

BITS AND PIECES: SOCIAL AND ENVIRONMENTAL PROTECTION IN THE REGULATION OF FOREIGN INVESTMENT

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I. INTRODUCTION

Foreign investment is developing a social conscience. There are three developments that herald this movement. The first is the expanding body of case law arising from arbitral tribunals, the jurisdiction of which is based on

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Chapter 11 of the North American Free Trade Agreement (“NAFTA”)¹ or an arbitration clause in a bilateral investment treaty (“BIT”), and which is coming to terms with new perceptions about the multilateral regulation of foreign direct investment (“FDI”). While investment instruments are traditionally geared towards the protection of investors and investment, many of them now contain a *quid pro quo*, calling for standards of corporate social responsibility.² Much of this thinking has arisen in the context of recent arbitration, which is predicated upon claims arising out of the breach of property rights or investor standards, but is increasingly challenged by the right of host States to regulate in the fields of social and cultural policy or environmental protection. It has led to the appearance of a new generation of “model” BITs spearheaded by the governments of the United States and Canada, which seek to regulate these competing interests through the negotiation of social and environmental clauses in their treaty-making practice.

A second related development is the introduction of broader social and environmental justice issues by civil society organizations (“CSOs”) before international arbitral tribunals by means of *amicus curiae* briefs. While it is still at the discretion of an arbitral tribunal to determine whether it will entertain such briefs, there is evidence of their increased use in practice. This trend is set to expand in international investment arbitration. The 2003 Statement of the Free Trade Commission on Non-Disputing Party Participation under NAFTA³ and the amendment in 2006 to the World Bank’s International Center for the Settlement of Investment Disputes (“ICSID”)⁴ Rules on Arbitration Proceedings⁵ open the way for CSOs to make submissions to arbitral tribunals on a range of social and societal issues. These new rules on greater transparency and participation by non-parties to an investment dispute are finding their way into several model BITs, and other governments may in the future feel compelled to include similar clauses in their investment treaties.

A third development, which is slowly gaining ground, is the introduction of a more tenable link between business and human rights into investment treaty instruments. This development has come about as a result of the

1. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

2. Peter Muchlinski, *Policy Issues*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 37 (Peter Muchlinski, et. al. eds., 2008).

3. See generally NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-disputing Party Participation, Oct. 7, 2003, available at <http://www.ustr.gov> [hereinafter NAFTA FTC Statement].

4. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, as amended through Apr. 10, 2006 [hereinafter ICSID].

5. ICSID, *ICSID Convention, Regulations and Rules*, 99, April 2006, <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.js> [hereinafter ICSID Arbitration Rules].

work of John Ruggie, the Special Representative of the UN Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises,⁶ who is seeking to define the relationship of corporations to human rights. There have been earlier attempts to hold transnational corporations (“TNCs”) accountable for standards of minimum social and environmental protection in the jurisdictions in which they operate. This has been done mostly through voluntary, non-binding codes of conduct, such as the International Labour Organization (“ILO”) with its Tripartite Declaration of Principles on Multinationals and Social Policy,⁷ the OECD Guidelines for Multinational Enterprises,⁸ and the UN Global Compact,⁹ the latter of which advocates ten universally accepted principles in the areas of human rights, labour, environment, and anti-corruption.

A significant factor in this respect is that some model BITs aim to incorporate by reference, these ‘soft’ law norms into their treaty instruments. But to what extent, if at all, are such putative corporate social responsibility clauses enforceable, and what do they mean for international firms seeking to invest overseas? Going a step further is it possible that an instrument like the abortive U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights¹⁰ or a set of mutually agreed principles or guidelines on the relationship of corporations to fundamental human rights could resonate with treaty-making in the field of foreign investment?

Drawing upon the recent practice of claimants and respondents before international investment tribunals, I examine the extent to which BITs and other international investment agreements (“IIAs”) have (a) followed up on the substantive implications arising from those decisions in the fields of

6. See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, delivered to the Human Rights Council, UN Doc. A/HRC/11/13 (Apr. 22, 2009), (prepared by John Ruggie) (following up on his earlier report, *Protect, Respect and Remedy: a Framework for Business and Human Rights to the HRC*, A/HRC/8/5 (2008)) [hereinafter Ruggie, U.N. Framework].

