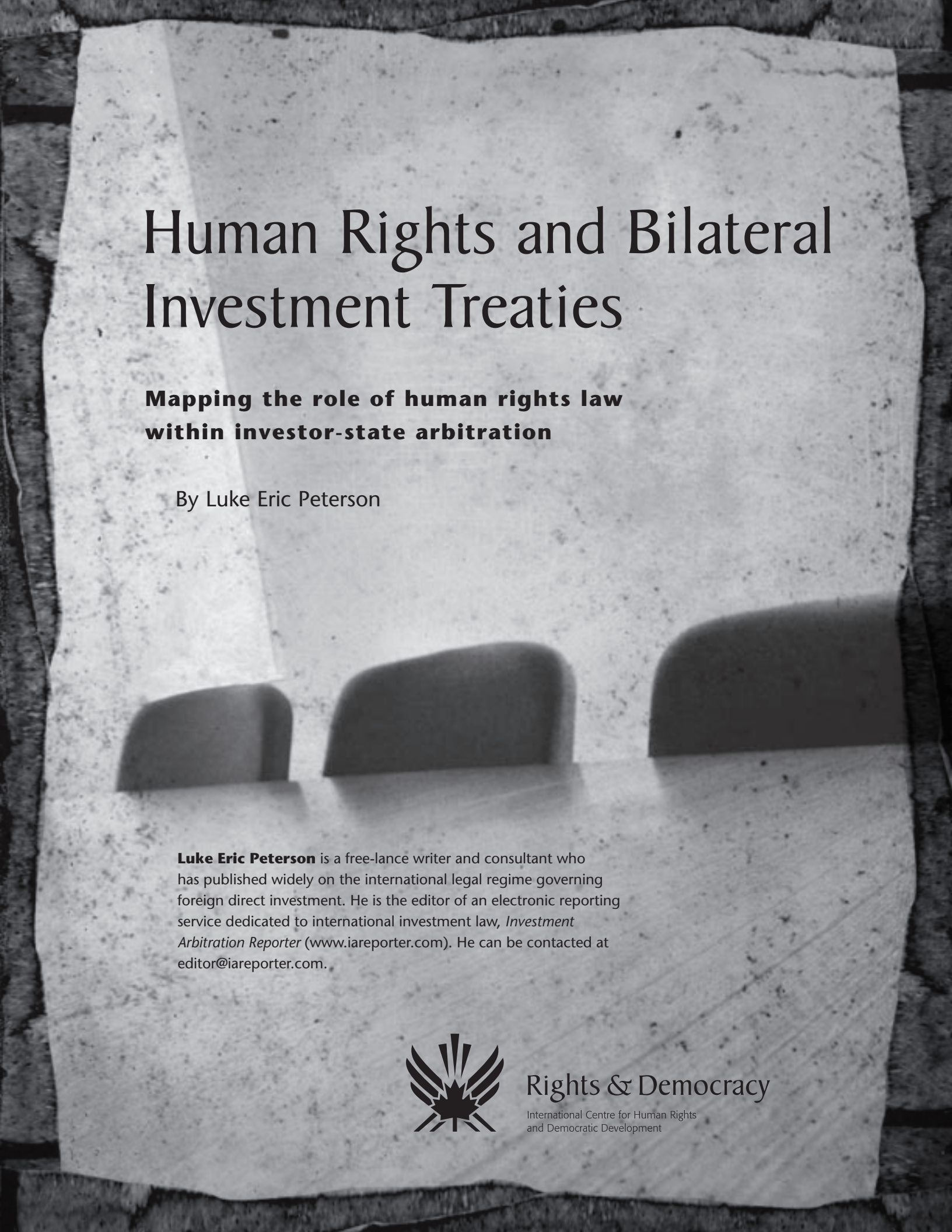

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Acronyms

ACIJ	Asociación Civil por la Igualdad y la Justicia
BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
CAFTA	US-Central America Free Trade Agreement
CELS	Centro de Estudios Legales y Sociales
CIEL	Center for International Environmental Law
FDI	Foreign Direct Investment
FIAN	Foodfirst Information & Action Network
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
HDSA	Historically Disadvantaged South Africans
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
ILO	International Labour Organization
MAI	Multilateral Agreement on Investment
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OECD	Organization for Economic Cooperation and Development
SCC	Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	UN Educational, Scientific and Cultural Organization
WTO	World Trade Organization

Executive Summary

The last half-century has seen the expansion of two distinctive areas of international law: one protecting human rights and the other protecting foreign direct investment. The human rights system may be more familiar—consisting of certain international law principles binding upon all states, as well as a range of regional and UN treaties. However, foreign investment also enjoys a vast network of investment treaties and free trade agreements that have taken on key importance in recent years. The latter regime protects foreign investors (both corporations and individuals) from arbitrary treatment at the hands of host governments, including cases of expropriation or nationalization of investments.

Sometimes these two regimes meet. International arbitration tribunals tasked with assessing the compliance of states with their obligations to foreign investors are occasionally confronted with human rights questions, including the relevance of human rights law to the resolution of disputes between foreign investors and states.

This paper introduces the foreign investment protection regime, so that human rights actors and experts can understand the basic features of the system—and its key legal and policy implications. The paper then profiles a series of lawsuits that have arisen between foreign investors and their host states—where state compliance with investment treaty obligations is at issue, and where human rights issues have also arisen. Human rights considerations are arising in several distinctive ways in these arbitrations. In a number of instances, adjudicators of treaty disputes have invoked human rights law as a guide or an analogy when interpreting the legal protections owed to foreign investors. For example, human rights norms related to due process or property rights are studied by adjudicators in order to help interpret and elucidate the investment treaty protections owed to foreign investors.

Meanwhile, in other contexts, arbitrators are being asked by host-governments or outside interests (e.g. civil society groups) to consider the human rights interests of community members. Where governments are accused of breaching protections owed to foreign investors, they are sometimes seeking to justify such actions on the grounds that a valid human rights obligation compelled the government to act in a given situation. For example, in an international arbitration between the Republic of Argentina and a bloc of foreign water companies, the government has sought to defend alleged investment treaty breaches by invoking the human right to water.

It remains to be seen to what extent governments are genuinely torn by their different international law obligations, or whether these are reconcilable. What is clear is that adjudicators of investment treaty arbitrations are on the front lines, making such determinations. In currently pending international law proceedings between investors and governments, arbitrators are being asked to weigh whether human rights considerations should limit or preclude the liability of states for breaching investment treaty obligations.

Yet, arbitrators have little guidance, apart from general rules of treaty interpretation, when it comes to reading and grappling with the human rights obligations of governments. Investment treaties and free trade agreements offer few instructions as to how such agreements should be reconciled with human rights obligations of the state. Governments could opt, in future, to introduce explicit human rights language into treaties. This would make explicit the requirement of arbitrators to consider the relevance of human rights law to the matters in dispute. However, this leads inevitably to broader questions as to the capacity of arbitrators to handle the human rights law dimensions of such disputes.

At times, investment arbitration tribunals and regional human rights courts may be functionally interchangeable—with prospective claimants able to decide whether to frame government interferences as a potential breach of an investment agreement or of a human rights convention. However, there is a potential for these two different legal regimes to generate different substantive outcomes—with varying policy and financial consequences for governments. Consequently, there is a need for human rights actors and policy-makers to compare and assess how these two parallel regimes may resolves differently certain basic types of disputes, including property expropriations, denial of justice or due process claims, and the claims for moral damages arising out of physical or intangible harms inflicted by governments.

More generally, it will be imperative to monitor more closely developments under the foreign investment regime, in an effort to understand how human rights issues are resolved when they arise.

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- Volume 1: *Human Rights Impacts for Foreign Investment Projects: Learning from community experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina, and Peru*, Rights & Democracy, 2007.
- Volume 2: *Getting it Right: A step by step guide to assess the impact of foreign investments on human rights*, Right & Democracy, 2008.

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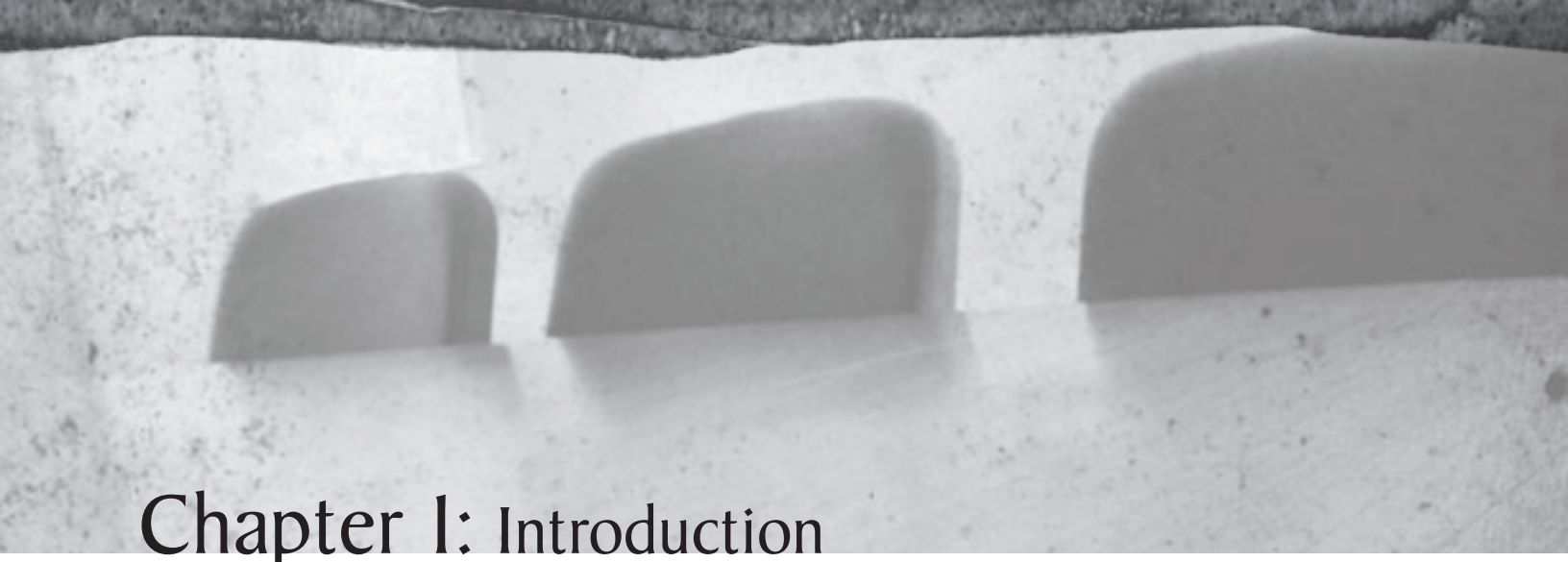

Chapter 1: Introduction

In surveying the disjointed development of two different areas of international law—those which provide protection for foreign investment on one hand, and human rights on the other—one thing becomes abundantly clear: the global village could use a good town planner. For decades, these two areas of international law have evolved largely aloof from one another, even if they share some distant roots in their respective efforts to limit state sovereignty.[1] In recent years, there has been growing speculation that the two regimes may come into occasional friction—or even collision—in certain instances.[2] Governments might pursue policies or measures in furtherance of human rights obligations, only to encounter allegations that such initiatives run afoul of parallel international obligations to protect foreign investors and their activities.

A recent series of human rights impact assessments of foreign investment projects initiated by Rights & Democracy highlighted considerable gaps in knowledge within the human rights community as to the international legal framework governing and protecting foreign investment, and the human rights impacts of that legal framework. The following paper was commissioned in an effort to capture and describe the rapidly-expanding international treaty regime which governs and protects foreign direct investment, and to highlight to what extent human rights issues are indeed arising in the context of legal disputes between foreign investors and their host governments.

As will be seen below, international treaties providing legal protection for foreign investment provide investors with the ability to sue governments in international arbitration in the event that the treaty protections are alleged to have been breached. In a small but growing number of these investor-state arbitrations, human rights law arguments have arisen. Typically, however, human rights law has been referenced by international arbitrators in contexts where human rights related to property or due process provide some insight or assistance into how investment treaty obligations might be construed. In other words, it is those human rights which sometimes protect business or economic actors that have been cross-referenced as interpretative aides in the investment treaty context.

At least to date, arbitrators have not grappled to the same extent with a very different use for human rights law: to highlight a host state's legal obligations to non-parties to the arbitration (e.g. those living within a given host state) and to use those obligations as a lens for interpreting and determining the boundaries of any parallel obligations owed to foreign investors. Nonetheless, arbitrators are

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[1] Dinah Shelton has written of how the law of state responsibility for injury to aliens (foreigners) "can be viewed as a precursor to international human rights law." Indeed, she notes that many of the nineteenth century cases dealing with injuries by states to aliens "concern what today would constitute violations of international human rights law." See Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Second Edition, 2005, par. 59-62; on the so-called fragmentation of international law more generally, see Martti Koskenniemi, "Fragmentation of International Law, Difficulties Arising from the Diversification and Expansion of International Law," Report for the International Law Commission, April 4, 2006, available on-line at: untreaty.un.org/ilc/guide/1_9.htm.

[2] In 2003, Rights & Democracy hosted a "think-tank" discussion which raised the potential for investment treaty disputes to touch upon human rights. Subsequent research has continued to focus on the potential for governments to be pulled between their treaty obligations to foreign investors and their human rights obligations. See for example, Luke Eric Peterson and Kevin R. Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration," International Institute for Sustainable Development, Briefing Paper 2003, www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf ; "Human Rights, Trade and Investment," Report of the UN High Commissioner for Human Rights, 2003, E/CN.4/Sub.2/2003/9; Rémi Bachand and Stéphanie Rousseau, "International Investment and Human Rights: Political and Legal Issues," Rights & Democracy, 2003, available at www.dd-rd.ca/site/_PDF/publications/globalization/bachandRousseauEng.pdf; Lahra Liberti, "Investissements et droits de l'homme," in Philippe Kahn and Thomas Walde, eds, *New Aspects of International Investment Law* (Hague: Hague Academy of International Law, 2007).

starting to encounter scenarios where the human rights of non-parties to arbitrations are being raised by governments or outside interest groups. As later sections of this paper make clear, in some pending international arbitrations between foreign investors and their host countries, investors are accusing their host governments of violating legal protections owed to them, at the same time as governments are countering with references to broader human rights obligations owed to citizens and others living under the government's jurisdiction.

In one arbitration case highlighted in detail below, a review of the legal pleadings of the arbitrating parties—a group of international water companies and the Republic of Argentina—demonstrates that governments are raising detailed and sophisticated human rights law arguments in the context of investment treaty disputes. In lay terms, states are beginning to demand that arbitrators not interpret international economic treaties in a vacuum—and that human rights law obligations are not ignored or marginalized.

While such developments may discomfort those who distrust the capacity of "commercial" adjudicative processes to interpret or review human rights norms, the reality, as made clear in the subsequent pages, is that arbitrators are today confronted with cases that have human rights impacts and externalities. Arbitrators will either ignore or engage with these human rights norms, but there is little prospect that the genie can be stuffed back into the bottle. This may help to explain why some governments and non-governmental organizations have recognized the stakes involved in these investor-state arbitrations and have pushed to ensure that economic treaties are read in light of human rights obligations.

Some of the disputes highlighted in the subsequent pages may provide an important testing-ground for the degree to which international legal protections owed by states to foreign investors will be read by adjudicators in light of, and in harmony with, a government's parallel human rights obligations to its own citizens. Accordingly, human rights actors and advocates should monitor the evolving foreign investment protection regime, so as to understand how tribunals are responding when confronted with human rights arguments arising in the context of legal disputes between foreign investors and their host governments.

"…foreign investment is governed by an unwieldy and highly-decentralized patchwork of bilateral investment treaties (BITs)."

Background to the international investment protection regime

The protection of foreigners, or aliens, is a long-standing preoccupation of international law. Long before the advent of modern international investment treaties, some minimum standards of protection have been owed by all states as a matter of customary international law—even if the extent of these obligations has been a matter of much controversy and debate. Notably, the international law governing the treatment of aliens encompasses not only business actors, but also ordinary citizens. Thus, many claims lodged against foreign states in the nineteenth century and the early part of the twentieth century for mistreatment of aliens, involved situations where foreign states were accused of having mistreated or abused what might be characterized as the civil rights of foreigners.[3] Examples include cases of unlawful arrest or detention; police brutality; prisoners being held incommunicado; or foreign citizens victimized by mob violence.[4] What's more, treaties negotiated to confirm or supplement these slender customary obligations, sometimes provided not only for economic and property protections, but also civil rights and religious liberties.[5] Indeed, a major negotiating objective of several governments, including the United States (US) and the United Kingdom (UK), with other countries, was to secure religious liberty guarantees—or at least freedom of conscience guarantees—for the protection of aliens.[6]

In the second half of the twentieth century, international claims arising out of the personal injury or death of aliens have tended to be pursued by individual victims via human rights channels as these became available, while claims

[3] See discussion of civil rights-type protections in Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (The Banks Law Publishing Co, 1916) pp. 69-77; for a flavor of claims between the US and Mexico involving civil rights, see A.H. Feller, *The Mexican Claims Commission: A Study in the Law and Procedure of International Tribunals*, 1923-1934, New York , Macmillan Company, 1935, pp. 132-146.

[4] Borchard, pp. 98-99; and Feller, *ibid*.