7. International Labour Organisation [ILO], Tripartite Declaration of Principles on Multinationals and Social Policy, 61 ILO Official Bull. Series A No. 1 (1978) available at <http://actrav.ilo.org/actrav-english/telearn/global/ilo/guide/triparti.htm> [hereinafter ILO Tripartite Declaration] (adopted by the Governing Body of the International Labour Office at its 204th Session in Geneva).

8. Organisation for Economic Co-Operation and Development [OECD], *OECD Guidelines for Multinational Enterprises*, June 27, 2000, <http://www.oecd.org/daf/investment/guidelines> [hereinafter OECD Guidelines 2000].

9. Former UN Secretary-General Kofi Annan announced the Global Compact at the World Economic Forum at its 1999 meeting in Dais. It was formally launched on Jul. 26, 2000, available at <http://unglobalcompact.org> [hereinafter UN Global Compact].

10. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003) [hereinafter UN Norms on Responsibilities of TNCs].

social and environmental protection, and have (b) introduced procedural innovations, securing non-disputing party rights before investment arbitration tribunals. A number of questions arise. (1) Do the new generation of model BITs and other forms of IIAs potentially support or hamper competing goals and policies in the fields of social and cultural policy or environmental protection? (2) To what extent is the right of the host States to regulate in such matters given recognition comparable to that of the investor?

This Article is divided into three further sections, each of which addresses the developments mentioned in the introduction, and is followed by a final section, which contains some conclusions.

II. INVESTOR PROTECTION VERSUS SOCIAL AND ENVIRONMENTAL PROTECTION

In the past decade, there has been an explosion of BITs, and other forms of IIAs, for the promotion and protection of foreign investment. The United Nations Conference on Trade and Development (“UNCTAD”),¹¹ which actively monitors and analyzes all forms of IIAs, has estimated the number of BITs to be 2,608 as of mid-June 2008.¹² It also notes that 179 states are now a contracting party to at least one BIT, while many others, such as the United States and Germany, are party to a significant number of BITs. Both the United States and Germany, as well as Canada, China, France, Norway, and the United Kingdom, have developed a new generation of model BITs,¹³ which they are using in investor-state relations for the regulation of foreign investment globally. Some of the newer BITs reflect a growing trend on the part of governments to negotiate new agreements or to renegotiate older ones, in order to reflect concerns about social and environmental issues, including the host state’s right to regulate in these matters.¹⁴

11. The United Nations Conference on Trade and Development (UNCTAD) was established on Dec. 8, 1962, and it became an official organ of the UN General Assembly on December 30, 1964. See G.A. Res. 1785, ¶ 1, U.N. GOAR, 17th Sess., Supp. No. 17, at 4, U.N. Doc. A/5217 (Dec. 8., 1962); G.A. Res. 1995, UN GOAR, 19th Sess., Supp. No. 19, at 1, U.N. Doc. A/5818 (Dec. 30, 1964).

12. ECOSOC, *Recent Developments in International Investment Agreements (2007 – 2008)*, IIA MONITOR 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2008/1 (2008) [hereinafter UNCTAD IIA Monitor 2008].

13. For some recent model BITs of the Governments of China, France, Germany, the UK and the US respectively, see the Annexes in Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 352, 360, 368, 376, 385 (2008).

14. UNCTAD IIA Monitor 2008, *supra* note 12, at 5.

A. Trends in First and Second Generation Investment Instruments

The political will of governments during the negotiation and adoption of BITs directly affects the extent to which host state responsibilities will be balanced by corporate social responsibility provisions directed at the investor or the investment. Many existing BITs are of the first generation, concluding somewhere between 1959¹⁵ and the early 1990s. By and large they reflect the demands of the major capital-exporting states in the developed, industrialized world, which were previously situated in the Northern hemisphere. An almost exclusive emphasis on the protection of the foreign investment was served by the conclusion of BITs that provided for the substantive protection and promotion of investment.¹⁶ Basic treatment guarantees against the discriminatory, unfair, and expropriable conduct of host states.¹⁷ Notwithstanding rapid developments in the field of investment treaty-making, the majority of these early BITs are still in force and usually form the basis for the settlement of investment disputes.