[5] Thus, for example, Art. XII of the 1851 US-Costa Rica treaty of friendship, commerce, and navigation, includes not only guarantees for "houses, persons and properties," but also guarantees of religious liberty and tolerance.

[6] See the extensive discussion of the UK-Mexico, US-Colombia, and US-Mexico negotiations conducted in the first decades of the nineteenth century in Wilkins B. Winn, "The Efforts of the United States to Secure Religious Liberty in a Commercial Treaty with Mexico, 1825-1831," *The Americas*, vol. 28, no. 3, January 1972, 311-332.

brought by one government against another government for the mistreatment of aliens have tended to arise out of *economic* injuries to foreigners.[7] In a similar vein, the negotiation of wide-ranging treaties protecting the broad range of rights owed to aliens—civil and economic—appears to have fallen out of fashion. Rather, there has been a steady growth over the last half-century in narrowly-tailored agreements for the protection of one category of aliens: foreign investors, and their investments. These binding international treaties protect both corporations and individuals, but in the context of their owning foreign investments—not in a more generalized sense of protecting the health and well-being of such actors from all forms of interference.[8] It is these investment treaties, and their application and uses, that are the primary focus of this study.

With the dramatic growth in flows of foreign direct investment (FDI) worldwide, this framework of international investment treaties has quietly grown to govern the billions of dollars devoted to cross-border investment activity. In contrast with the system used to govern world trade—whose locus has long been at the World Trade Organization (WTO), and before that the General Agreement on Tariffs and Trade (GATT). Foreign investment is governed by an unwieldy and highly-decentralized patchwork of bilateral investment treaties (BITs). Indeed, efforts to develop a single multilateral agreement on investment have failed consistently, often in the face of concerted opposition from civil society groups suspicious of the motives underlying such initiatives. Human rights non-governmental organizations (NGOs) were in the vanguard of opposition to the proposed Multilateral Agreement on Investment (MAI) being negotiated by the Organization for Economic Cooperation and Development (OECD), as well as a later initiative by WTO member-governments. At the regional level, human rights NGOs also led opposition to a proposed Free Trade Area of the Americas (FTAA), which might have included an investment chapter modeled after bilateral investment treaties.

At the root of the opposition from human rights NGOs has been a concern that a MAI or a FTAA would extend powerful legal protections to property and assets, perhaps chilling the ability of governments to regulate economic activity for broader objectives such as the promotion and protection of human rights—or obliging states to compensate foreign investors when human rights policies impact negatively upon them.[9]

Notwithstanding such concerns about the multi-lateralization of investment protection rules, governments have negotiated countless *bilateral* (and some regional) treaties on the model of the MAI or FTAA, typically with a fraction of the publicity devoted to the latter. Indeed, the number of such agreements quintupled: from 385 to 1,857 during the 1990s. As of mid-2008, there were more than 2600 bilateral investment treaties with similar BIT-like provisions also written into a growing number of broader free-trade agreements (FTA).[10] The upshot of this trend has been that many of the objectives sought by proponents of a multilateral or regional agreement—including high levels of property protection—have been obtained through other means. While the current patchwork of BITs (and FTAs) is not universal in its coverage, it has proven highly-serviceable – with international law firms advising foreign investors to structure any FDI projects or transactions so that they fall under the protective umbrella of one of these agreements.[11] For example, a US investor might incorporate a Dutch vehicle so that any onward investments are covered by a Dutch treaty with the intended host country.

Broadly speaking, the foreign investors who draw upon this legal framework may be corporate enterprises (private or public), as well as individual businesspeople making investments in another country. However, given the loose drafting of many investment treaties, there is broad scope

"As of mid-2008, there were more than 2600 bilateral investment treaties with similar BIT-like provisions also written into a growing number of broader free-trade agreements (FTA)."

[7] Dinah Shelton, *op.cit.*, pp. 56-57.

[8] Notwithstanding the narrow remit of these investment treaties, there is an argument that certain categories of non-profit activity (for example certain developmental or charity activities which promote economic development in a host country) might enjoy protection under these treaties. See Luke Eric Peterson and Nick Gallus, "International Investment Treaty Protection of Not-for-Profit Organizations," International Center of Not-for-Profit Law Working Paper, May 2008, available on-line at www.icnl.org/knowledge/pubs/BITNPOProtection2.pdf.

[9] See for example, Rick Rowden and Vicki Gass, "Investor Rights or Human Rights? The Impacts of the FTAA," Action Aid USA Briefing Paper, Nov. 2003, on file with author.

[10] UNCTAD, *Recent Developments in International Investment Agreements 2007- June 2008*, IIA Monitor, no. 2, 2008, available on-line at www.unctad.org/en/docs/webdiaeia20081_en.pdf.

[11] See Table 4 below.

under many of these agreements for companies or individuals to wield such treaty protections against their *own* government simply by structuring their business activities so that they are owned by foreign entities eligible for protection under an international treaty.[12]

Thus, given that cross-border investment flows increasingly travel under the protective passport of one or another of these international agreements, it is important to understand the protections offered by such instruments and, later, to examine the impact of such agreements upon human rights.

Provisions of bilateral investment treaties

Bilateral investment treaties trace their origins to the late 1950s, and were developed in an effort to supplement the slender protections afforded by customary international law to aliens. While there were some minimal protections guaranteed to foreign investors who might find themselves suffering abuse at the hands of a host country, there was also continuing disagreement as to more specific forms of treatment that should be extended by host governments. For example, at the United Nations, governments from developed and developing countries clashed sharply over whether governments could nationalize foreign investment in the natural resources sector without paying *full* compensation to foreign investors.[13]

Against such a backdrop, bilateral investment treaties were hoped to provide (in theory) greater certainty and clarity as to the legal rules which would apply, at least with respect to the investments flowing between a given set of countries. However, the terms of the treaties still require interpretation and adjudication to determine their concrete application, with most of these treaties permitting investors to file arbitration lawsuits in case of alleged breach by a host government. Germany concluded the first modern bilateral investment treaty in 1959 with Pakistan, and other European capital-exporting governments would inaugurate their own BIT programs in subsequent years. (Apart from the treaties which are the focus of this paper, an investor or its local representative may also sign contracts, concessions or host-country agreements with the local authorities.)[14]

It must be stressed that the vast majority of BITs do not force countries to open their economies to foreign investors. Although some countries demand market access as part of their investment treaties, most existing BITs do not oblige governments to privatize sensitive economic sectors (for example: airlines; banking; insurance) or to open those sectors to foreign ownership. Rather, the treaties extend protection to those foreign investments which are made in conformity with existing rules on foreign ownership in the local economy. Thus, if a state permits a foreigner to acquire a local business or establish a new green-field investment, those investments might be covered by an international treaty which obliges governments to live up to higher standards of protection than are available under local law.[15]

These investment treaties are generally single-purpose instruments protecting foreign investors and their assets, rather than imposing duties or legal responsibilities on foreign investors. While BITs will differ from case to case, over time, they typically provide for the repatriation of profits and other investment-related funds; protection from being treated less favourably than local investors and/or investors from third-countries (national treatment and most-favored nation treatment respectively); certain absolute standards of protection (eg. "fair and equitable treatment" or "full protection and security"); as well as a promise of compensation in case of nationalization or expropriation. Table 1 (opposite) sets out some of the key protections.

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[12] See the majority and dissenting opinions in *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction and Dissenting Opinion of April 29, 2004.

[13] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press), 2004, pp. 22-23.

[14] These agreements may set forth specific rights and responsibilities of the two parties, and provide for some mode of dispute settlement (for e.g. the local courts or some form of arbitration). While these contracts or agreements may provide an additional layer of legal protection for FDI projects, such instruments will differ widely from project to project and are beyond the scope of this paper. Recently, one aspect of such contractual arrangements has been examined in a study prepared for Prof. John Ruggie, the UN Special Representative on Business and Human Rights. (Andrea Shemberg, "Stabilization clauses and human rights," March 11, 2008). This study examined a series of investor-state contracts, and found that a number of stabilization clauses used for investments outside of the OECD contained stringent wording which might allow a foreign investor to "avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human rights goals." (par. 146).

[15] Recent treaties pursued by the US, Canada, Japan, Singapore and several other countries do encompass so-called pre-establishment commitments, which may place foreigners on the same footing as locals when it comes to being able to establish new investments or acquire existing ones.

Table I: Key protections contained in BITs

Fair & Equitable Treatment
Arbitrators must interpret what constitutes "unfair" or "inequitable" treatment in light of the facts of a dispute. Tribunals have differed as to what this entails in practice. Examples of "unfair" or "inequitable" treatment in the eyes of certain arbitrators have included the denial of justice by local courts, or where administrative authorities have acted in bad faith or subjected investors to harassment or discrimination. Often, arbitrators interpret this obligation to protect an investor's "legitimate expectations" although there is no consensus as to what this concept encompasses.

Full Protection & Security
Host governments must ensure basic police protection of foreign-owned property.

National Treatment
National treatment ensures that foreign investors and their investments are treated comparably to the local investors (or investments) of the host state.

Most Favored Nation (MFN) Treatment
MFN treatment ensures that foreign investors and their investments are treated comparably to foreign investors (or investments) from third states.

Restrictions on Expropriation and Indirect Expropriation
Treaties generally protect against direct or indirect expropriation, by obliging the host state to pay full compensation for any investment subjected to such treatment.

Free Transfer of Funds
Foreign investors are guaranteed the right to repatriate investment-related funds (profits, interest, fees, and other earnings).

Fair and equitable treatment

Perhaps the most important protection provided in investment treaties is that which offers "fair and equitable treatment." The meaning of this obligation continues to evolve, and there are disagreements as to whether the standard is uniform across countries regardless of their level of development.[16] At a minimum the standard is designed to protect against "denials of justice," however states may also run afoul of its terms where they treat foreign investors in bad faith, or with an absence of due process. In some cases, arbitrators have taken the view that the protection safeguards the "legitimate expectations" of investors—for example, where certain promises or representations were made by government officials or agencies and then subsequently reneged upon. For example, a state might fail to issue permits which were promised to a foreign investor or neglect to follow through with the sale of (previously offered) shares in a state-owned company. However, there is no consensus as to what, exactly, investors should expect from their host countries—whether it be a stable business environment, transparency in dealings with state officials, or certain standards of administrative efficiency and due process.

In one arbitration ruling, which has proven particularly contentious, a tribunal took the sweeping view that "fair and equitable treatment" includes an obligation "for the host state to act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the

[16] Nick Gallus, "The influence of the host state's level of development on international investment treaty standards of protection," 6(5) *Journal of World Investment and Trade* 711 (October, 2005).

"While investment treaties impose certain limits on how governments may treat foreign investors or foreign-owned businesses, they place few countervailing limits or obligations on investors."

relevant policies and administrative practices or directives, to be able to plan its investments and comply with such regulations."[17]

Some observers have noted that such a daunting set of duties would bedevil even the government apparatus of the most advanced economies, much less poorer less-developed nations. Lawyers for the Government of Chile famously characterized the above-interpretation, which was quoted approvingly in some subsequent cases, as an "extreme" program of good governance imposed upon governments.[18] Failure to meet this heightened reading of the fair and equitable treatment standard might trigger an obligation to pay compensation to investors denied such protection.

Expropriation

Another key investment treaty provision is that relating to expropriation. A concern which has emerged in relation to the North American Free Trade Agreement (NAFTA)—which contains provisions similar to those contained in investment treaties—is how to define the concept of "indirect" expropriation. Uncertainty has long swirled in relation to drawing a clear line between those regulatory measures which have some impact upon the profitability of an investment, and those which amount to an "indirect" expropriation of an investment (i.e. a taking or deprivation carried out through indirect or regulatory means.) Continuing uncertainty has prompted some governments to introduce new language into its future investment treaties so as to provide greater clarity that legitimate public interest regulatory measures will rarely be characterized as indirect expropriation under an investment treaty. In the Canadian context, the 2004 model investment treaty declares that:

> Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[19]

Most treaties do not contain such language however, thereby leaving greater discretion to arbitrators to draw the line between legitimate regulations (which will not constitute an expropriation) and those actions or measures which amount to an expropriation of an investment.

Limited investor responsibilities

While investment treaties impose certain limits on how governments may treat foreign investors or foreign-owned businesses, they place few countervailing limits or obligations on investors. A 2001 UN review of investment treaties found few examples of obligations imposed on investors or their home countries.[20] In the intervening period, there have been comparatively few moves to draft treaties with greater investor obligations. Nevertheless, analysts have argued that certain baseline investor responsibilities are implicit in standard investment protection treaties. Professor Peter Muchlinski has argued that the "fair and equitable treatment" protection offered by host governments to foreign investors can be read so as to impose certain duties on those same investors, including the duty to refrain from unconscionable conduct.[21] In other words, an investor could not claim to have suffered unfair or inequitable treatment at the hands of a host-government if they themselves had engaged in "unconscionable" activities—for example misrepresenting to government officials their own activities or business experience.[22] This argument has been borne out in several subsequent arbitration rulings, where tribunals convened to hear investment treaty disputes have ruled that fraudulent misrepresentations and

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[17] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case no. ARB(AF)/00/2), Award of May 29, 2003.

[18] *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case no. ARB/01/7, Decision on Annulment, February 16, 2007, par. 66.

[19] See the draft treaty text at www.international.gc.ca.

[20] "Social Responsibility," UNCTAD Series on Issues in International Investment Agreements, 2001, p. 17.

[21] Peter Muchlinski, "Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard," 55 *International and Comparative Law Quarterly*, July 2006, pp. 567-598.

[22] See discussion of *Azinian v. Mexico* case in Muchlinski, pp. 576-77.

certain other forms of investor malfeasance may undermine any investor claims against host governments.[23]

Although most BITs do not contain *explicit* investor responsibilities, there have been various proposals which would introduce such obligations into treaty texts, including the conditioning of legal protections for investors upon various duties including to comply with International Labour Organization (ILO) and the OECD instruments on corporate responsibility and to operate investments so that they do not circumvent international labour and human rights conventions.[24] A draft model investment treaty released for discussion in 2008 by the Government of Norway, makes some efforts to introduce modest investor responsibilities.[25] In particular, the preamble to the Norwegian agreement—which will be relevant whenever arbitrators are called upon by investors to interpret the treaty provisions—makes reference to several objectives including corporate social responsibility, anti-corruption, and the principles of "transparency, accountability and legitimacy" for all participants in the foreign investment process. Furthermore, the draft agreement "encourages" investor compliance with the OECD Guidelines for Multinational Enterprises and the UN Global Compact; however, it does not go so far as to mandate concrete investor obligations. Apart from this, there have been academic proposals which would introduce clauses into investment treaties so as to give citizens the right to bring "counter-claims" against foreign investors for certain human rights violations.[26] However, such proposals have not moved from the drawing board into actual treaties. Indeed, in his 2008 report to the UN Human Rights Council, the UN Special Representative on Business and Human Rights, John Ruggie, lamented that the legal rights of transnational corporations have expanded greatly—including through bilateral investment treaties—while the legal framework regulating those same corporations has not expanded in a similar fashion.[27]

In the absence of a single more-balanced global agreement on investment, there are limits to incremental and piecemeal reforms to bilateral investment treaties. For example, if the Norwegian Government negotiates more balanced bilateral treaties with foreign partners, it remains to be seen whether Norwegian investors will elect to make use of such agreements or whether they will instead structure their foreign direct investment (FDI) activities so as to make use of agreements concluded by *other* governments with the intended host-country. Indeed, many bilateral investment treaties define "investor" loosely so as to encompass any corporate entities incorporated pursuant to the putative home country's laws. Thus, for example, investors from a range of countries may—and do—elect to incorporate in the Netherlands, so as to take advantage of that country's BITs with a broad range of developing countries. Indeed, given the patchwork of protection available and the gaps in coverage in the current system, it is perfectly rational for investors to "shop" for treaty protection if their own home country does not have a treaty with a desired host-country. This phenomenon of treaty-shopping could detract from sporadic government efforts to reform or re-balance investment treaties.

"In other words, where an investor believes itself to have been denied "fair and equitable treatment" or some other treaty protection, the investor can sue the host government before an international arbitration tribunal in an effort to collect financial compensation for such treaty breaches."

Dispute settlement provisions of bilateral investment treaties

The investor protections found in BITs are typically made effective by a powerful international dispute settlement mechanism which permits investors to initiate arbitration claims against their host state in cases of alleged breach of the treaty protections. Typically, the investor will nominate an arbitrator, the state will do likewise, and a third member of the tribunal will be selected by consensus or by some supervising body. Investors may take issue with the full

[23] *Inceysa Vallissoletana v. El Salvador*, Award of August 2, 2006; and *Plama Consortium Limited v. Republic of Bulgaria*, Award of August 27, 2008.

[24] For more on IISD's Draft Model Investment Agreement, which was co-drafted by the author of the present briefing paper see www.iisd.org/investment/model_agreement.asp.

[25] For more information see www.regjeringen.no/en/dep/nhd/documents/Consultations/Horingsdokumenter.

[26] See for example, Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order," 27 *Boston College International and Comparative Law Review* 429, (2004).

[27] Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, April 7, 2008, at par. 12.

range of government measures, including new taxes, administrative decisions, laws, or other forms of state action. Perhaps most important, investors can claim cash damages arising out of treaty breaches.

Although BITs are state-to-state treaties, they pave the way for investor-to-state claims. Thanks to the arbitration mechanism contained in BITs, investors can enforce the treaty terms without relying on their home governments to espouse their claims for them (as is required in the WTO system or under the traditional forms of diplomatic protection used to protect aliens and overseas assets). In other words, where an investor believes itself to have been denied "fair and equitable treatment" or some other treaty protection, the investor can sue the host government before an international arbitration tribunal in an effort to collect financial compensation for such treaty breaches.