A second, “newer” generation of BITs and other IIAs either contain individual investment chapters, have separate protocols on investment attached to them, or include substantive provisions on investment protection and liberalization.¹⁸ They embrace regional agreements like NAFTA,¹⁹ MERCOSUR,²⁰ or ASEAN,²¹ or sectoral investment agreements like the

15. Germany entered into the first modern bilateral investment treaty with Pakistan in 1959; see Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23 (entered into force Apr. 28, 1962).

16. Peter Muchlinski, *Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 681 (Peter Muchlinski, et al. eds., 2008) [hereinafter *Corporate Social Responsibility*].

17. Federico Ortino, *The Social Dimension of International Investment Agreements: Draft a New BIT/MIT Model?* 7 INT’L L. FORUM DU DROIT INT’L 243, 243 (2005).

18. UNCTAD, *Systemic Issues in International Investment Agreements (IIAs)*, 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/2 (2006).

19. See generally NAFTA, *supra* note 1.

20. Tratado para la constitución de un Mercado Común entre la República Argentina [MERCOSUR], la República Federativa del Brasil, la República del Paraguay y la República Oriental del Uruguay [Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay], Mar. 26, 1991, 30 I.L.M. 1041, available at http://www.sice.oas.org/agreements/Mercin_e.asp#MERCOSUR. A specific instrument on investment, known as the Colonia Protocol on the Reciprocal Promotion and Protection of Investments in Mercosur, which provides BIT-like protection to MERCOSUR member nations, was signed on Jan. 17, 1994; however, it is not yet in force. See Protocolo de Colonia para la promoción y protección recíproca de inversiones en el MERCOSUR [Colonia Protocol for the Promotion and Reciprocal Protection of Investments in MERCOSUR], MERCOSUR/CMC/DEC No. 11/93 (Jan. 17, 1994), available at <http://www.sice.oas.org.trade.mrcsrs/decisions/DEC1193.asp>. It was followed by the Buenos Aires Protocol on the Promotion and Protection of Investments made by Countries that are not Parties to the MERCOSUR, which was signed on Aug. 5, 1994; however, it is not yet in force. See Protocol on Promotion and Protection of Investments Coming from

Energy Charter Treaty.²² Many of these IIAs, including the newer BITs, build on the first generation of investment treaties but place more emphasis on the liberalization of investment, as there is a reduction of market access barriers. The principal aim of these IIAs is the promotion of economic growth among the states that are parties to them.

Some of the IIAs, like the NAFTA or the Energy Charter Treaty, offer strong investor protection standards and internationalized dispute settlement. Other IIAs, like the various ASEAN investment instruments, are pure market access instruments, which have more in common with modern trade agreements and specialised instruments on trade in services. A feature of NAFTA is its more holistic approach to trade and the regulation of foreign investment, as evidenced by the preambular text to the treaty, which seeks *inter alia* to “promote sustainable development; and protect, enhance and enforce basic workers’ rights.”²³ Two additional agreements to NAFTA, on specific social issues in the fields of environmental²⁴ and labor²⁵ cooperation, endorse this approach. The North American Agreement on Environmental Cooperation (“NAAEC”) and the North American Agreement on Labor Cooperation (“NAALC”) came into existence after intense lobbying by environmental groups and labor unions, who were worried about inadequate environmental protection and trade union representation in Mexico. In practice, civil society organizations

Non-MERCOSUR State Parties, MERCOSUR/CMC/DEC. No. 11/94 (Aug. 5, 1994); see also ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 1, 50–51 (2009).

21. Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore & the Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987, 27 I.L.M. 612; Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand & the Socialist Republic of Vietnam Establishing a Framework Agreement on the ASEAN Investment Area (AIA), Oct. 7, 1998, 39 I.L.M. 708. Both have been superseded by the Agreement Between the Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand & the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations (ASEAN), known as the Comprehensive Investment Agreement (ACIA), Feb. 26, 2009, available at <http://www.aseansec.org/22219.htm> (not yet in force).

22. The Energy Charter Treaty, Dec. 17, 1994, 33 I.L.M. 381 (1995), reprinted in THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS: A LEGAL FRAMEWORK FOR INTERNATIONAL ENERGY COOPERATION (Energy Charter Secretariat ed., 2004).

23. NAFTA, *supra* note 1, at Preamble; see also Ortino, *supra* note 17, 245–246 (concerning the importance of the preambular text of treaty instruments because they provide the relative contextual basis for interpreting substantive treaty provisions).

24. See generally North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480.

25. See generally North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1547 [hereinafter NAALC].

(“CSOs”) have considered the NAAEC and the NAALC to be “weak and ineffectual”.²⁶ Instead, there is an increased emphasis on raising social and environmental issues before investment tribunals, which is the topic that I will turn to next.

B. Towards Social and Environmental Protection Through Investment Arbitration

The most recent generation of IIAs has arisen largely as a result of two developments. One of those developments is the burgeoning case law under NAFTA Chapter 11 concerning regulatory and environmental ‘takings.’ In *Ethyl Corporation v. Canada*,²⁷ a U.S. corporation, which was the sole manufacturer in Canada of the manganese-based gasoline additive (“MMT”), challenged a Canadian statute²⁸ banning inter-provincial and international import of MMT as a pollutant and harmful to human health. The arbitral tribunal’s award on jurisdiction raised concerns as to whether regulatory measures in the field of the environment, public health, and other social issues could possibly amount to compensable takings under the relevant treaty provisions.²⁹ This would effectively interfere with the right of a host state, such as Canada, to regulate in the public interest.³⁰

A domestic challenge by four Canadian provinces,³¹ under Canada’s Agreement on Internal Trade (“AIT”),³² led the panel³³ to find the Canadian Statute to be invalid because it constituted an undue burden on Canada’s internal commerce.³⁴ Meanwhile, the Canadian Government settled the

26. Rajib N. Sanyal, *The Social Clause in Trade Treaties: Implications for International Firms*, 29 J. BUS. ETHICS 379, 381 (2001).

27. *Ethyl Corp. v. Canada*, Award on Jurisdiction, 38 I.L.M. 708, (NAFTA Ch. 11 Arb. Trib. 1998), [hereinafter *Ethyl Award on Jurisdiction*].

28. The Manganese-Based Fuel Additives Act, 1997 banned the importation or inter-provincial sale of methylcyclopentadienyl manganese tricarbonyl (MMT), an octane booster, which when added to gasoline enhances fuel efficiency. The Act left local sales of MMT in Canada undisturbed. Manganese-Based Fuel Additives Act [MBFAA], 1997 S.C., ch. 11 (Can.).

29. *Ethyl Award on Jurisdiction*, *supra* note 27.

30. See M. Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 293 (2d ed. 2004).

31. The four relevant Canadian provinces are Alberta, Québec, Nova Scotia, and Saskatchewan.

32. Agreement on Internal Trade, July 18, 1994, Can., available at <http://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/home>.

33. Agreement on International Trade, Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, (June 12, 1998), http://www.ait-aci.ca/index_en/dispute.htm (Governments of Québec, Nova Scotia, and Saskatchewan intervening as co-complainants).

34. See Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of Chapter 11* in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 173, 182–83 (David L. Markell & John H. Knox eds., 2003).

NAFTA claim by agreeing to rescind the MMT ban and pay Ethyl \$13 million, which was considered to be the reasonable cost of the dispute and Ethyl's lost profits in Canada. Canada also took the unprecedented step of issuing a statement that there was no scientific basis for banning MMT on either environmental or health grounds.

Contrary to the decision in *Ethyl*, the Arbitral Tribunal in *Methanex Corporation v. United States*³⁵ found that a California state ban on the manufacturing and sale of the gasoline additive methyl tertiary butyl ether ("MTBE"), did not amount to expropriation, nor was it compensable.³⁶ This was based on the Tribunal's findings that the measure was non-discriminatory, that it had been adopted for a public purpose, and that it was in accordance with due process. Moreover, no specific commitments had been given to the putative foreign investor, and therefore, no legitimate expectations had been created upon which the Methanex Corporation could rely.³⁷

While this form of regulatory taking,³⁸ or indirect expropriation, may potentially deprive the investor of utilizing the investment in a meaningful way, it allows the state to give effect to environmental and societal concerns while avoiding the payment of compensation. Not only is this an unattractive proposition for some investors, but it may also have a detrimental effect on some host state governments. Some states may feel that the regulation of foreign investment by BITs and other IIAs limits their national policy space by hindering their right to regulate for social or environmental purposes. At the same time those same states do not wish to put off potential foreign investors with burdensome regulation. Moreover, there are uncertainties surrounding what constitutes a regulatory taking, and which takings are non-compensable or compensable.