There is no single international court or body which hears such claims; rather they are handled on a case-by-case basis according to a handful of different procedural rules. Most investment treaties make available more than one set of arbitration rules, meaning that the investor can actively choose the arbitration rules. This decision can have important consequences as the procedural rules differ, including in relation to the level of confidentiality surrounding the process. Several of the most common arbitration options are described in Table 2 (below).

Table 2: Various arbitration options available in BITs

International Centre for Settlement of Investment Disputes (ICSID)
The World Bank's ICSID is the only purpose-built facility created for settling FDI disputes between investors and governments. For decades, the Centre handled only a trickle of *contract* disputes. However, in the 1990s, ICSID's caseload exploded as investors began to invoke the arbitration-offers contained in BITs. Of the various arbitration options available for resolving BITs disputes, the ICSID is unique in that it publishes a full list of arbitrations taking place under the Centre's auspices. However, hearings are in-camera unless both parties wish otherwise.

United Nations Commission on International Trade Law (UNCITRAL)
Unlike the ICSID, the UNCITRAL does not administer or supervise arbitrations; rather the UNCITRAL has drafted procedural rules which can be used by parties wishing to arbitrate their disputes in an "ad-hoc" fashion. Because UNCITRAL arbitrations do not take place under a single roof it is extremely difficult to know the number of such arbitrations actually underway. Nevertheless, the rules are widely offered in BITs, and surveys suggest that a substantial number of investment treaty arbitrations take place under this less visible channel.

Stockholm Chamber of Commerce (SCC)
While less commonly offered in investment treaties, the SCC rules are found in a minority of BITs, particularly where one or both parties hails from Eastern Europe or the former USSR, as well as the Energy Charter Treaty a powerful multilateral agreement governing trade and investment in the energy sector. The SCC handles a modest number of investment treaty arbitrations – up to several in a given year - as revealed through statistics it publishes. Little information is available about arbitrations taking place under SCC rules unless the disputants desire otherwise.

International Chamber of Commerce (ICC)
The Paris-based ICC's International Court of Arbitration is a popular venue for resolving private commercial disputes. The ICC also handles a tiny number of investment treaty cases, about which very little is known. The major bottleneck which limits the number of treaty cases arbitrated at the ICC is the fact that most BITs do not offer ICC arbitration as an option.

Several features of the BIT arbitration process are important to note. First, the process lags significantly in terms of transparency. There are no uniform requirements for arbitration claims to be publicly disclosed. While arbitrations at the World Bank's ICSID are all disclosed on a public register, those taking place under other procedural rules are not subject to the same level of openness.[28] Furthermore, when it comes to the actual unfolding of the arbitration process, some procedural rules impose formidable barriers even if an individual party (either the investor or the government) would like to disclose information about the proceeding. For example, under the often-used UNCITRAL rules, the default for arbitration proceedings is clearly one of confidentiality. The legal pleadings and the oral hearings are typically not a matter of public record.

Oddly, there is no way to know how many claims are filed worldwide against governments, much less the details of such claims and their legal, policy and financial implications. In a few cases discussed here, this information has come to light as a result of research and investigation conducted for this paper. Sometimes parties pro-actively disclose information about their cases; at other times journalists or non-government organizations investigate lawsuits and bring new information to light.[29]

Another notable feature of the arbitration process is the extent to which the parties may choose who will hear the dispute. There is no permanent standing court which hears such cases. Rather they are submitted to purpose-built arbitration tribunals. The ability of individuals to serve as advocates and argue on behalf of investors and governments, as well as arbitrators who will sit in other cases and interpret the meaning of treaties, has generated considerable scrutiny and debate.[30] There have been calls for a permanent court whose members would be full-time and independent judges hearing investment treaty disputes.[31] However, such proposals have yet to lead to any significant alteration in the current case-by-case arbitration model.

It should be stressed that investment treaties have spawned a large volume of *international* law disputes. Investors can often avoid taking disputes to the *national* courts of the host state. Rather, they may initiate an international claim after observing the (typically minimal) waiting periods prescribed in the given investment treaty. Clearly, this stands in contrast with the international human rights system, where access to UN human rights bodies and regional human rights courts requires the exhaustion of domestic remedies as a means of respecting state sovereignty and the principle of subsidiarity (i.e. that conflicts should be resolved at a local level to the extent possible).

"There has been a groundswell of these BIT arbitrations in recent years, with dozens known to be filed in a given year. A further unknown number of cases are thought to be initiated without any disclosure."

As will be profiled in the remainder of this paper, there is clear evidence of human rights issues being raised before investment treaty tribunals. This trend leads to obvious questions as to the capacity of adjudicators to engage satisfactorily with the human rights dimensions of such disputes. Nevertheless, the reality is that human rights are—and will continue to be—raised in investment treaty arbitrations. As such, it is important to understand how these processes operate, including in comparison to human rights adjudication mechanisms. Table 3 (following page) offers a comparison of several of the major features of investment protection and human rights resolution processes, specifically two of the most commonly-used regional human rights courts.

The next section profiles the use of investment treaties by foreign investors to arbitrate against their host governments over alleged treaty breaches. Subsequent sections explore how issues of human rights law are arising in these investor-state arbitrations—and how arbitrators are engaging with the human rights obligations of states.

Uses of BITs in investor lawsuits with host-governments

BITs have become a major feature of the foreign investment regulatory landscape, with many governments facing lawsuits from foreign investors and needing to reconcile their conduct with these international treaty obligations. As was noted earlier, in cases where an investment treaty has not

[28] www.worldbank.org/icsid.

[29] One tool for following developments in the field is the *Investment Arbitration Reporter*, an electronic reporting service published by the author of this briefing paper. (www.iareporter.com).

[30] Michael Goldhaber, "*Are Two Hats Too Many?*," *The American Lawyer Magazine*, vol. 27, no. 6, Focus Europe edition, Summer 2005.

[31] Gus Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, 2007.

Table 3: Comparing key features of regional human rights courts and investment treaty arbitration

Key questions	**Regional Human Rights Courts (European Court of Human Rights or Inter-American Court of Human Rights)**	**Investment Treaty Arbitration**
What is the process by which individuals can bring claims for treaty violation?	Requires exhaustion of domestic legal remedies.	Rarely any exhaustion requirement; there may be a short waiting period prescribed by treaty (e.g. 3-6 months) before claimants can invoke international arbitration, but this is often waived by arbitrators.
Who adjudicates?	Full-time judges who sit for a set period of time.	Arbitrators appointed to hear a single case; often drawn from ranks of law firms, academia, or retired judiciary.
Must claims be publicly disclosed?	Yes.	No. While ICSID claims are disclosed; those proceeding under other rules need not be.
Are hearings open to the public?	Yes, unless specific circumstances call for privacy.	No. Only in rare cases will proceedings be opened (i.e. where both parties desire openness).

been concluded between a would-be investor's home country and the intended host country, it is increasingly commonplace for investors to structure their investments so that they flow through at least one country which has a protective treaty with the intended host state. Thus, even where a treaty is not in place between an investor's home country and its intended destination-country, a foreign investment transaction may still be protected by some treaty. With more than 2600 BITs in existence, it is not always easy to determine which international treaties pertain to a given FDI project. Table 4 (following page) provides some guidance for observers seeking to understand which investment treaties may apply to a given FDI project. However, only investors will know how they have structured their investments and with what treaty implications.

Given that foreign investors increasingly structure their investments so as to be governed by one or more treaties, it may come as no surprise that lawsuits under these treaties are burgeoning. Typically, claims are brought against governments by corporations alleging that their investments have been treated contrary to treaty commitments. However, in a small number of cases, individual businesspersons—rather than corporations—bring claims against governments. While these may involve strictly economic disputes, on occasion they may evoke the more traditional international claims for mistreatment of aliens involving allegations of false imprisonment, harassment, physical abuse, or even torture. For example, a Dutch businessperson, Mr. Trinh Vinh Binh brought a claim against the Vietnamese government pursuant to the Netherlands-Vietnam investment treaty in 2005. Apart from a standard allegation of confiscation of certain business assets, Mr. Trinh also alleged that he had been subjected to illegal pre-trial detention, torture and physical abuse at the hands of

Table 4: Understanding which treaties may apply to a particular investment project

1. The home country of the foreign investor may have a BIT with the host country. If there are multiple foreign investors involved in a given project, there may be multiple treaties which apply to a given project.
2. Investors can incorporate subsidiaries or holding companies off-shore, which may entitle them to protections contained in treaties that have been signed between such third countries and the host country. Most famously, the US construction conglomerate Bechtel launched an investment treaty arbitration against Bolivia—despite the absence of a US-Bolivia investment treaty—because Bechtel routed its investments into a Bolivian water services concession via the Netherlands. Thanks to this corporate structure, the investments qualified as "Dutch" under the Netherlands-Bolivia BIT. Accordingly, it is critical for host countries and other observers to determine what intermediary companies may have been used in FDI transactions, so as to understand what treaties might be applicable to a given investment.
3. Even when an investor's home country has a BIT with a host country, an investor may elect to use the treaty of some other "home" country by structuring its investments in a creative fashion. For example, the Montreal-based Aeroport Development Corporation invoked the Cyprus-Hungary BIT in a dispute with Hungary over the construction and operation of a terminal at Budapest airport. Although Canada had a BIT with Hungary, the investors had invested via Cypriot subsidiaries thus entitling them to invoke the Cyprus-Hungary treaty if any of its provisions were deemed more generous than those of the Canada-Hungary treaty.
4. Investors may invoke the MFN clause in a given BIT in an effort to obtain more favorable rights or protections contained in other treaties. For example, a UK-incorporated investor (RosInvest Co UK Ltd) successfully invoked such a clause in a recent arbitration with Russia under the UK-Russia treaty, thus enabling the investor to benefit from more generous arbitration rights contained in the Denmark-Russia treaty. However, not all arbitration tribunals have endorsed such an investor-friendly interpretation of the MFN clause, leading to continuing uncertainty on this point. At a minimum, governments should be aware that investors may try to invoke the MFN provisions of a given BIT in an effort to "bring in" the provisions of other investment treaties.

The United Nations maintains lists of BITs entered into by each country, as well as copies of the texts of many such agreements.* However, with dozens of treaties under negotiation at any given moment, the international trade or foreign affairs ministries of specific governments should be able to provide the most up-to-date information about the recent treaties of a given country.

* See www.unctad.org/iia and consult the "IIA databases" for more details.

Vietnamese authorities.[32] This type of claim, while clearly an outlier in the investment treaty context, looks similar to human rights claims in some respects even though asserted under an economic treaty.

Nevertheless, in the modern era, it is unusual for investment treaties to be wielded so as to protect what might be characterized as the civil rights or physical well-being of individual aliens. The overwhelming proportion of known investment treaty claims are brought by corporate actors, alleging that certain government measures (laws, regulations, administrative rulings), or other state actions (or omissions) have led to a breach of one or more treaty obligations

[32] The Binh case proceeded under the UNCITRAL procedural rules, and few details emerged about the case. The arbitration was settled before the arbitrators had an opportunity to rule in the case. Details presented here is based on confidential information obtained by Rights & Democracy.

owed to foreign investments. Often investors will claim that they have suffered a direct or indirect expropriation, for example where government actions are alleged to have seriously diminished or destroyed the value of an investment. At other times, investors may claim that governments have treated them unfairly, arbitrarily, or in a discriminatory fashion. Claims in this latter vein have included ones which allege foreign investors to have been subjected to less favourable regulatory or licensing treatment than other investments; to domestic administrative or judicial processes which lacked due process or transparency; or to have been harmed by a decision on the part of a new government to reverse earlier privatizations or introduce significant new taxes or royalties on existing investments.

As of this writing, pending arbitrations between investors and states touch upon most economic sectors (energy, mining, telecommunications, water & sewage concessions, manufacturing, financial services, media and entertainment, agriculture and food processing), and raise fundamental questions as to the limits imposed by investment treaties on state sovereignty.[33] While the merits of these different cases may vary sharply, they all raise potential liability for governments. The amounts claimed in damages by investors are not indicative of what will be awarded in the event that a state is held liable for a treaty breach; however, the financial damages awarded in successful BIT claims by foreign investors can run into the tens or hundreds of millions of dollars.

There has been a groundswell of these BIT arbitrations in recent years, with dozens known to be filed in a given year. A further unknown number of cases are thought to be initiated without any disclosure. Such disputes may arise out of truly egregious conduct on the part of the state or government officials including those resulting in destruction of investor property or assets. At other times, BIT lawsuits may arise in an effort to block or challenge efforts by governments to regulate foreign investors for seemingly important public purposes, including health, environmental or cultural policy reasons.

Regulatory authority and state sovereignty

Investment treaties have attracted heavy public scrutiny, particularly in North America, when foreign investors have mounted arbitration lawsuits which touch upon sensitive questions of governments' regulatory authority. The BIT-like provisions of the NAFTA earned notoriety in the late 1990s when a series of investor lawsuits targeted sensitive measures such as a California ban on a controversial gasoline additive and a Canadian trade ban on another gasoline additive.[34] More than a decade later, the Government of Canada continues to face BIT-type NAFTA lawsuits which touch on controversial issues such as the environmental impact assessment process for an unpopular quarry site; an effort to phase out the hazardous agro-chemical Lindane; and the proposed use of a mine site for the disposal of non-toxic municipal waste.[35]

Many difficult and thorny questions remain to be resolved when it comes to interpreting and applying investment treaty obligations including: the dividing line where a regulation or state action tips over into a form of "expropriation" for which compensation must be paid to the affected foreign investors; what types of policy differentiation between different business actors will be permissible without breaching the duty to provide National Treatment to foreign investors and investments; and to what extent the absence of certain exception provisions in BITs can be read as an indication that such exceptions are not implicit in the treaty.

Because such a wide range of government actions or policy measures may come under scrutiny in investment treaty disputes, it is not surprising that human rights issues are also starting to arise in this context, as is explored more fully in the next chapter. Before turning to this discussion, the next chapter offers a brief recap of the status of human rights under international law.

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[33] For an indication of the arbitrations (largely treaty-based, but some contract-based) handled by the International Centre for Settlement of Investment Disputes, visit their website at www.worldbank.org/icsid.

[34] Howard Mann and Konrad Von Moltke, "NAFTA's Chapter 11 and the Environment," International Institute for Sustainable Development, Working Paper, 1999.

[35] Luke Eric Peterson, "Drowning in Chapter 11 Lawsuits," *Embassy: Canada's Foreign Policy Newsweekly*, April 16, 2008, available on-line at www.embassymag.ca/page/view/.2008.april.16.peterson.

Chapter 2: Exploring the relationship between human rights and investment treaties

Human rights and international law

Even as an architecture of treaties has been developed to protect foreign investment, a separate series of international treaties have been concluded in response to the mandate set out in the Charter of the United Nations.[36] The Charter empowered the UN to promote "higher standards of living, full employment, and conditions of economic and social progress and development", as well as "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Indeed, the Charter obliges UN member-states to "take joint and separate action" in cooperation with the UN to promote human rights.

As in the realm of foreign investment law, not all legal obligations are treaty-based; some are rooted in customary international law which is premised upon the long-standing practice of states and whose strictures bind all states regardless of their consent. As Robert Howse and Makau Mutua observe:

> The scope and content of the customary international law of human rights, as indeed of all customary law is a work in progress. While there are certain human rights whose status as custom is generally agreed upon, that list is not necessarily complete or closed. But it is clear from existent international law that a "state violates international law if, as a matter of state policy, it practices, encourages or condones" the following conduct: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; detention; systematic racial discrimination such as apartheid; and consistent patterns of gross violations of internationally recognized human rights.[37]

Supplementing these customary obligations are a growing array of human rights treaties, many of which have been negotiated under the auspices of the UN—such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights—while others are strictly regional conventions such as those developed in Europe, America and Africa. This extensive (and growing) catalogue of treaties concluded by governments, overlays the customary obligations described above so as to impose significant and meaningful obligations for governments in the area of human rights.

Given that governments have extensive binding international human rights obligations, as well as the above-described obligations to foreign investors, are there instances where the two sets of obligations interact with one another? The next sections explore this question by looking at the legal disputes known to have arisen between foreign investors and host governments under investment treaties.

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[36] This section draws extensively from an earlier Rights & Democracy publication, Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000: International Centre for Human Rights and Democratic Development), pp. 8-10, available at www.dd-rd.ca/site/_PDF/publications/globalization/wto/protecting_human_rightsWTO.pdf.

[37] Howse and Mutua, p. 9.

Is human rights law being raised in investment treaty lawsuits?