This is not considering the effect of various, sometimes inconsistent, investment arbitration awards. In particular, those awards that pit investor protection standards against the right of the host state to regulate in order to ensure provision of essential public services or to deal with the effects of a particular economic crisis are arguably the most sensitive. The Argentinean economic and financial crisis of 2001–2002 is particularly instructive in this respect. It has given rise to more than forty-three ICSID proceedings instituted under relevant BITs as to which Argentina is a party, which resulted in liabilities for Argentina conservatively estimated at around \$8

35. See generally 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005).

36. *Id.* pt. IV, ch. D, ¶ 6.

37. DOLZER & SCHREUER, *supra* note 13, at 110.

38. A regulatory taking in some jurisdictions is equated with takings of property that fall within the police powers of the State. See generally UNCTAD, *Taking of Property*, U.N. Doc. UNCTAD/ITE/IIT/15 (2000); see also SORNARAJAH, *supra* note 29, at 353–354.

billion, although others estimate the potential claims to be around \$80 billion.³⁹

However, it is the cases of government interference with an investment involving the operation of public services — mostly in the utilities sector such as water, sanitation, or power — that have struck a chord in some investor-host state relations. For example, in the case of *Aguas del Tunari v. Bolivia*,⁴⁰ brought under the Netherlands/Bolivia BIT, widespread popular protests followed the privatization of water services in the City of Cochabamba, including the grant of a 40-year concession to Aguas del Tunari (a subsidiary of the US corporation Bechtel) and a sharp increase in water prices. The investor abandoned its concession in 2000 and filed for compensation under ICSID. An “out of court” settlement left Bechtel being paid only nominal compensation.

Other investment disputes under BITs that have generated considerable public interest include two cases involving the Government of Argentina’s decision to abandon the pegging of the peso to the dollar and to freeze rates in the water sector. One dispute was *Suez/InterAguas v. Argentina*,⁴¹ and the second dispute was *Suez/Vivendi v. Argentina*.⁴² These disputes were brought under the Spain/Argentina and France/Argentina BITs respectively. Similarly, privatization of the water industry and subsequent cancellation of the investor’s concession to supply water to the country’s capital Dar-es-Salaam was at issue in the case of *Biwater v. Tanzania*,⁴³ brought under the UK/Tanzania BIT. As is evident from the *amicus curiae* briefs that were filed before the relevant tribunals in all three disputes, and which are discussed in the next section, the arbitral tribunals were encouraged to balance the interests of the foreign investor against the right of the host state to legitimately regulate on environmental and public health grounds.

When it comes to regulatory takings and indirect expropriation, NAFTA tribunals, as well as other arbitral tribunals constituted on the basis of BITs,⁴⁴ have begun to apply some differentiation. While each claim must be judged on its own individual merits, investment arbitration tribunals are applying certain criteria. The tribunals look at whether the investor has suffered “substantial deprivation”, the effect of the expropriatory measure,

39. William Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 *ASIAN J. INT’L L. & POL’Y* 199, 204 (2008).

40. *Aguas del Tunari, S.A. v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction, 20 *ICSID REV.* 450 (ICSID Arb. Trib. 2005) [hereinafter *Aguas del Tunari, Decision on Jurisdiction*].

41. ICSID Case No. ARB/03/17 (ICSID Arb. Trib. 2004) [hereinafter *Suez/InterAguas*].

42. ICSID Case No. ARB/03/19 (ICSID Arb. Trib. 2004) [hereinafter *Suez/Vivendi*].

43. *Biwater Gauff Ltd. v. United Rep. of Tanzania*, ICSID Case No. ARB/05/22 (ICSID Arb. Trib. 2008) [hereinafter *Biwater Gauff*].