Generally speaking, arbitrators in investment treaty disputes are not empowered to find that human rights obligations have been breached. As tribunals with limited jurisdiction, arbitrators are usually limited to determining whether a particular investment treaty protection has been breached. However, this does not mean that human rights law might not form part of the backdrop against which investment treaty obligations are read and applied. It has long been recognized that the law applicable to investment arbitrations typically encompasses international law (rather than simply the given investment protection treaty), and that this could include other non-economic forms of international law.[38]

Indeed, as far back as the 1980s, an investment arbitration tribunal acknowledged that obligations imposed by *other* international treaties ratified by a host state may be relevant in defending its treatment of a given foreign investor. In the case in question, *SPP v. Egypt*, a panel of ICSID arbitrators took seriously the argument that a host state might be bound by certain obligations flowing from the UN Educational, Scientific and Cultural Organization (UNESCO) Convention concerning the Protection of the World Cultural and Natural Heritage.[39] On the facts of the case, the accession by Egypt to the UNESCO Convention did not excuse its cancellation of an investment contract that had been earlier issued for the construction of a tourist development adjacent to a cultural site. However, arbitrators did view the Convention as having relevance to the dispute. In particular, the arbitrators declined to award *future* lost profits to the investors on the reasoning that they could not be compensated for activities which would be in violation of international law once the UNESCO Convention came into force for Egypt and was applied to the project site in question.[40] More recently, various other cases have been identified wherein non-investment forms of international law (be they environmental or cultural) have been recognized by tribunals as relevant to the resolution of alleged breaches by a state of its investment obligations.[41]

"Turning to the body of disputes which have been submitted to arbitration under investment treaties, it becomes clear that human rights law has in fact, already been raised in a number of instances. However, there appear to be two distinct scenarios."

Under the international rules of treaty interpretation, as spelled out in Article 31.3 (c) of the Vienna Convention on the Law of Treaties, arbitrators may interpret treaty obligations in the light of "relevant rules of international law applicable in the relations between the parties." Even if arbitrators have not tended to rely on this particular Article, it is abundantly clear that they may do so.[42] Of course, arguments will arise as to *what* rules of international law are relevant in a given context. While *jus cogens* norms against slavery or racial discrimination or the human rights obligations contained in the UN Charter will be relatively uncontroversial, views differ as to other international law norms, such as those contained in human rights *treaties*. Nevertheless, a wide path is open for arbitrators to consider human rights and other international law obligations of states in the course of interpreting the obligations contained in investment protection treaties.

Turning to the body of disputes which have been submitted to arbitration under investment treaties, it becomes clear that human rights law has in fact, already been raised in a number of instances. However, there appear to be two distinct scenarios. First, there are instances where human rights obligations owing to business actors (the right to property or due process) are used to help define the investment treaty protections owed to investors. Second, there is an emerging trend whereby human rights obligations owed by the host state to non-parties to the arbitration proceeding (individuals or groups under the state's jurisdiction) are coming into the picture. Recently, governments and sometimes non-governmental organizations, have referred to these human rights obligations in an effort to justify or defend certain government actions or measures that may have had negative impacts on foreign investors.

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[38] See Peterson and Grey, 2003.

[39] *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case no. ARB/84/3, Award of May 20, 1992, 32 I.L.M. 933 (1993), par. 154.

[40] *Ibid*., par. 190-191.

[41] See for example, Howard Mann, "International Investment Agreements, Business and Human Rights: Key issues and opportunities," International Institute for Sustainable Development, 2008, pp. 25-29.

[42] See Moshe Hirsch, "Interactions between investment and non-investment obligations in international investment law," in Schreuer, Christoph, Muchlinski, Peter, Ortino, Federico,eds., *Oxford Handbook of International Investment Law* (Oxford University Press, 2008), pp. 154-181.

Human rights analogies used to define protections owed to investors

While most investment treaties are silent on human rights, this does not mean that human rights issues are irrelevant to disputes that arise between investors and their host governments. Indeed, there are several ways in which human rights may be relevant to investment treaty disputes between governments. A review of known investment treaty arbitrations undertaken as part of this research paper found that human rights have come up in a small number of investment treaty arbitrations, at least on the basis of publicly-available information. These examples are typically the final rulings (or awards) rather than the legal pleadings which are generally not public. Some examples are profiled in this section.

More often, at least to date, these instances where human rights law arises in investment treaty arbitrations are those where such legal obligations are invoked *on behalf of the investor* or used by arbitrators to help elucidate BIT obligations. While this may come as a surprise to some observers, it is the case that corporations and individual business persons may be entitled to certain human rights protections.[43] Whereas individuals may enjoy protections under the whole gamut of regional and international human rights treaties, corporations also enjoy some human rights protections, at least under the European Convention on Human Rights. Indeed, in light of this reality, investors (both corporate and individual businesspersons) sometimes mount human rights claims before the European Court of Human Rights in lieu of, or in addition to, investment treaty claims initiated against a host government.[44]

Thus, perhaps not surprisingly, in several investment treaty arbitrations between foreign investors and their host governments, arbitrators (and/or counsel for investors) have referred to human rights jurisprudence in the course of interpreting and applying the protections *owed to investors* under investment treaties. Typically this has been done without much theoretical explanation for the resort to human rights jurisprudence; rather, as occurred in the *Mondev v. United States* case, the tribunals seem to have held that human rights cases might help to illuminate—by way of analogy—how certain investment treaty provisions might be construed.[45]

In the *Mondev v. United States* case under NAFTA, the tribunal faced a claim by a Canadian real estate developer objecting to its treatment at the hands of US courts. In the course of ruling on Mondev's claim that it had not received "treatment in accordance with international law", the tribunal examined the case-law of the European Court of Human Rights with respect to Article 6(1) which provides among other things a right to a court hearing.[46] In other arbitration cases, including the *Tecmed v. Mexico* case, arbitrators have looked to human rights case-law for assistance in interpreting the BIT obligations owed to investors in relation to expropriations of property.[47] Thus, for example, the jurisprudence of the European Court of Human Rights on the "peaceful enjoyment of possessions" has been referred to by arbitrators seeking to interpret investment treaty protections against expropriation or nationalization. In the *Azurix v. Argentina* case, an ICSID tribunal endorsed the approach taken in the Tecmed v. Mexico case (described above) whereby a judgment of the European Court of Human Rights was deemed to provide "useful guidance" to the interpretation of the expropriation clause of the US-Argentina bilateral investment treaty.[48]

Another instance where arbitrators have referenced human rights jurisprudence in order to buttress interpretation of protections owed to investors occurs in a 2008 ruling in a dispute between a Dutch-incorporated energy company and the Government of Romania.[49] Although Romania had asked the tribunal to decline jurisdiction over the dispute on the grounds that the Dutch company was, in fact, controlled by Romanian nationals, the tribunal declined to do so Rather, the tribunal noted that the terms of the Netherlands-

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[43] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press), 2006.

[44] See for example, the legal tack of investors in the Russian oil company, Yukos, who have pursued investment treaty claims, as well as claims before the European Court of Human Rights. In another instance, in the *Limited Liability Company AMTO v. Ukraine arbitration*, the arbitrators make clear in their final award that the claimants also mounted a case against the Ukraine at the European Court of Human Rights. See the Amto award at ita.law.uvic.ca/documents/AmtoAward.pdf.

[45] *Mondev International Ltd. v. USA*, ICSID Case no. ARB/(AF)/99/2, Award of Oct 11, 2002, par. 144, available on-line at ita.law.uvic.ca/documents/Mondev-Final.pdf.

[46] *Mondev* Award, par. 141-144.

[47] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case no. ARB(AF)/00/2), Award of May 29, 2003, at par. 116-122, available on-line at ita.law.uvic.ca/documents/Tecnicas_001.pdf.

[48] *Azurix Corp. v. Argentina*, ICSID Case no. ARB/01/12, Award of July 14, 2006, par. 311-12, available on-line at ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf.

[49] *The Rompetrol Group N.V. v Romania*, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, available on-line at ita.law.uvic.ca/documents/RomPetrol.pdf.

"…it is clear that arbitrators—and some investors—have drawn upon human rights jurisprudence, in an effort to buttress or inform certain interpretations of protections owed to investors."

Romania investment treaty were clearly capacious enough that Romanian citizens could create corporate entities in the Netherlands and use those for purposes of owning investments made in Romania. By doing this, Romanian citizens would obviously benefit indirectly from the international treaty protections owed by Romania to Dutch companies. In the course of defending this particular reading of the Romania-Netherlands investment treaty, the arbitrators observed that it is not controversial for states to negotiate international treaties *that apply to their own citizens:*

> The classic instance is that characteristic feature of our period, human rights, but there is no reason why identical policy considerations should not animate States in trade, environmental or other fields; and indeed, as one knows from practical experience, important elements connected with property, assets and economic activity enter into the heart of human rights regimes.[50]

In other words, these examples, including treaties on human rights, assisted the tribunal in holding that Romania might have willingly negotiated an international treaty which protected its own citizens provided that they incorporated in another territory and then invoked the treaty in the guise of foreign investors.

In a recent BIT arbitration, arbitrators were asked in another case involving Romania, to look skeptically on a foreign investor claim by a pair of Swedish nationals, who were Romanian-born and retained extensive ties with Romania. In the course of dismissing certain jurisdictional objections by Romania, the tribunal explored whether the claimants were indeed nationals under Swedish law and thus entitled to sue Romania under the Sweden-Romania BIT. In so doing, the tribunal noted that it "will be mindful of Article 15 of the Universal Declaration of Human Rights according to which everyone has the right to a nationality, and that no one shall be arbitrarily deprived of this nationality nor denied the right to change his nationality."[51] The tribunal did not reference this right further, but its invocation appears to have colored the tribunal's approach to Romania's objections to the claimants' standing in the case. Indeed, the tribunal observed that a state wishing to second-guess another state's conferment of nationality upon an individual faces a steep burden of proof.[52]

Yet another instance where arbitrators have referenced human rights law on behalf of foreign investors can be seen in the arbitration between the US-based energy company CMS Gas Transmission and the Government of Argentina. In a 2005 ruling, arbitrators dismissed objections raised by Argentina to the effect that the social and economic impacts of its recent financial crisis compromised human rights, and thereby raised questions as to the applicability of investment treaties and the protections owed to foreign investors investing in Argentina's public utilities. Notably, the arbitrators took the view, without elaborating, that fundamental human rights were not affected; moreover, the arbitrators added that Argentina's Constitution and international human rights treaties provide protection for property rights, thus minimizing the likelihood that the former agreements were in collision with investment treaty provisions protecting property.[53]

Another especially notable instance where human rights obligations were raised in the context of an investment treaty dispute occurred in the *Trinh Vinh Binh v. Vietnam* arbitration under the Netherlands-Vietnam bilateral investment treaty. As noted earlier in this paper, no rulings were issued in this UNCITRAL arbitration. Moreover, the pleadings in the case remain confidential. However, an investigation for Rights & Democracy finds that human rights arguments were raised by the claimant, a Dutch-Vietnamese dual national. Specifically, it was alleged that Mr. Trinh—who made millions of dollars in investments in Vietnam—was detained by authorities for an excessive period of time prior to trial (18 months) and subjected to "torture" and "inhumane treatment" while in the custody

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[50] *Rompetrol v. Romania*, Decision of April 18, 2008, par. 109.

[51] *Ioan Michula and Others v. Romania*, ICSID Case no. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008, par. 88.

[52] *Ibid*., par. 87.

[53] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005, paras. 114-121. (This cursory discussion is perplexing insofar as the tribunal seems to dismiss concerns raised as to the impact of the Argentine financial crisis on the human rights of Argentine citizens by means of the following syllogism: property is a human right; investment treaties protect property; therefore, investment treaties are treaties which protect rather than harm human rights.)

of authorities. The claimant argued that conduct by the Vietnamese police and security forces that was patently illegal and corrupt and seriously deviated from international norms of due process and human rights should serve to violate the "full protection and security" and "fair and equitable treatment" obligations in the Vietnam-Netherlands treaty.

Finally in a still-ongoing arbitration, which has yet to see a ruling by arbitrators, a group of Canadian First Nations individuals are suing the US Government, alleging interferences with their tobacco business. They object, in particular to the terms of a major settlement struck between most US states and the 4 major tobacco companies—and the impact of this settlement upon their own business in the United States. The claimants argue that the US has breached a provision of the NAFTA which obliges governments to treat investors "(i)n accordance with international law, including fair and equitable treatment and full protection and security."[54] However, the claimants argue that the interpretation of that NAFTA obligation must be in accordance with the wider body of international law, including international human rights law, and particularly those obligations owed to indigenous peoples. Among these latter obligations, according to the investors, is an obligation to respect the rights of indigenous peoples to occupy and enjoy their traditional territories, including for purposes of carrying out traditional commercial activities, as well as an obligation to "take pro-active steps to engage in good faith consultations with indigenous peoples before imposing a measure that impairs individual or group property rights and/or indigenous economic activities".[55]

In essence, the claimants argue that arbitrators should take into account these human rights obligations owed to indigenous peoples when interpreting and construing what it means to treat the investors "fairly and equitably". A decision in the case may not be forthcoming until 2009 or 2010.

Based upon the above examples, it is clear that arbitrators —and some investors—have drawn upon human rights jurisprudence, in an effort to buttress or inform certain interpretations of protections owed to investors. It must be recalled that arbitrators in investment treaty disputes lack the jurisdiction to hold states liable for breach of their human rights obligations. Rather, under the terms of the investment treaties, the arbitrators are generally limited to determining if the protections in the investment treaty have been breached. As part of such an interpretive exercise, arbitrators can (and sometimes do) look to human rights law for analogies or as an aid in constructing the meaning of the investment treaty obligations.

Thus, investment treaties may be useful for foreign investors (both individuals and corporations) seeking to advance certain *narrow* ranges of human rights. Apart from using investment treaties to challenge state taking of property, individuals who have suffered mistreatment (lengthy pretrial detention, inhumane treatment, or other more egregious abuses) also may be able to hold governments to account via the means of an investment treaty arbitration.[56] Also, foreign-owned media companies or individual publishers might be able to bring claims against governments which seek to censor or silence a free press. For example, in one notable case, an ICSID tribunal indicated that a government would breach an investment treaty if it punished a foreign-owned publisher for publishing campaign materials for an opposition political party.[57] Although this claim does not appear to have been couched in express human rights terms, the investor argued that political retaliation against the corporate publisher of opposition materials should be considered "unfair" and "inequitable" treatment contrary to an investment treaty.[58] It should be observed that this particular dispute might have given rise to a claim under the freedom of expression clause of the European Convention on Human Rights, rather than under a bilateral investment treaty. Thus, to some extent, regional

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[54] *Grand River Enterprises v. United States of America*, Claimant's Memorial, July 10, 2008, available on-line at www.state.gov/documents/organization/107684.pdf.

[55] *Ibid*.

[56] Even some not-for-profit organizations arguably enjoy some protection—at least in relation to overseas activities which are focused on economic development and arguably "investments"—under these investment treaties. Thus, for example, if a human rights organization were to finance and operate an overseas project designed to further women's social and economic livelihoods, these activities might be protected from interference by state authorities. On the potential (and limits) for not-for-profit organizations to benefit from investment treaty protections, see Luke Eric Peterson and Nick Gallus, "International Investment Treaty Protection of Not-for-Profit Organizations," International Center for Not-for-Profit Law Working Paper, May 2008, available on-line at www.icnl.org/knowledge/pubs/BITNPOProtection2.pdf.

[57] *Tokios Tokeles v. Ukraine*, ICSID Case no. ARB/02/18, Award of July 26, 2007 par. 123. On the facts of the case, the arbitrators were not convinced that Ukraine had conspired to punish a Lithuanian-owned publisher for political reasons. However, the tribunal stated unequivocally that such behaviours, if proven, would breach the treaty.

[58] For further analysis see: Memo on freedom of expression and investment treaties, prepared for Vale-Columbia Center for Sustainable Investment, on file with author.

human rights agreements and bilateral investment treaties confer somewhat overlapping forms of protection; it may fall to claimants to decide which channel they will use to pursue their claims.

While the scope for investment treaties to advance certain human rights objectives should not be overlooked, neither should it be overstated. Ultimately, those wishing to claim under a treaty must be able to demonstrate an investment. As noted earlier, these investment treaties protect a much narrower range of aliens than an earlier generation of international treaties which protected *all* aliens (irrespective of their being involved in cross-border investments).

Apart from those cases where foreign investors use investment treaties in an effort to advance certain narrow human rights arguments—there is another type of scenario that may arise under the foreign investment protection regime: where legal disputes between investors and states may have knock-on implications for the human rights of other persons living under the jurisdiction of the host country. It is *these* human rights impacts, which were the central focus of the earlier Rights & Democracy human rights impact assessment case-studies, and which are the focus of the next sections.

Relevance of a state's human rights obligations towards non-investors

Where international arbitrations arise between a foreign investor and its host-state, a key question is whether the human rights of non-parties to the arbitration (eg. communities or individuals living under the state's jurisdiction) may be relevant to the resolution of such disputes. In some circumstances, a state may act so as to further its human rights law obligations towards local members of a community, yet this could have adverse effects on a foreign investor (eg. by imposing some cost or burden). If the foreign investor sues the state for alleged breach of an investment treaty, will the broader human rights dimensions of the case be considered by arbitrators? In theory, there is

"…legal disputes between investors and states may have knock-on implications for the human rights of other persons living under the jurisdiction of the host country."

substantial scope for governments to raise human rights law obligations in the course of defending against allegations of investment treaty breach. But are governments actually raising human rights arguments in these arbitration cases? As the next section makes clear, governments are beginning to raise human rights law arguments—thus obliging arbitrators to consider their relevance and import.

The human right to water

One of the most visible circumstances where a government's human rights obligations to those living within its territory may come into the frame of investment treaty arbitrations is in relation to foreign investments in the water and sanitation sector. Over the last decade, there have been at least a dozen BIT arbitrations brought against governments in relation to disputes in this sector.[59] Ten of these cases have been brought against Argentina, whereas the remaining two were brought against Bolivia and Tanzania respectively.[60] Others may have been launched without publicity, given that there are no universal requirements for such lawsuits to be publicly disclosed.

United Nations bodies have increasingly emphasized that a right to water can be inferred from several of the rights in the International Covenant on Economic, Social and Cultural Rights, including the right to the highest attainable standard of health, the right to housing, and the right to food; what's more human rights obligations related to water are explicitly referenced in several other human rights instruments, including the UN Convention on the Rights of the Child, and the UN Convention on the Elimination of

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[59] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case no. ARB/97/3); *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* (Case no. ARB/03/17); *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic* (Case no. ARB/03/18); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (Case no. ARB/03/19); *Azurix Corp. v. Argentine Republic* (ICSID Case no. ARB/01/12); *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case no. ARB/02/3); *Azurix Corp. v. Argentine Republic* (ICSID Case no. ARB/03/30); *SAUR International v. Argentine Republic* (ICSID Case no. ARB/04/4); *Anglian Water Group v. Argentine Republic*, UNCITRAL arbitration filed in 2003; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case no. ARB/05/22); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case no. ARB/07/17); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case no. ARB/07/26).

[60] *Op. cit.*

all forms of Discrimination against Women.[61] At a minimum, states have obligations to progressively realize economic and social rights to the maximum of their available resources. The Committee on Economic Social and Cultural Rights, in its General Comment No.15 —a non-binding, but authoritative interpretation of the ESCR—has set forth a number of steps which governments must pursue, including steps to ensure that third parties entrusted with water delivery are not permitted to compromise "equal, affordable and physical access to sufficient, safe and acceptable water."[62]

It has long been conjectured that human rights might be at stake in certain of the disputes which gave rise to these investor-state arbitrations in the water sector.[63] New research conducted for Rights & Democracy finds clear evidence that human rights arguments have been raised by the respondent host-government in at least one of these ongoing international arbitrations arising out of the Aguas Argentinas concession.[64] As will be described below, the tabling of these human rights arguments in the Aguas Argentinas case places the onus squarely upon the arbitration tribunal to address such arguments and to consider their relevance to the legal dispute. Indeed, the tribunal hearing the dispute acknowledged at an early stage of the proceedings that the case "may raise a variety of complex public and international law questions, including human rights considerations."[65] A ruling in that arbitration could emerge in 2009.

The particular dispute in question arises out of a major investment in the water utility of the municipality of Buenos Aires by a consortium of foreign investors, including Suez, Vivendi, Anglian Water Group and Aguas Barcelona. Together with local investors, the foreign firms created a local entity, Aguas Argentinas S.A. which entered into a 30 year contract to manage the water and sewage concession. Over the course of the investment, the investors would quarrel with local authorities about a host of issues. Later, as Argentina's financial crisis deepened, the investor grappled with the government over the freezing of water-prices charged to consumers. The investor argued that it was contractually entitled to modifications of tariff-rates in the event of inflation or currency devaluation, so as to maintain the "economic equilibrium" of the project over its lifetime. The Government of Argentina countered that Aguas Argentinas (a local company) was party to the concession contracts and that the *foreign* investors—who were not themselves signatory to such contracts—should not be able to bring an arbitration case which depends upon the alleged breach of those contractual commitments. Rather, it would be for the local company to pursue the matter in the local courts. Moreover, the Government countered that Aguas Argentinas has failed to live up to its contractual obligations—including in relation to water quality and supply.

In March of 2006, the Argentine Government terminated the concession, alleging technical failures by Aguas Argentinas. By this time, the foreign investors had long since resorted to international arbitration, alleging that various Argentine actions violated protections in BITs signed by Argentina with the investors' home countries: France, Spain and the United Kingdom. By August of 2006 an arbitration tribunal had ruled that it had jurisdiction to examine the investor allegations on their merits.[66] At the crux of the claims by the foreign investors is an argument that Argentina has breached its contractual undertakings —leading to a knock-on breach of its BIT obligations to protect foreign investments. Notably, in legal filings in this ICSID proceeding, Argentina has made human rights a major part of its defense.

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[61] General Comment no. 15, (2002), January 20, 2003; the Committee on Economic, Social and Cultural Rights held in its General Comment that a right to water is implicit in Articles 11 and 12 of the ICESCR and explicit in Article 14(2) of the Convention on the Elimination of Discrimination Against Women and Article 24(2) of the Convention on the Rights of the Child.

[62] General Comment no. 15, par. 24

[63] See for example the discussion raised in Peterson and Gray.

[64] Suez, *Socieded General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *Anglian Water Group v. Argentine Republic* (UNCITRAL arbitration proceeding). Ultimately, human rights considerations may be relevant to a number of the known water services arbitrations, however particular focus was devoted to the Aguas Argentinas arbitration as this dispute was examined in volume one of the Rights & Democracy *Investing in Human Rights* project.

[65] *Suez, et al. v. Argentina*, ICSID Case no. ARB/03/19, Order in response to a petition for transparency and participation as amicus curiae, May 19, 2005, available on-line at: ita.law.uvic.ca/documents/suezMay19EN.pdf

[66] Suez, *Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no. ARB/03/19, Decision on Jurisdiction, August 3, 2006.

Argentina argues for relevance of human rights law in BIT arbitrations

Argentina has insisted that its BIT obligations must not be interpreted in a vacuum divorced from the rest of international law. In particular, Argentina stresses that the BIT "must be construed in a manner which does not affect the fulfillment of other international obligations between the states signatory of such BITs."[67] According to Argentina, such an approach would ensure that BIT obligations would be read in light of other rules of international law linking Argentina, the United Kingdom, France and Spain, including "any treaty on human rights contemplating the human right to water".[68]

Second, after arguing for the applicability of human rights law, Argentina insists that its treatment of the claimants in the Aguas Argentinas arbitration was motivated by various business failings on the part of Aguas Argentinas, coupled with an overriding obligation on Argentina's part to protect the population's right to water.[69] In Argentina's view, these shortcomings by Aguas Argentinas compelled the Argentine authorities to intercede so as to ensure that the right to water was not undermined by third parties.[70]

Reading the expropriation obligation in light of human rights

Human rights obligations are invoked by Argentina in an effort to rebut several specific allegations of treaty breach. For instance, in response to claims that Argentina indirectly expropriated the Aguas Argentinas concession, the Government has argued that any measures taken were motivated by obligations, binding in international law, to address those breaches by the concessionaire "which engaged fundamental human rights issues".[71] In particular, Argentina cites General Comment No.15 on the "Right to Water", in support of its "overriding responsibility to ensure the availability of water to all members of society.[72] In view of such compelling motives, Argentina maintains that its actions were a legitimate and proportionate response—rather than an act of indirect expropriation contrary to the BITs at issue.[73]

For their part, the claimant water companies retort that the human right to water is "irrelevant" to the arbitration.[74] On this view, the motives of a government are irrelevant to a determination as to whether an expropriation has occurred; rather the claimants lay their emphasis squarely on the *effect* of Argentina's measures, and rely on those earlier arbitral rulings which deem irrelevant the purpose or motive underlying a government's conduct.[75] Of particular note, the claimants insist that they had "specific representations" or promises from the Argentine Government—in the form of tariff adjustment mechanisms—which distinguish its allegations of expropriation from those other cases where investors had no such promises or representations from government.

Reading the fair and equitable treatment obligation in view of human rights

Apart from seeking to defend against a claim of expropriation by invoking its human rights obligations, Argentina has also mounted a human rights inspired defense to allegations that it failed to extend "fair and equitable treatment" to the claimants. On this argument, the BIT obligation must be interpreted so that Argentina's conduct is viewed in its broader context—including the extraordinary social and economic crisis befalling the country, as well as "other relevant

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[67] Counter-Memorial of Argentine Republic in ICSID Case No. ARB/03/19, December 8, 2006, paragraph 794, on file with author.

[68] *Ibid.*, par. 796.

[69] *Ibid.*, par. 800.

[70] *Ibid.*; (no view is taken in this paper as to the competing factual allegations of Argentina and the foreign investors).

[71] *Ibid.*, 842-43.

[72] Rejoinder of the Argentine Republic in ICSID Case No. ARB/03/19, August 17, 2007, par. 1003-5, on file with author.

[73] *Ibid.*

[74] Reply of Suez, *et al.*, in ICSID Case no. ARB/03/19, par. 321, on file with author.

[75] Reply of Suez, *et al.*, par. 387-403.

international norms," including the right to water.[76] Again, Argentina refers to General Comment No.15 in support of its "overriding responsibility" to ensure water-availability to all.[77]

According to the investors in the Aguas Argentinas consortium, the fair and equitable treatment clause should be interpreted so as to provide a stable and predictable investment environment which ensures that an investor's *legitimate and reasonable expectations* are met. The Argentine Government disagrees with the "legitimate expectations" lens, characterizing the investors' reading as unrealistically "broad". However, the Government adds that any attempt by the tribunal to examine the investors' "legitimate and reasonable expectations" should also take account of the broader context in which Argentina operated.[78]

The state of necessity and human rights obligations

A third way in which human rights figure prominently in Argentina's defense in the Aguas Argentinas arbitration is the Government's last-ditch defense of necessity. Under this argument, any bilateral investment treaty breaches would be excused by the state of necessity which Argentina operated under from the onset of the financial crisis. The defense of necessity has been particularly contentious, with arbitration tribunals in other cases reaching divergent views as to its applicability to the Argentine financial crisis.[79] In the Aguas Argentinas case, the Government argues that, by virtue of a sustained state of emergency arising in December 2001, Argentina meets the strict conditions imposed by customary international law in order to be excused from liability for any treaty breaches. A key part of Argentina's necessity defense is the identification of a number of human rights obligations under the UN Charter, various human rights treaties, and domestic law which obliged the Government to act so as to protect and uphold rights to life, health and sanitation. Acknowledging the central role of water to such rights, the Government noted that it was incumbent to take emergency measures designed to ensure continued and expanding access to water and sanitation during the financial crisis.[80]

"Argentina's defense of necessity (in an effort to excuse emergency measures harming foreign investment) has engendered sharp disagreement amongst arbitrators in other arbitrations — as has the invocation by Argentina of its obligation to protect the human rights of Argentine citizens."

In response to these arguments, the claimant water companies argue that Argentina had other alternatives short of an outright abandonment of the earlier-agreed water regulation framework and commitments made to foreign water companies. In particular, the companies contend that Argentina could have established "systems of cross-subsidies to ensure that the poorest categories of consumers were shielded from increases in water prices during the crisis period, whilst the wealthier consumers and industry (which continues to export in dollar terms) would have seen increases in line with the inflation of other basic products."[81]

Argentina's defense of necessity (in an effort to excuse emergency measures harming foreign investment) has engendered sharp disagreement amongst arbitrators in other arbitrations—as has the invocation by Argentina of its obligation to protect the human rights of Argentine citizens. As earlier noted, the tribunal in the CMS v. Argentina case quite peremptorily dismissed Argentina's human rights arguments. Subsequent tribunals, however, have given greater attention to a more generalized human rights defense raised by Argentina. According to this defense, the emergency measures taken in the face of the financial

[76] Counter-Memorial of Argentine Republic in ICSID Case No. ARB/03/19, par. 864.

[77] *Ibid*., par. 893-94.

[78] Counter-Memorial of Argentine Republic, *op. cit.*, at par. 892-93.

[79] For background see: "Argentina prevails in large part in financial crisis dispute with insurance company," by Luke Eric Peterson, *Investment Arbitration Reporter*, Sept.8, 2008, available on-line at www.iareporter.com/Archive/IAR-09-08-08.pdf.

[80] Counter-Memorial of the Argentine Republic, paras 1011-25 and 1059-61.

[81] Reply of Suez *et al*., par. 508.

crisis were necessary to uphold Argentina's constitutional order and basic rights and liberties of the Argentine public. However, when faced with such a generalized human rights defense, tribunals are reaching sharply divergent conclusions.

For instance, in the 2007 ruling in the Sempra v. Argentina arbitration, an ICSID tribunal revealed that an expert witness for the US gas company had conceded that Argentina would have been compelled by the American Convention on Human Rights to have maintained its constitutional order in the face of its 2001-02 financial crisis.[82] The arbitrators took the view that the constitutional order (and survival of the state) were not imperiled by the crisis and that various policy measures were available to Argentina. This precluded Argentina from relying on a defense of necessity in relation to the emergency measures taken during that crisis.[83]

Taking a starkly different view, another ICSID tribunal, in a 2008 ruling in the Continental Casualty v. Argentina case has held that the extreme social and economic hardship and dislocation suffered by Argentina clearly led the government to act out of a state of necessity.[84] Indeed, the tribunal pointedly noted that arbitrators should accord a significant margin of appreciation to states acting in times of such grave crisis, and not seek to second-guess the policy choices of governments.[85] Moreover, the arbitrators gave serious weight to the need for states to act proactively to protect constitutional guarantees and fundamental liberties rather than wait until it is too late to protect such liberties in the face of looming catastrophe.[86]

In previously unseen briefs filed in that arbitration by Argentina, the Government argued that it had an obligation to ensure basic human rights and human dignity in the face of a dire financial crisis and that these rights are of a higher order than those contained in investment treaties.[87] Invoking the Inter-American Court of Human Rights, Argentina maintained that no investment treaty obligation could oppose the Government's obligation to guarantee the "free and full exercise of the rights of all persons under (its) jurisdiction".[88]

NGOs also raise human rights law arguments in Argentine water cases

In several investment treaty arbitrations, arbitrators have confirmed their ability to accept legal arguments submitted by outside actors—although strict confidentiality limits can sometimes make it difficult for such would-be-interveners to know what is taking place in the arbitration proceeding. In addition to the human rights arguments tabled by Argentina in the Aguas Argentinas arbitration, similar arguments have been made by a group of non-governmental organizations intervening in the case.[89]

In a legal brief submitted several months after Argentina filed the above-discussed human rights defenses (which were themselves confidential), these NGOs presented arguments for consideration of the tribunal. The NGOs stressed that Argentina has international law obligations related to the right to water and that such obligations will be germane to the arbitration, both as part of the applicable law of the dispute, and as a "lens" through which the BIT obligations should be interpreted and applied.[90] Indeed, the NGOs seemingly express some optimism that arbitrators can reach a harmonious interpretation of investment treaty obligations and human rights obligations, provided that the latter are taken seriously.

The NGO brief notes that human rights law requires that Argentina adopt measures to ensure access to water to the population, including physical and economic access. On this view, the freezing of the tariff levels

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[82] *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award of September 28, 2007, par. 331.

[83] *Ibid.*, par. 332.

[84] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of Sept.5, 2008, par. 180-81.

[85] *Op. cit.*, par. 181.

[86] *Op. cit.*, par. 180.

[87] *Counter-Memorial of Argentine Republic in Continental Casualty v. Argentine Republic*, ICSID Case no. ARB/03/9, par. 851, on file with author, paras 568-69.

[88] *Counter-Memorial of Argentine Republic in Continental Casualty v. Argentine Republic*, ICSID Case no. ARB/03/9, par. 851, on file with author.

[89] Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. De Provision de Servicios de Acción Comunitaria, Unión de Usarios y Consumidores, and Center for International Environmental Law (CIEL).

[90] *Amicus Curiae* Submission in ICSID Case no. ARB/03/19, April 4, 2007, available at www.ciel.org/Tae/ICSID_Amicus_5Apr07.html. Indeed, some of the research for that brief was undertaken by two of the NGOs during their work on a human rights impact assessment of the project, supported by Rights & Democracy.

amidst an economic crisis allowed the population to have access to water and sanitation, and thus the measures complied with Argentina's requirements under human rights law. With respect to the "fair and equitable treatment" standard, the NGOs argue that no investor could have a "legitimate expectation" that a Government would permit water-prices to increase three-fold following the devaluation of the Argentine Peso. Accordingly, a foreign investor could not claim that the breach of such expectations amounted to unfair or inequitable treatment by Argentina. The NGOs also argue that the foreign investors should not be permitted to rely upon any apparent commitments by Argentina—for example in concession contracts—to the effect that it would refrain from taking certain human rights-protecting measures in the event of an economic crisis. The NGOs argue that it would be a violation of "public order" for arbitrators to interpret BIT protections, such as the "fair and equitable treatment" standard, in a manner that legitimizes any attempt by a government to "contract out" of its human rights obligations.

Thorny questions remain unresolved

Together, the arguments of Argentina and the amicus curiae NGOs, along with the responses of the water companies, invite the presiding tribunal to resolve the dispute in a wider frame—one which takes account not merely of Argentina's legal obligations to foreign investors, but the wider constellation of human rights obligations also applicable to Argentina. Here, there are no easy and ready-made answers as to what human rights obligations are required of Argentina in the specific circumstances of the financial crisis. The arbitrators will need to assess those human rights obligations, and how they should be reconciled with Argentina's investment treaty obligations. Even if arbitrators determine that human rights law obligations are relevant to the determination of the dispute, this may not excuse any and all actions taken by Argentina against foreign investors. Indeed, arbitrators face a difficult and novel task in determining how international human rights and economic law obligations are to be juggled by states.

"From a human rights perspective, great sensitivity is called for in such situations where protestors are objecting to a foreign investor's activities, as there is ample evidence of overzealous use of force by police and security forces in relation to the protection of foreign investments in the developing world."