44. For example, other cases arose out of the Argentinean economic crisis under various BITs. See *Azurix Corp. v. Argentine Rep.*, 47 *I.L.M.* 445 (ICSID Arb. Trib. 2007); *LG & E Energy Corp. v. Argentine Rep.*, 46 *I.L.M.* 36 (ICSID Arb. Trib. 2006).

the duration of the investment, whether the investor has retained “continued control” over the enterprise, and the legitimate expectations of the investor.⁴⁵

In practice, the effect of this exercise is that tribunals are striving to reach a balance between the right of the investor to derive protection from specific treaty standards, and the right of the host state to act in the public interest. As the NAFTA Tribunal in *Glamis Gold, Ltd. v. United States*⁴⁶ remarked, when considering a claim of indirect expropriation of an open-pit mine on environmental and cultural policy grounds, its award was important for the “private and public entities concerned with environmental regulation, [and] the interests of indigenous peoples.” However, the Tribunal also noted “the tension . . . between private rights in property and the need of the State to regulate the use of property.”⁴⁷

C. “Modeling” Social and Environmental Protection Clauses in Third Generation Investment Instruments

It is becoming increasingly common for states to expand on their legitimate right to regulate for social or environmental purposes by imposing restrictions in one of two ways. One is for governments to provide exceptions to the general prohibition on the imposition of performance requirements in many IIAs. For example, Article 1106 of NAFTA outlaws performance requirements but permits measures where they are “necessary” for the protection of the environment; they are for reasons of human, animal, or plant health and safety; or they are related to the conservation of living and non-living exhaustible natural resources.⁴⁸ The second condition for the application of such measures by the host state is that it must not be “arbitrary” or “unjustifiable,” nor must it “constitute a disguised restriction on international trade or investment.”⁴⁹

This wording is drawn from the preamble, or *chapeau*, to Article XX of the GATT 1994.⁵⁰ It implies that the host state’s discretion in applying such measures will be subject to a series of tests. When it comes to a measure that is “necessary” for the protection of human, animal, or plant life or health, the host state government adopting the measure will have to demonstrate that the BIT-inconsistent measure is reasonably available given

45. DOLZER & SCHREUER, *supra* note 13, 96–115.

46. *Glamis Gold, Ltd. v. United States*, Final Award (NAFTA Arb. Trib. 2009), <http://www.naftaclaims.com> [hereinafter *Glamis Gold*].

47. *Id.*

48. NAFTA, *supra* note 1, art. 1106(6).

49. *Id.*

50. General Agreement on Tariffs and Trade 1994, art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (adopting The General Agreement on Tariffs and Trade 1947, 55 U.N.T.S. 187).

the objective to be sought, i.e. reasonably necessary and proportionate to the aim.⁵¹

Similarly, a host state government adopting a measure for the conservation of living and non-living exhaustible natural resources will have to show that the BIT-inconsistent measure is “reasonably related” to the objective of the measure. It will also have to demonstrate that the investment measure is “primarily aimed” at conservation.⁵² GATT and WTO case law requires that there is “a genuine relationship of ends and means between the objective pursued and the measure at issue.”⁵³ What is evident is that any treaty interpreter, including an arbitrator, will be called upon to balance the right of the host state to invoke the exception and its obligation to respect the rights of other states and their investors/investments, under the relevant IIA.

The other means of restriction, which is common to some third generation BITs, is a so-called “non-lowering of standards” clause. Such a provision aims to suppress the temptation of host states to lower their environmental or labour standards as an incentive to attract foreign investment. It is intended to respond to the “pollution haven” hypothesis and the phenomenon of “social dumping”; whereby, the host state seeks to attract foreign investment that is environmentally damaging or fails to address violations of fundamental labour standards, and subsequently lowers its environmental or labour standards as an inducement to inward investment.⁵⁴ An example of this is found at Article 1114(2) of NAFTA,⁵⁵ which is a non-binding “best efforts” approach to a “non-lowering of standards” on environmental protection. It recognizes that it is “inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”

The U.S. Model BIT,⁵⁶ the Canadian Model FIPA,⁵⁷ as well as the draft Norwegian Model BIT,⁵⁸ reflect both trends. For example the U.S. Model

51. *Corporate Social Responsibility*, *supra* note 16, at 637, 670–71.

52. Panel Report, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.6, L/6268 (Nov. 20, 1987), GATT B.I.S.D. (35th Supp.) at 98 (1989).

53. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 145, WT/DS332/AB/R (Dec. 17, 2007).

54. *Corporate Social Responsibility*, *supra* note 16, at 671.