With a ruling expected early in 2009, this case could mark the first known instance where arbitrators devote extensive discussion to a human rights defense raised by a government in an investment treaty arbitration. Notably, in the case of another recently-resolved investment treaty arbitration between a UK water services company, Biwater Gauff Tanzania Ltd., and the Republic of Tanzania, the Government did *not* cast its defense in strict human rights terms, nor did the arbitral tribunal explore the human rights obligations of Tanzania.[91] The final award in the Biwater case, issued in July of 2008, suggests that Tanzania artfully sidestepped the question of whether it was under a human rights obligation in relation to water: "Water and sanitation services are vitally important, and the Republic was more than right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so."[92]

By contrast, the centrality of right to water arguments in Argentina's ongoing arbitration with the Aguas Argentinas consortium will likely compel the tribunal to grapple with human rights issues in any ruling in that case. It will be important for human rights actors to monitor and analyze the resolution of the dispute by the tribunal. When the ruling is issued, the website of the ICSID will indicate that a decision has been handed down—although it can sometimes take months for the parties to give their consent to ICSID to publish that decision. In rare cases, parties do not jointly consent to the release of an award, but either of the two parties may elect to release or circulate the decision themselves.

[91] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case no. ARB/05/22, Award of July 24, 2008, available online at ita.law.uvic.ca/documents/Biwateraward.pdf.

[92] At par. 434.

Human rights to assembly and free expression

States have various international human rights law obligations to protect the right of citizens to assemble peacefully, express themselves, and to take part in non-violent protests. The International Covenant on Civil and Political Rights contains such obligations, as do regional human rights conventions.[93] Furthermore, under some circumstances, states may need to take certain "positive" or "proactive" measures to ensure the effectiveness of such rights. For example, the European Court of Human Rights has held that governments have an obligation to provide a degree of police protection at public protests which might be targeted by disruption or violence.[94] These particular rights are especially germane in any discussion of foreign investment, as some FDI projects can be controversial and subject to opposition.

Just as states have clear human rights obligations in relation to freedom of expression and assembly, governments may undertake in their international investment treaties to provide foreign investors and/or investments with "full protection and security". At a minimum, this obligation requires that states provide a baseline of police protection for foreign-owned projects; this is not a strict liability obligation, but it does mandate a certain level of *due diligence* on the part of the host country. For instance, in a 1990s-era FDI dispute between an American corporation and (then) Zaire, the Government was found by arbitrators to have breached the "full protection and security" obligation because it had taken no steps whatsoever to prevent the ransacking and looting of privately-owned manufacturing facilities by the state's armed forces. This legal obligation on states to exercise due diligence in protecting foreign-owned investment also extends to the actions of non-state actors (e.g. citizens, other businesses, criminals, etc.)[95] Further muddying the picture, some investment treaty arbitrators have taken the view that the "protection and security" standard includes not only the *physical* protection of foreign-owned investments, but also security from other forms of "harassment" which pose no physical threat to assets or threat of violence.[96] While a disputed interpretation, it is conceivable that activist campaigns, even when unaccompanied by physical efforts to blockade or picket an investment, might be construed as forms of "harassment".[97]

It should also be stressed that host governments may take on even more extensive physical protection and security obligations in individual contracts or host-government agreements with a particular foreign investor. For example, a host state may agree to provide 24-hour-a-day police protection for particular facilities, or commit particular resources (such as helicopters, police vehicles, etc.), or pledge to prevent any "interferences" by outside actors with an investor's operations.[98] Such obligations go beyond the standards found in international treaties, and are beyond the purview of this paper. However, they may impose more stringent legal obligations—whose relationship with human rights will be even more friction-generating—even as such contract obligations remain hidden from public view by virtue of being buried in confidential business arrangements concluded with foreign investors.[99]

At the best of times, governments may walk a tight-rope in balancing legitimate rights of protest, while offering basic police protection to FDI projects. From a human rights perspective, great sensitivity is called for in such situations where protestors are objecting to a foreign investor's activities, as there is ample evidence of over-zealous use of force by police and security forces in

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[93] This section draws on a previously unpublished memo prepared for Rights & Democracy on some of the potential human rights implications of the Canada-China bilateral investment treaty negotiations.

[94] See for example the case of *Platform Artze fur das Leben v. Austria*, May 25 1988, Application No. 10126/82, European Court of Human Rights, in particular see the discussion of this case by Article 19 at www.article19.org.

[95] *UNCTAD, Bilateral Investment Treaties in the Mid-1990s* (United Nations: New York and Geneva, 1998), p. 55.

[96] See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no. ARB/97/3, Award of August 20, 2007, par. 7.4.13 – 7.4.17.

[97] For a narrower reading of the "full protection and security" standard see *BG Group Plc v. Argentine Republic*, (UNCITRAL arbitration proceeding), Award of Dec. 24, 2007, par. 326, available on-line at ita.law.uvic.ca/documents/BG-award_000.pdf.

[98] See for example the stringent terms of investor-state contracts concluded in relation to the Chad-Cameroon pipeline project, in Amnesty International UK, *Contracting Out of Human Rights: The Chad-Cameroon pipeline project*, pp. 25-26.

[99] For more on investor-state contracts generally, see Andrea Shemberg, "Stabilization clauses and human rights," Draft of March 11, 2008, available on-line at: www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf; as well as IIED, Lifting the lid on foreign investment contracts: the real deal for sustainable development, October 2005.

relation to the protection of foreign investments in the developing world.[100] Indeed, there is some anecdotal evidence to suggest that governments feel under varying degrees of *legal* compulsion to smooth the path for FDI projects. For example, the government of Guatemala has professed to being torn between its duties to provide security for a highly controversial foreign-owned gold and silver mine in the country's western region and the government's obligations to uphold the rights of citizens and indigenous groups to assemble and protest the mining operation. As has been widely reported in the mainstream news media, public opposition to the project ultimately tipped over into violence as locals and security forces clashed over efforts by protestors to blockade roadways and impede further mining activity at the mining site.[101] Media coverage of these events has alluded to the government's feeling under legal duties to ensure that protests do not derail the investment in question. In April of 2005, the Associated Press noted that "(t)he government said it had to honor the mining concession, or risk a huge lawsuit by the company."[102]

By and large however, investment protection treaties are typically *silent* on the obligations of states to respect human rights to expression and assembly, much less the complex challenges inherent in balancing and reconciling such human rights obligations with the policing and provision of security of FDI projects. For instance, exactly what degree of disruption of business activities must be borne by foreign investors facing citizen protests? Protestors might blockade roadways or facilities for a period of hours in order to conduct a protest march. Conversely, protest activities might shut down business activity for a period of weeks or even months. Similarly, labour unrest could lead to losses or disruption on the part of foreign-owned businesses, either through picketing, sit-ins or other activities. However, investment treaties offer no guidance to arbitrators as to how to reconcile—in concrete circumstances—a state's human rights obligations and its security obligations to foreign investors.

"Ultimately, arbitrators might need to judge at what stage police or security forces became duty-bound by virtue of treaty obligations to minimize, or even dismantle, such citizen activities or incur financial liability to foreign investors for treaty breach. "

A review of known investment treaty arbitration disputes finds that in several legal disputes, foreign investors have sued states and alleged that citizen or worker protests lead to a breach of the host state's "protection and security" obligations towards the affected investor. The available record is silent in these cases as to whether the states raised explicit human rights defenses, for example by referring to human rights law obligations. In each case, arbitrators ruled that the alleged disruptions suffered by the investors did not rise to the level where the host state failed to provide for basic security and protection. In fact, as will be seen, these particular cases provide some grounds for cautious optimism that the particular treaty obligation (full protection and security) is of limited reach and that tribunals are also attentive to the delicate balancing acts faced by states needing to protect foreign investment and the democratic rights of citizens. Still, it should be reiterated that arbitrators are under no strict duty to follow the path set by earlier tribunals; as such there is no guarantee that future tribunals will approach doctrinal questions in similar ways.

Arbitrators find that facts do not support "failure to provide security" arguments in key cases

In a high-profile investment treaty arbitration involving a Spanish firm and the Government of Mexico, the investor accused state authorities of having breached its "full protection and security" obligation by not preventing "adverse social demonstrations" which had dogged the investor's controversial hazardous waste treatment facility.[103] In a 2003 arbitration ruling in that

[100] See Rights & Democracy, "Mining a Sacred Mountain: Protecting the Human Rights of Indigenous Communities," 2006 Case Study in Human Rights Impact Assessment Project, available online at www.dd-rd.ca/site/_PDF/publications/globalization/hria/Philippines%20-REPORT.pdf; see also Amnesty International, *Policing to Protect Human Rights: A Survey of Police Practice in Countries of the Southern African Development Community, 1997-2002*, Amnesty International Publications 2002; for a notable example of an investment project where serious breaches have occurred see: Amnesty International, *India: The 'Enron project' in Maharashtra – Protests Suppressed in the Name of Development*, July 17 1997, ASA 20/031/1997, available on-line at web.amnesty.org/library/Index/engASA200311997.

[101] Wendy Stueck, "Clashes reported in Guatemala over Glamis mining project," *The Globe and Mail*, January 13, 2005.

[102] Mark Stevenson, "Gold Rush runs into opposition over mines, cyanide," *The Associated Press*, April 12, 2005.

[103] *Tecmed v. Mexico*, Award of May 29, 2003, *op. cit.*, par. 175.

case, the tribunal determined that there was "not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the landfill."[104] However, had the investor presented "sufficient evidence" regarding the conduct of the Mexican authorities, it seems clear that the tribunal would have had to wrestle with the balance to be struck between the right to public protest and the obligation to provide protection and security for foreign investment projects.

In another investment treaty arbitration, a foreign investor argued unsuccessfully that the state of Romania had failed to quell labor unrest, to the detriment of the investor's industrial operations in that country.[105] For its part, the Romanian Government had countered that the labor unrest was occasioned by a failure of the foreign firm to pay wages owed to workers, and that the organizers of these protests conducted them in an "orderly manner and after notice had been given to the Prefect's office." The presiding tribunal was inclined to agree, and noted that there was no evidence that the state authorities had failed to meet the relatively minimal obligations flowing from that particular treaty provision.

In a third investor-state dispute resolved in August of 2008, the investor had complained that it was subjected to "worker riots" and that the failure of Bulgarian authorities to curtail these riots constituted a breach of the state's obligation to provide full protection and security to the foreign investor.[106] Bulgaria countered that the so-called "riots" were, in fact, peaceful protests by workers who had been denied their wages, and that adequate police presence had been devoted to policing these demonstrations. Notably, the tribunal was unable to determine which of the conflicting factual accounts was more accurate. With the onus on the investor to make its case, the claim for breach of the protection and security obligation failed.

Based on this trio of notable cases, it appears arbitrators have tended to adopt relatively restrained readings of the "full protection and security" treaty standard—viewing it as a due diligence standard, rather than a strict liability standard. In the cases surveyed, there has been a general failure of the claimants to provide "sufficient evidence" of a state's failing to meet this standard in cases where policing of citizen or worker protests were at issue. Based on the facts of these particular arbitrations, it would appear that these claims were not especially difficult ones for arbitrators to grapple with. Much thornier fact-scenarios could easily arise where citizen mobilizations or protests lead to more significant disruption of a foreign-owned business's activities. Ultimately, arbitrators might need to judge at what stage police or security forces became duty-bound by virtue of treaty obligations to minimize, or even dismantle, such citizen activities or incur financial liability to foreign investors for treaty breach. While there is no public record of an investment treaty arbitration dealing with these thornier questions it is very conceivable that one might arise in future. Indeed, adjudicators in the trade realm have grappled with some cases where citizen blockades have come into collision with the imperatives of free trade and transit.[107]

Certainly, there is significant potential for arbitrators to grapple in future with the balance between investor security and citizen rights of protest or assembly. Moreover, some future disputes may also implicate questions of squatters' rights and longer-term "interferences" by local citizens or groups. One pending arbitration claim which has come to light under the US-Central America Free Trade Agreement (CAFTA) could provide a more difficult test-case for arbitrators. The case in question involves allegations by a US investor that the Government of Guatemala has failed to provide protection for its railway business. In a 2007 document offering a preliminary sketch of its legal claims, the investor claimed to have "faced public interference from locals who have vandalized the tracks, stolen railroad materials for personal use and

[104] *Tecmed v. Mexico Award*, par. 177.

[105] *Noble Ventures Inc. v. Romania*, ICSID Case no. ARB/01/11, Award of October 12, 2005, par. 160-67, available on-line at ita.law.uvic.ca/documents/Noble.pdf.

[106] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case no. ARB/03/24, Award of August 27, 2008.

[107] Arthur Appleton and Bernd U. Graf, "Freedom of Speech and Assembly Versus Trade and Transit Rights: Roadblocks to EU and MERCOSUR Integration," 34 *Legal Issues of Economic Integration*, no. 3, pp. 255-81, 2007.

set up living quarters as squatters along the tracks, in some cases in collaboration with local authorities."[108]

While the prospect of investment arbitration tribunals grappling with such issues may discomfit human rights practitioners, neither can they shrink from the reality that such cases are arising. Even where arbitrators acknowledge the need to consider a state's human rights obligations, it would help for investment treaties to set forth how tribunals should reconcile the security obligations owed to foreign investors with these human rights obligations owed to citizens of the host country. Governments might wish to clarify that the duty of host states to provide "full protection and security" to foreign investors and/ or investments must not infringe upon the democratic rights of citizens, as embodied in various international and national human rights treaties, to assemble and express themselves peaceably. What's more, investment treaties might state expressly that they should be read in conformity with human rights norms. Perhaps more helpful, treaty negotiators might seize the more difficult task of setting out specific tests to help guide adjudicators as to the appropriate balance to be struck in concrete situations. For example, what level of inconvenience or disruption must be borne by foreign investors before their treaty rights are violated in order to ensure that the democratic rights of citizens have been exercised?

Regrettably, some governments need little excuse to trample upon the rights and liberties of local citizens —particularly where signature economic projects are at stake with large financial and political significance. In the absence of more definitive statements as to the full protection and security standard and its relationship to the human rights of citizens, certain investors or governments might bluff or over-state the demands of the "full protection and security" obligation. It is certainly commonplace for foreign investors to send threatening letters to governments urging that they reconsider certain policy actions or postures, lest they face arbitration claims for damages. Because such correspondence tends to be private, it is impossible to assess how foreign investors may characterize (or perhaps exaggerate) the obligations of host governments when it comes to matters of policing and security. Thus, human rights actors would be advised to monitor and publicize those arbitral rulings which strike a balance between investor security and the rights of persons living in the particular community. Greater awareness on the part of governments—particularly those with little or no experience of investment treaty arbitrations —could ensure that policymakers are not goaded into taking misguided actions to the detriment of the basic democratic rights of citizens.

The human rights of indigenous peoples

To date, at least two known investment treaty arbitrations have seen clear arguments as to the relationship of investment obligations and human rights owed to indigenous peoples. The Grand River Enterprises case currently pending under NAFTA was discussed earlier in this paper, and involves arguments that First Nations investors in the United States have not been treated fairly and equitably—with a particular emphasis laid upon the alleged failure of the US Government to meet certain human rights obligations to indigenous persons.

Meanwhile, a different scenario has arisen in a NAFTA arbitration, between the Canadian mining company Glamis Gold Ltd. and the United States Government. In the Glamis case, human rights obligations have been raised not in support of an investor's claim, but rather in opposition to it. The Glamis case involves a claim by the Canadian company that California state mining regulations violate protections contained in the NAFTA. In particular, Glamis objects to requirements for back-filling and re-grading of open pit mine sites which are in close proximity to Native American sacred sites. The Canadian firm mounted its claim in 2003, and in 2005 a US indigenous group (the Quechan) applied to the tribunal for leave to intervene as *amicus curiae* in the case. At the same time, the Quechan community tabled a legal brief which it sought to have considered by the tribunal. Among the arguments raised in that brief is one which encourages the tribunal "to construe the text of an international agreement in a manner that ensures consistency between and among all applicable international

[108] Notice of Intent to Submit a Claim to Arbitration, *Railroad Development Corporation v. The Republic of Guatemala*, March 13, 2007, available on-line at dace.mineco.gob.gt/dacepdf/doc1exp16dace07.pdf.

"While clearly allowing expropriation of foreign-owned land, the compensation standards provided under these BITs may complicate the efforts of developing country governments that are contemplating land redistribution policies."

obligations."[109] In this instance, the Quechan encourage the tribunal to interpret Glamis's treaty protections "in a manner consistent with the (USA)'s conventional and customary international law obligations to preserve and protect indigenous peoples' rights to land and its resources."[110]

At the time of writing, an award had yet to be rendered in the Glamis arbitration, although one may be forthcoming in early 2009. However, in parallel with that arbitration, it should be observed that human rights courts have also had occasion to grapple, in their own way, with the relationship between indigenous rights and the legal protections owed to foreign investors. In Paraguay, which boasts an extremely stratified pattern of land-ownership, claims have been brought to the Inter-American Court of Human Rights by indigenous groups laying claim to ancestral lands. In the *Sawhoyamaxa* case, the Court held that various rights of the Sawhoyamaxa community under the American Convention on Human Rights had been violated by Paraguay, following a more than a decade-long struggle by the community to gain title to certain ancestral lands.[111] Among these rights were the community's right to property, as well as its right to judicial protection and a fair trial (which were deemed to have been violated by a wholly ineffective domestic land claims process).

For its part, the Paraguayan Government had protested that the lands in question were privately-owned by German citizens and were being exploited productively. However, the Court held that this did not absolve the state of its duty to ensure restitution of the Sawhoyamaxa's property. While declining to dictate how the state should strike the balance between the community's property rights and those of the private-owners, the Court observed that, if the state could not "on objective and reasoned grounds" return the traditional lands to their previous owners, then the state "must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples …."[112] Having done neither of these, the state was held to have violated the Sawhoyamaxa's property rights under the American Convention on Human Rights.

Of particular interest, Paraguay had attempted to justify its failure to act in the Sawhoyamaxa case by reference to a bilateral investment treaty which protects German investments in Paraguay. According to the authorities, this treaty prohibited the Paraguayan authorities from expropriating the German-owned properties in question. However, the Inter-American Court rejected this line of argument, observing that the treaty permitted property to be expropriated for "public purposes". Moreover, the Court noted that compliance with commercial treaties should always be compatible with the American Convention on Human Rights, "which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among states."[113]

The Court rightly observes that investment treaties typically do not prohibit expropriation or nationalization of property that is for a public purpose. This is important to recall given that the German Government has reportedly referred to the Germany-Paraguay treaty in efforts to *deter* the Paraguayan Government from expropriating German-owned lands.[114] However, scrutiny of Article 4 of the Germany-Paraguay treaty clearly indicates that expropriations are permitted provided that they are accompanied by compensation for the affected property-owner.[115]

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[109] *Non-Party Submission, Glamis Gold Ltd. v. United States of America*, Submission of the Quechan Indian Nation, p. 9.

[110] Op. cit. pp. 9-10.

[111] Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006

[112] Sawhoyamaxa Judgment, par. 135.

[113] *Ibid.*, par. 140.

[114] See the report of the FIAN, et al., *Globalizing Economic and Social Rights by strengthening extraterritorial state obligations*, February 2005, available on-line at www.eed.de/fix/files/doc/eed_fian_bfdw_case_studies_human_rights_05_eng.pdf.

[115] A number of Paraguay's investment treaties can be viewed on UNCTAD's website (www.unctad.org/iia).

While clearly allowing expropriation of foreign-owned land, the compensation standards provided under these BITs may complicate the efforts of developing country governments that are contemplating land redistribution policies. As the next section makes clear, there are a number of live legal cases where foreign investors are objecting to land reform activities. The factual circumstances of such disputes can differ widely—with some governments appearing to follow carefully-prescribed legal procedures and safeguards, while others appear to make capricious land-grabs. One major recurring issue in these disputes will be the actual amount or level of compensation owing for breach of BITs in cases of land reform.

Land reform and compensation

Generally speaking, BITs do not prohibit governments from expropriating foreign-owned land or resources. However, BITs typically mandate that compensation must be paid in such circumstances, and while the terms differ from treaty to treaty, this compensation is often expressly pegged to the fair market-value of the assets in question.[116] Thus, there may be important divergences between domestic law and BITs on the question of compensation. For example, the domestic laws of some countries may permit less-than-market-value-level compensation to be paid to affected property-owners in cases where expropriations have been undertaken for particularly important reasons. In South Africa, for instance, less than market value might be owing in case of expropriations taken for purposes of racial redress or land reform.[117]

Conversely, BITs may be construed as providing for market-value levels of compensation, leading to a potential obligation for the expropriating state to pay higher levels of compensation and perhaps complicating or hindering land reform or other redistributionist initiatives. In one oft-cited ruling not arising out of a BIT but which is often cited in BIT arbitration discussions,

"…there may be a divergence between the amounts that arbitration tribunals will pay to foreign investors for land expropriations and what human rights courts might award."

an arbitral tribunal held that the Government of Costa Rica was obliged to pay market-value compensation for the expropriation of a tract of land which was designated for use as a nature preserve.[118] While the tribunal conceded that there was disagreement as to what standard of compensation was owed as a matter of international law—full, adequate, appropriate, fair, or reasonable—it added that, in the case before it, the members of the tribunal and the two parties had agreed that the standard was one which demanded "fair market value".[119]

It is important however, to stress that arbitration tribunals have yet to grapple in an exhaustive way with the particular level of compensation owing in cases where land reform initiatives are alleged to violate investment treaty provisions. Even though investment treaties tend to spell out compensation standards, these are still subject to interpretation and debate. This is particularly the case where the treaties are ambiguous (providing for "just", "fair" or "appropriate" compensation rather than full market-value compensation). For example, one arbitrator, Prof. Ian Brownlie, in an arbitration not related to land reform but involving a broadcasting enterprise, has ruled that a treaty provision that guarantees "just compensation" further defined in the relevant treaty as reflecting the "genuine value" of investments, does not require that full market-value compensation be paid.[120] Brownlie's decision also cited the work of Professor Oscar Schacter to the effect that "Large-scale expropriation such as general land reform often raises questions as to ability of the state to pay full compensation. In such examples, a good case can be made that 'less than full value would be just compensation' when the state would otherwise have an 'overwhelming financial burden'."[121]

[116] For some examples, see the South Africa-Korea BIT which speaks of "market value"; or the Germany-Namibia BIT which speaks of the value of an investment immediately prior to the expropriation; or the UK-Paraguay BIT which speaks of the market value immediately before the expropriation took place.

[117] See discussion in Luke Eric Peterson, "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights," South African Institute for International Affairs briefing paper, published in Frederich Ebert Stiftung Dialogue on Globalization Occasional Papers series, no. 26, November 2006, pp. 25-27.

[118] *CDSE v. Costa Rica*, Award of February 17, 2000, ICSID Case no. ARB/96/1, par. 69-71 available on-line at ita.law.uvic.ca.

[119] *Ibid.*

[120] CME v. Czech Republic, Separate Opinion On the Issues at the Quantum Phase, Ian Brownlie, March 14, 2003, available on-line at ita.law.uvic.ca.

[121] *Ibid.*, par. 31.

Others have argued that BIT compensation standards should be interpreted flexibly as is the case under regional human rights conventions so as to accommodate certain overriding social interests or purposes.[122] Indeed, commentators sometimes point to the practice of the European Court of Human Rights, which has stated that "Article 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value."[123] Indeed, in an effort to explicitly yoke the BIT compensation standard to that used in regional human rights law systems, the Government of Norway recently developed a draft model investment treaty which would adopt the approach used in the European Human Rights Convention with respect to questions of expropriation.[124] This human rights approach might lead to *less* than market-value compensation being awarded in some investment treaty arbitrations, depending upon the circumstances motivating a given expropriation, for example where a government is pursuing bona fide land reform measures in favour of indigenous people.

It should be stressed, however, that such positions are contested ones—with investors and governments likely to differ sharply in the absence of crystal-clear treaty provisions. What is clear, is that these questions are not hypothetical; as the next section makes clear, a number of land-reform measures are currently being challenged by investors as potential breaches of investment treaty obligations.

Land reform adjudications where investment treaty obligations are raised

While arbitration tribunals have yet to deal squarely with the question of whether full market-value compensation should be ordered in cases where land reform measures are governed by investment treaties, they will inevitably be asked to do so. Indeed, land expropriation claims have been threatened or initiated against a handful of developing countries already by European-based investors. Other cases may have been launched, or even fully adjudicated, without any publicity. Of the known cases, a UK investor brought a suit against the Venezuelan Government in 2005 after a state agency authorized the seizure of a number of UK-owned landholdings and designated these lands for redistribution to landless Venezuelans.[125] Elsewhere, the Government of Namibia has faced the threat of similar lawsuits. Following the proposed expropriation of German-owned agricultural properties as part of Namibia's land redistribution program, German citizens threatened Namibia with lawsuits under the Germany-Namibia bilateral investment treaty.[126] Some have turned, in the first instance, to Namibia's courts. The Namibian High Court, in a March 2008 ruling involving three German nationals, affirmed that the relevant Minister in charge of land reform is obliged to act in accordance with the Germany-Namibia Bilateral Investment Treaty.[127] However, the court did not explore in further detail the demands of the treaty; rather the court simply indicated that the Ministry had failed to consider the treaty, as well as a number of other domestic legal requirements. Without commenting further on the BIT, the Court held that the Government's move to expropriate the German nationals was in violation of Namibia's own laws and constitution.

The South African Government has also faced a BIT lawsuit which was not publicized for several years, but about which some information has since come to light in the autumn of 2008.[128] A Swiss investor successfully sued the South African government for failing to provide his South African land-holdings with the level of police protection mandated by the South Africa-Switzerland

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[122] See Prof. Zachary Douglas's remarks at a conference on Investment Law Arbitration and Human Rights, March 21, 2007, at American University, webcast available on-line at www.wcl.american.edu/arbitration/webcasts.cfm.

[123] *Holy Monastaries v. Greece*, Judgment of December 9, 1994, Series A, No. 301-A (1995) 20 EHRR 1m as quoted in Clare Ovey and Robin C.A. White, *Jacobs & White: The European Convention on Human Rights*, Fourth Edition, Oxford University Press, 2006, p. 363.

[124] An English language commentary on the draft model investment treaty, wherein the endorsement of the ECHR approach, was available on-line as of June 10, 2008, at www.regjeringen.no/nb/dep/nhd/dok/Horinger.

[125] "UK farm group settles BIT claim over Venezuelan land seizures and invasions," *Investment Treaty News*, April 11, 2006, available on-line at www.iisd.org.

[126] "Absentee landlords to challenge Namibian Government over Expropriation," BBC Monitoring International Reports, Dec. 2, 2005; "Namibian President to make landmark visit to Germany," Agence France Presse, By Brigitte Weidlich, Nov. 26, 2005; "German Farmers Challenge Namibia Land Reform, International Arbitration Considered," Investment Treaty News, May 31, 2006, available on-line at www.iisd.org.

[127] *Gunther Kessl, et al. v. Ministry of Lands and Resettlement*, et al., Judgment of March 6, 2008, par. 106-07.

[128] "Swiss investor prevailed in 2003 in confidential BIT arbitration over South Africa land dispute", *Investment Arbitration Reporter*, Oct. 22, 2008, available on-line at www.iareporter.com/Archive/IAR-10-22-08.pdf.

bilateral investment treaty. The investor also sought to sue South Africa for expropriation (and full compensation) as a result of his property having been claimed by several native South Africans as part of an ongoing domestic land-claims process. On the facts of the case, the arbitral tribunal rejected the Swiss investor's expropriation claim because the South African land claims process was still ongoing. The tribunal therefore deemed any expropriation claim by the Swiss investor to be premature. Nevertheless, it is possible that other foreign investors will follow suit and seek to invoke their BIT protections in the face of any moves by the South African Government to expropriate land-holdings.

Of course, more abusive efforts by governments to redistribute land will also come in for challenge under investment treaties. A group of Dutch farmers filed a BIT claim against Zimbabwe in 2003, following the forcible and violent seizure of foreign-owned farms in Zimbabwe. The Dutch claimants allege that the Government, "by legislative acts and extra-legal means implemented a program to acquire land and improvements in Zimbabwe owned by Claimants and others for redistribution to certain of its citizens."[129]

Ultimately, the human rights community needs to recognize that investment treaty arbitration represents the primary international channel through which land reform is likely to be challenged in developing (and even developed) countries by foreign investors. These treaties open a path for foreign investors to challenge land reform and other redistributionist policy initiatives, including those designed to benefit indigenous communities, and to do so outside of the domestic courts and constitutional systems of the countries where the reforms are undertaken.

Stepping back from the arbitration field and examining how such questions are handled in other international legal forums, it is worth stressing that there may be a divergence between the amounts that arbitration tribunals will pay to foreign investors for land expropriations and what human rights courts might award. Such a divergence serves to highlight the need to consider more squarely how different international adjudicative bodies are handling similar-type disputes.

It will be imperative for human rights actors to monitor developments in this emerging area of international law. It is not sufficient simply to track human rights processes and to push for declarations and norms which promote domestic policies of land and resource redistribution, without also taking note of key developments in the field of foreign investment protection which may harbour significant implications for land reform and redistributionist policy initiatives. Indeed, it may be necessary for investment treaties to offer much clearer guidance as to how the investor protections are to be squared with indigenous rights, land reform initiatives, and the level of compensation to be paid to affected foreign landowners.

Policies targeting disadvantaged persons or groups

Often governments may introduce policy measures or preferences which are designed to boost the prospects of certain marginalized or disadvantaged persons or groups whether they be indigenous persons, ethnic minorities (or majorities), women, or others. On the face of it, such policies could come into friction with investment treaty protections accorded to foreign investors, particularly where certain duties or obligations are to be borne by foreign investors or foreign-owned companies, or where certain benefits or preferences are denied to foreign investors. Nonetheless, it is unusual for governments to make reservations or exceptions to investment treaty protections in this context. On rare occasions, some treaties include exceptions to ensure that positive discrimination measures taken in favor of designated groups cannot be challenged by foreign investors as a violation of the investment treaty guarantees of non-discrimination (or national treatment).[130]

In other words, where special programs or policies are put in place to provide benefits or preferences to a targeted group or minority, a foreign investor would not be able to invoke his own entitlement to "national treatment" in an effort to obtain the same preferences or benefits meted out to these groups. However, such exception clauses do not appear in all treaties. Moreover, where they are seen, they may only apply

[129] *Bernadus Henricus Funnekotter and others v. Republic of Zimbabwe*, Request for Arbitration submitted to International Centre for Settlement of Investment Disputes, May 30, 2003, p.14 (on file with author).

[130] Compare, for example, the treaty practice of Canada or the United States with that of the United Kingdom or the Netherlands. By and large, the former countries include exceptions which limit the obligation to provide favourable treatment to foreigners in relation to special programs or policies targeted at disadvantaged persons or groups.

to *certain provisions* of investment treaties, rather than the entire treaty. So, for instance, the exception may apply to the national treatment clause of a treaty, but not to other provisions which promise investors "fair and equitable treatment" or other protections.

It is exceedingly rare for a government to insert a general exception into an investment agreement so that *none* of the investment protection provisions may be invoked in an effort to challenge special preferences or policies for historically disadvantaged groups. Notably, the New Zealand Government in an agreement with Thailand includes such a sweeping general exception, thus making clear that none of the investor protections will override the government's capacity to accord special or more favorable treatment to the indigenous Maori people.[131]

Such matters are not of mere hypothetical interest. For years, controversy has swirled around the Black Economic Empowerment (BEE) policies being developed by the South African Government in an effort to ameliorate the lingering effects of the Apartheid system.[132] BEE policies include a range of measures targeted at Historically Disadvantaged South Africans (HDSAs), including employment equity schemes, preferential access to government contracts and licenses, and divestment policies which oblige businesses to sell shareholdings to HDSA partners. While well-intended, the policies have attracted criticism both from those who say that the policies impose too great a burden on business, as well as those who complain that the BEE policies benefit only a layer of well-connected wealthier HDSAs.[133] In response to such criticisms, the South African Government has adapted its BEE policies over time—both as an effort to water down proposals for larger scale share divestments, as well as to ensure that the benefits of such policies are "broad-based" and beneficial for poorer, disadvantaged persons.

Some foreign businesses have responded warily to BEE, with the policies widely viewed as having contributed to the deadlock of major trade negotiations between South Africa and the United States. Meanwhile, some countries with whom South Africa has concluded economic agreements have expressed the view that the imposition of BEE measures on foreign enterprises may contravene South Africa's international economic commitments.[134]

Recently, a group of European investors in the South African mining sector took the unprecedented move of filing a legal claim against South Africa, alleging that various BEE requirements violate the terms of investment protection treaties with Italy and Luxembourg. The investors own several South African mining companies, and held various mining rights which were subject to a mandatory "conversion" process, whereby all South African mineral resources are to be brought under state control and re-licensed to miners for fixed periods of time. As part of this conversion process, companies are assessed on their progress towards social, labour, and development objectives, including the hiring of HDSA managers and provision of special programs and benefits for HDSA workers. In the view of the investors, these BEE-inspired policies impose significant costs on company operations and amount to an "expropriation" of the companies' pre-existing mining rights, as well as "unfair" and "inequitable" treatment, contrary to the terms of South Africa's investment protection treaties.

In their request for arbitration filed in 2006—which was still confidential at the time of this writing—the investors allege that they may suffer upwards of $350 million (US) in damages, depending upon the final effects of the BEE mandates introduced by the South African Government. In 2007, an arbitration panel was convened to hear the dispute, however progress to date has been slow; written arguments in the case will play out over 2008 and 2009, with hearings expected to be held later in 2009.

At this stage, any legal arguments tabled in the case remain confidential. However, already, it is clear that human rights policies are implicated in the dispute. A central question for the arbitrators will be the extent to which investment treaty obligations, including those related to expropriation and fair and equitable treatment, will yield to human rights policy objectives

[131] See Article 15.8 of the New Zealand-Thailand Closer Economic Partnership Agreement of 2005, available on-line at www.mfat.govt.nz/Trade-and-Economic-Relations.

[132] *The Economist*, "South African Mining: the Diggers are Restless," June 22-28, 2002

[133] *Time Magazine*, Welcome to the Club, May 29, 2005, available on-line at www.time.com/time/europe/html/050606/africa/story.html.