55. NAFTA, *supra* note 1, art. 1114(2).

56. See Office of the U.S. Trade Representative, 2004 Model Bilateral Investment Treaty (2004), <http://www.state.gov/e/eeb/ifd/c644.htm> [hereinafter U.S. Model BIT (2004)].

57. Canada’s model bilateral investment treaty is known as a Foreign Investment Promotion and Protection Agreement or FIPA. See Canada’s Foreign Investment Protection and Promotion Agreement Model, 2003, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx> [hereinafter Canadian Model FIPA (2003)].

58. Norway’s Draft Model Bilateral Investment Treaty, 2007, www.regjeringen.no/upload/.../Utkast%20til%20modellavtale2.doc [hereinafter

BIT, besides providing exceptions to the prohibition on performance requirements on environmental grounds in Article 8(3)(c),⁵⁹ also incorporates two “non-lowering of standards” provisions. The language in Article 12 on “Investment and Environment” and in Article 13 on “Investment and Labor” is more strident than in Article 1114(2) of NAFTA. Paragraph 1 of Article 12 of the U.S. Model BIT states, with respect to protection offered by domestic environmental law, that “each Party shall strive to ensure that it does not waive or otherwise derogate from, . . . such laws in a manner that weakens or reduces the protection afforded in those laws as encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”⁶⁰

There is a repetition of this text in paragraph 1 of Article 13 concerning domestic labor laws, with the additional requirement that each party must not derogate from its domestic labor laws in a manner that “weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2.”⁶¹ The “internationally recognized labor rights” are specifically listed in the second paragraph of Article 13 as:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of discrimination; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.⁶²

Norwegian Model BIT (2007)]. Following critical public comments, the Government of Norway subsequently withdrew the Norwegian Model BIT 2007 in June, 2009; see Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty*, INV. TREATY NEWS, June 8, 2009, available at <http://www.investmenttreatynews.org/cms/news/archive/2009/08/08/>; see SOUTH CENTRE, COMMENTS ON NORWAY’S DRAFT MODEL BILATERAL INVESTMENT TREATY (BIT): POTENTIALLY DIMINISHING THE DEVELOPMENT POLICY SPACE OF DEVELOPING COUNTRY PARTNERS 3 (2008), http://www.southcentre.org/index.php?option=com_content&task=view&id=942&Itemid=77 [hereinafter South Centre comment, 2008].

59. U.S. Model BIT (2004), *supra* note 56, art. VIII, ¶ 3.

60. *Id.* at art. XII, ¶ 1.

61. *Id.* at art. XIII, ¶ 1.

62. These internationally recognized labor rights have all been endorsed in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, June 18, 1998, 37 I.L.M. 1233 [hereinafter ILO Declaration 1998] (adopted by the International Labour Conference at its 86th Session in Geneva). Only the final requirements in Art. 13(2)(e) of the U.S. Model BIT, concerning minimum wages, hours of work, and occupational safety and health, fall outside of the ILO Declaration 1998. See also NAALC, *supra* note 25, art. 1(2) (referencing the Labor Principles in ¶¶ 6, 9, 10 of the NAALC’s Annex 1, which also concern the issues of minimum wage and occupational safety and health). Related provisions have been emphasized in many other modern international agreements and model BITs.

These two “non-lowering of standards” clauses in respect of environmental protection and labour standards have already been incorporated into the U.S./Uruguay BIT.⁶³

The draft Norwegian Model BIT contains a “General Exceptions” provision in Article 24,⁶⁴ which is modeled on Article XX of GATT, and similar language in the U.S. and Canadian Model BITs. It is not specifically linked to exceptions concerning the prohibition on performance requirements, such as the one found in the second paragraph of Article 8, which relates to “[a] measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements.”⁶⁵ In fact, Article 24 is horizontal in character, such that it could operate as an exception not only for performance requirements but also with respect to any obligation, including the protection of investor standards under the Model BIT. The draft Norwegian Model BIT also provides for a separate cultural exception in Article 27, which is “designed to preserve and promote linguistic and cultural diversity, cultural and audiovisual policy.”⁶⁶ However, when it comes to the “non-lowering of standards”, paragraph 1 of Article 11 of the Model BIT states that “it is inappropriate to encourage investment by relaxing domestic health, safety or environmental and core labour standards.”⁶⁷ The next sentence is modeled almost verbatim on a similar provision in Article 1114(2) of NAFTA and the model BITs of Canada⁶⁸ and the U.S., besides being strongly reminiscent of the former negotiating text of the Multilateral Agreement on Investment.⁶⁹ It stipulates that “a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.”⁷⁰