[134] Luke Eric Peterson, South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights, Frederich Ebert Stiftung Occasional Papers Series, no. 26, November 2006, available on-line at library.fes.de/pdf-files/iez/global/04137.pdf.

or be interpreted in light of those latter objectives. Here it should be noted that the specific treaties in question, with Italy and Belgium-Luxembourg, are silent as to wider human rights or social goals, and contain no express guidance for arbitrators seeking to determine if South Africa's BEE policies are in conformity with the treaty protections accorded to foreign investors.[135] In fact, the treaties with Italy and Belgium-Luxembourg stand in stark contrast with the South African Constitution which sets forth a long list of overarching goals and objectives, including to heal divisions of the past and to promote democratic values, social justice and fundamental human rights. Thus, much is in the hands of the parties to argue how the treaties ought to be interpreted—whether in a vacuum, or in light of the wider social context, and/or national and international laws on human rights—and for the arbitrators to ultimately pass judgment on such arguments.

Some have argued that the arbitrators should read these particular investment treaties narrowly, in light of relevant international law related to investment but not in light of broader human rights obligations which South Africa may have.[136] On this view, only "that part of international law that relates to international investments as well as, in limited cases, rules of international law that are closely connected to the investment/activity forming the subject of the dispute" would be relevant to the interpretation of the investment treaty's norms.[137] The South African Government and some human rights groups might be expected to raise human rights arguments to counter this approach, arguing for a much broader interpretation of the investment treaty provisions in light of wider human rights concerns.

The South Africa arbitration has been brewing for years and unless settled will likely provide a testing ground for the relationship between BIT obligations and human rights obligations of the state. However, the major difficulty for those wishing to monitor or seeking to influence the handling of this particular dispute is that there is no guarantee (at least at the time of this writing) that the process will be open to public scrutiny. The arguments and the oral hearings themselves are playing out behind closed doors in sharp contrast with typical court proceedings. Indeed, even where NGOs might intervene in the case, this may not succeed in bringing greater transparency to the actual workings and resolution of the dispute. As more and more investor-state lawsuits are seen to touch upon human rights issues, the question of transparency comes increasingly to the fore.

Issues of transparency and the right to receive information

Even where observers are convinced that important human rights issues may be implicated in the international legal system which protects foreign direct investment, it is not always straightforward for such interested parties to monitor—much less have a stake or influence in—this system. The procedures for resolving investment treaty disputes do not provide for the same levels of transparency seen in other areas of international law, particularly those in the human rights system.

Even dedicated investigation and reporting will only bring a certain degree of information to light. Some arbitrations remain confidential because the parties wish to keep it this way, or because they are forbidden from speaking publicly about the cases. There are two factors which accommodate this confidentiality. First, the treaties themselves rarely stipulate that investor-state arbitrations be open to public scrutiny. Although Canada and the United States have embraced a move towards openness in their recent investment treaties, many other governments have not followed suit. Thus, it often falls to the given procedural rules that govern a given dispute—for example, the World Bank's ICSID rules or the United Nation's ad-hoc UNCITRAL rules —to stipulate how open the proceedings shall be. To a considerable degree, these procedural rules have not been designed with transparency or openness in mind. Indeed, in the case of the UNCITRAL rules, and the rules of certain Chambers of Commerce, these rules were tailored to private commercial arbitration between two parties, where confidentiality has long been a major consideration. Although the ICSID system offers the greatest level of

[135] Some South African investment treaties do contain (slender) human rights exceptions—preventing foreign investors from claiming that they have been treated less favourably than HDSA persons.

[136] "South Africa's bilateral investment treaties, Black Economic Empowerment and mining: a fragmented meeting?", Matthew Coleman and Kevin Williams, *Business Law International*, vol. 9, no. 1, pp. 56-94.

[137] *Ibid.*, par. 11.19.

transparency thanks to a public docket listing all cases being arbitrated at the Centre, ICSID proceedings are themselves closed to the public unless both parties desire openness. What's more, a move several years ago to bring greater transparency to ICSID proceedings was watered down in the face of objections from many ICSID stakeholders.

To the extent that governments continue to negotiate investment treaties which draw upon procedural rules that provide for scant levels of transparency, the resolution of investor-state disputes will continue to take place (to varying degrees) in the shadows.

Beyond any changes to future investment treaties or arbitration rules in favor of more transparency, there is also the potential for concerned citizens to challenge the confidentiality of arbitration proceedings through access to information laws or human rights mechanisms. For example, Margarete Stevens, a former Acting General Counsel at the ICSID, observed at a 2007 conference that a recent ruling of the Inter-American Court of Human Rights might be a harbinger of future efforts to force governments to reveal more about any foreign investor lawsuits which they may be facing.[138] Stevens noted that the Republic of Chile was held in violation of Article 13 of the American Convention on Human Rights by virtue of its failure to provide the Chilean public with fuller information about a major forestry development project in that country, including contracts concluded with foreign investors. Indeed, in that case, *Claude-Reyes et al. v. Chile*, the Inter-American Court affirmed that the right to freedom of information encompasses a right to seek and receive information.[139] Moreover, the Court noted the importance of information-disclosure to the functioning of democracy:

> In this regard, the State's action should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately.[140]

"…claims might be presented to human rights fora, including regional human rights courts, in an effort to construe the lack of transparency surrounding investor-state arbitration as a violation of a state's human rights obligations."

In holding that Chile was not justified in withholding information from members of the public, the Court also noted that this failure to disclose information hindered the public's ability to exert democratic supervision or "control" over the actions of the state.

As Margarete Stevens has suggested, it is easy to envision alleged human rights violations which might be raised by media organizations, non-governmental organizations, or concerned citizens, in relation to the non-disclosure by a given government of relevant information about foreign investor arbitrations mounted against that government. This might take the form of requests made of governments for disclosure of any and all arbitrations (including those whose existence is unknown to the public). Indeed, in the North American context there have been some uses of access-to-information laws in order to access information about investor-state lawsuits whose existence was known, but whose details were confidential. In the *Loewen v. United States* case, a NAFTA tribunal acknowledged that governments may have legal obligations to release documents related to arbitral proceedings. This acknowledgement came after the US Government approached the tribunal following a Freedom-of-Information request filed by US non-governmental organizations.[141] Additionally, claims might be presented to human rights fora, including regional human rights courts, in an effort to construe the lack of transparency surrounding investor-state arbitration as a violation of a state's human rights obligations.

At the same time, as interested parties make demands of governments—including through access to information laws or human rights complaint channels—they may also continue to petition arbitrators directly for greater access to information about a pending case. These requests may be couched in express human rights terms, thus inviting arbitrators themselves to rule on the meaning and relevance of such human rights norms.

[138] Remarks at a conference on Investment Law Arbitration and Human Rights, March 21, 2007, at American University, webcast available on-line at www.wcl.american.edu/arbitration/webcasts.cfm.

[139] *Claude-Reyes, et al. v. Chile*, Judgment of September 19, 2006, Inter-American Court of Human Rights; the NGO CELS, which contributed a human rights impact assessment to an earlier phase of the Rights & Democracy project on Investing in Human Rights submitted an *amicus curiae* brief in the *Claude-Reyes* case.

[140] Par. 86.

[141] For more information on this episode see OECD Investment Committee, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, pp 6-7, available on-line at www.oecd.org/dataoecd/25/3/34786913.pdf.

Chapter 3: Reflections and recommendations

A series of conclusions can be drawn based on the preceding scenarios where human rights issues are arising in investment treaty arbitrations. First, to the extent that human rights law issues have been referenced *to date* in arbitration awards and rulings, this has generally been in relation to *investor rights* to property, due process, etc. Thus, in a handful of cases, arbitrators have drawn analogies to human rights jurisprudence in a bid to strengthen their own reading of certain investor protections, such as those on property or due process.

Second, notwithstanding this practice, there are emerging scenarios where the human rights of non-parties (someone other than the foreign investor) are implicated in investment treaty disputes. These scenarios include those where the rights of citizens to assemble, express themselves and protest government or investor decisions; where government policies have been designed to accord preferences to certain historically disadvantaged persons or groups; where indigenous rights or claims come into friction with the rights of foreign investors; and where government regulation of the water and sanitation industry is professed to be in furtherance of human rights obligations such as the right to health, right to food, or right to water.

Third, it is also clear that in certain of these latter scenarios, governments and sometimes non-governmental organizations, are tabling legal arguments grounded in human rights law. This is most evident in the Aguas Argentinas arbitration. Given the confidentiality surrounding the pleadings in many cases there may be other instances which are not currently a matter of public record.

Fourth, confronted with these human rights law obligations, it now falls to arbitration tribunals to determine to what extent they are relevant to the resolution of a given dispute. For example, arbitrators will consider whether human rights obligations may be raised by a state as a defense or justification when the state is accused of breaching foreign investment obligations. While arbitrators do not have jurisdiction to rule that a state has breached its human rights obligations, arbitrators may express opinions as to what those human rights obligations require and demand of governments, and whether they excuse or mitigate actions affecting foreign investors.

Fifth, and finally, arbitrators have little guidance, apart from general rules of treaty interpretation, when it comes to reading and grappling with the human rights obligations of governments. Likewise, they have little explicit guidance as to how human rights obligations are to be reconciled with investment treaty obligations in concrete circumstances.

In view of these conclusions, human rights advocates should now consider taking advantage of various openings, some of which are sketched out in this chapter.

Monitoring

There are a growing number of investment treaty arbitrations where human rights issues are implicated. These cases raise important and largely unexplored questions as to how human rights law should be squared with investment treaty obligations.

A first, and elementary task is to monitor more effectively developments in this decentralized and opaque area of international law. There is a need for ongoing and dedicated

tracking of lawsuits arising under investment treaties, so as to highlight those which raise human rights issues.[142] There are a large number of investor-state arbitrations whose existence is disclosed to the public—for example by disclosure on the ICSID website - and these cases should be investigated and monitored by researchers, civil society organizations, and journalists on a systematic and ongoing basis.

Currently, there are limits on the capacity of interested observers to monitor and analyze developments in the investment law regime. Thanks to the arbitration rules utilized in investment treaty cases, an unknown number of these cases may be launched without being disclosed publicly. Governments can bring greater transparency to the field by negotiating individual treaties which mandate open dispute resolution. However, with hundreds of existing treaties already in force, there have been broad-brush proposals to revise the procedural rules of arbitration so that any investor-state disputes using those rules will play out in public.[143]

Study and analysis of how similar issues are resolved in the two regimes

There is a need to study and consider how the foreign investment protection and human rights systems offer overlapping forms of protection to certain actors. For example, both investment and human rights treaties provide protections in case of expropriation of property; yet, as noted earlier, human rights adjudicators and investment arbitration tribunals may take differing views as to when a particular government action will trigger a requirement to compensate the affected property-owner and what level of compensation (full market value or some lesser amount) should be awarded.

Another issue which may be handled differently in the two systems is the question of awarding compensation for *moral damages* (rather than financial losses). It is common in human right adjudication to award some form of moral damages to victims of human rights violations (eg. for pain and suffering, harm to dignity, fear, mental distress, etc.).[144] Under the case-law of the European Court of Human Rights, the overwhelming number of cases where damages are awarded, involve awards of moral damages, rather than for financial losses.[145] Notably, that practice has started to be embraced in the investment treaty arbitration context. In early 2008, arbitrators awarded *moral damages* to a company whose executives suffered the "stress and anxiety of being harassed, threatened and detained" and intimidated by state agents and armed individuals.[146] At a glance, the amount of these damages $1 million (US)—seems to far exceed those awarded in most human rights cases, even for the most egregious of abuses including torture, disappearances, extra-judicial killings. Thus, it should be a matter of priority for scholars and policymakers to assess how these two international law regimes are handling similar types of issues including the award of moral damages.

To date, many in the human rights community have failed to grasp the extent to which individuals and/or corporations can actively choose whether to file similar-looking claims under regional human rights mechanisms (such as the Inter-American Court of Human Rights) or under the arbitration mechanisms of bilateral investment treaties. For governments, and persons living under their jurisdiction, the rulings of these different international adjudicative mechanisms could lead to widely divergent legal, policy and financial consequences.

Study and analysis of how human rights law is interpreted and applied by investment arbitrators

It is clear that foreign investor interests can come into friction with the human rights of those living in the host country. As profiled earlier, investor-state arbitrations have arisen which may have implications for the right to water or a state's

[142] The ICSID website provides information on arbitrations pending at that particular institution (www.worldbank.org/icsid). Other means of tracking developments more generally are the Investment Arbitration Reporter (www.iareporter.com) and the *American Lawyer Magazine's* biannual survey of large (in financial terms) investment arbitrations.

[143] Recently, Prof. John Ruggie, the UN Special Representative to the Secretary General called upon the state-parties to the UNCITRAL to consider changes to its procedural rules which would ensure that investor-state arbitrations touching upon "human rights and other state responsibilities" are played out in a more transparent fashion. Proposed changes might encompass the disclosure of all such arbitrations, as well as open access to hearings and documents. However, it remains to be seen whether—and to what extent—governments will implement such proposals during their ongoing review of the UNCITRAL arbitration rules. See Statement of John Ruggie to the UNCITRAL Working Group II, February 4-8, 2008, available on-line at www.reports-and-materials.org/Ruggie-statement-UNCITRAL-Feb-2008.pdf.

[144] Dinah Shelton, *Remedies in International Human Rights Law*, Second Edition, Oxford University Press, 2005, pp. 291-93.

[145] Shelton, *op.cit.*, p. 296.

[146] *Desert Line Properties LLC v. Yemen*, ICSID Case no. ARB/05/17, Award of February 6, 2008.

use of affirmative action policies targeting disadvantaged persons, or a state's need to balance investor security with the human rights of protestors and critics of a particular FDI project. In such cases, arbitrators of investment treaty claims are being asked by governments (or outside parties) to consider the legal relevance of the host governments' human rights obligations and their potential to mitigate or justify certain actions taken against foreign investors.

Because most investment treaties are silent as to human rights law considerations, governments may choose, in future, to introduce explicit human rights language into treaties.[147] This would make explicit the requirement of arbitrators to consider the relevance of human rights law to the matters in dispute. However, this leads inevitably to broader questions as to the capacity of arbitrators to handle the human rights law dimensions of such disputes. As Anne van Aaken has remarked, the power of this interpretative role is not to be underestimated particularly in a context where dozens of investor-state arbitrations are initiated each year under investment treaties. Thus, van Aaken observes, "the question who adjudicates becomes important."[148] Indeed, there is something of a Catch-22 dilemma for those who advocate for arbitrators to take account of the wider body of international law, including human rights law. In the event that arbitrators comply, they will need to draw conclusions as to how the human rights obligations of governments should be interpreted and understood.[149] On rare occasions, arbitrators may have clear human rights law expertise. For example, some individuals who sit as investment arbitrators have expertise or experience in the human rights law field.[150] At other times, however, arbitrators may have little in the way of specific human rights expertise.

Various strategies might be undertaken in an effort to ameliorate these gaps. For instance, arbitrators with human rights law expertise could be chosen. However, in the absence of binding requirements, it falls to each side to choose its own arbitrator. Alternatively, arbitrators might consult outside experts or specialized agencies, including human rights treaty bodies, to brief them on any human rights issues implicated in a case. However, in the absence of mandates to this effect, much discretion is given to arbitrators to determine to what extent human rights obligations will be examined and on what basis. Notably, arbitrators in an investment treaty dispute recently declined a request by a government to seek an opinion from the European Court of Justice and/or the European Commission on questions of EU Law.[151] Governments should study whether there is a need for investment treaties to include mandatory referral procedures providing for consultation with expert agencies or human rights adjudicative mechanisms on human rights law issues.

The international regime for the protection of foreign investment is a robust and far-reaching system of international law, with several thousand treaties giving rise to concrete disputes that may have far-reaching consequences. The arbitrators charged with resolving such disputes are confronting human rights issues in a number of instances, and it falls to those concerned with the promotion and protection of human rights to monitor and study the broader implications of this emerging trend.

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[147] Notably, the UN Special Representative John Ruggie has recently called for greater coherence on the part of government agencies in the drafting of investment (and other economic) treaties, observing that trade and economic departments have too often worked at "cross purposes with the States' human rights obligations and the agencies charged with implementing them." See Report of April 7, 2008, par. 33. Indeed, briefings prepared for the UN Special Representative have called for the development of investment treaty language related to human rights, see Mann, 2008, p. 39.

[148] Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection," University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper no. 2008-1, p. 33.

[149] While clearly lacking the jurisdiction to hold governments in breach of human rights obligation, tribunals may need to draw their own assessments as to the demands of such human rights obligations as part of their effort to interpret investment treaty obligations. For example, in the case of the right to water—which has been subjected to minimal interpretation by international courts or tribunals—nvestment arbitrators could find themselves very much in the vanguard of analyzing that evolving human right.

[150] Judge Pedro Nikken, a former member of the Inter-American Court of Human Rights, presides as a member of the arbitral tribunal in the *Aguas Argentinas* arbitration. Elsewhere, Judge Thomas Burgenthal, a former President of the same Court, and Prof Lucius Caflisch, a former member of the same court, have presided in some investment treaty arbitrations.

[151] Although investment treaty texts do not provide for such referrals, governments have, on occasion, requested that arbitrators seek the input of other agencies or tribunals. For example, in the *Eastern Sugar v. Czech Republic* arbitration pursuant to the Netherlands-Czech Republic bilateral investment treaty, the Czech Republic had urged arbitrators to refer the matter to the European Court of Justice and/or the European Commission in order to seek an opinion on certain questions, including whether the relevant treaty may have been implicitly terminated when the Czech Republic joined the European Union. Arbitrators were not bound to accede to this request, and did not do so in the Eastern Sugar case. See *Eastern Sugar B.V. v. Czech Republic*, Partial Award of March 27, 2007, available on-line at http://ita.law.uvic.ca/documents/EasternSugar.pdf.