63. Treaty Between the Government of the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. XII & XIII, Nov. 4, 2005, S. TREATY DOC. NO. 109-9, 44 I.L.M. 268, 278 [hereinafter US/Uruguay BIT, 2005]; *see also Corporate Social Responsibility*, *supra* note 16, at 653 (noting “no lowering of standards’ clauses concerning labour rights in US BITs”).

64. Norwegian Model BIT (2007), *supra* note 58, art. 24.

65. *Id.* art. 8(2).

66. *Id.* art. 27.

67. *Id.* art. 11(1).

68. *See* NAFTA, *supra* note 1, art. 1114(2); *see also* U.S. Model BIT (2004), *supra* note 56, arts. XII & XIII.

69. The proposed Multilateral Agreement on Investment (“MAI”) (1995–1998) was negotiated under the auspices of the OECD but abandoned in 1998. During the negotiating phase some delegations had proposed appending the OECD Declaration and Decisions on International Investment and Multinational Enterprises. OECD Guidelines 2000, *supra* note 8. The text and commentary are present at The Multilateral Agreement on Investment, Apr. 22, 1998, OECD Doc. No. DAF/FE/MAI(98)7/REV1, *available at* <http://www1.oecd.org/daf/mai/htm/2.htm>.

70. Norwegian Model BIT (2007), *supra* note 58, art. 11(1), at 10.

Given that many countries have a large number of BITs, which are nearing their expiry date and need to be renegotiated or replaced by more modern forms of investment treaty,⁷¹ we may expect similar changes from other major capital exporting countries, although the trend has not been followed by all governments, as is clear from the case of Germany.⁷² However, generally speaking, it is clear that many of these third generation agreements are striving to reflect a better balance between the rights of investors on the one hand and the right of the host state to regulate where there are legitimate public concerns related to social, environmental, health, and safety issues.

III. LINKING SOCIAL AND ENVIRONMENTAL JUSTICE TO FOREIGN INVESTMENT: FROM A NOISE TO A SIGNAL

Historically, there has not been a role for *amicus curiae* briefs in international investment arbitration, which has placed much emphasis on the privity of parties and the consensual nature of arbitration.⁷³ However, things are changing with a growing trend towards acceptance by investment arbitration tribunals of *amicus curiae* briefs, and the extension of non-disputing party rights in the matter of access to documents and the arbitral proceeding, particularly where there are sensitive matters of public interest about which an arbitral tribunal may know very little. It is against this background that I map the growing trend towards the acceptance of *amicus curiae* briefs, and other non-disputing party rights before investment arbitration tribunals, and examine the current status of case law on the matter.

It is my contention that the issue of social and environmental justice has moved beyond the noise of *amici* and has been received as a signal by a number of governments.⁷⁴ This has happened as a result of an increased

71. For example, just under a quarter of the 44 new BITs signed in 2007 replaced earlier treaties. See UNCTAD IIA Monitor 2008, *supra* note 12, at 5.

72. German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments, 2008, <http://ita.law.uvic.ca/investmenttreaties.htm>. The situation with respect to EU Member States is somewhat complicated and is currently under review. This is because now that the Lisbon Treaty has come into force on 1 December 2009, the European Commission will in the future occupy the field in investment treaty-making. It has already given rise to the development of a first generation of European Investment Promotion and Protection Agreements (“EIPAs”), which may come to replace many of the existing BITs of Member States upon their expiry.

73. Eduardo Savarese, *Amicus Curiae Participation in Investor-State Arbitral Proceedings*, 17 ITALIAN Y.B. INT’L L. 99, 103 (2007) (noting fn. 17 at 103, concerning the tribunal’s decision in *Aguas del Tunari* not to admit *amicus curiae* submissions); *Aguas del Tunari*, Decision on Jurisdiction, *supra* note 40, ¶ 17.

74. The idea of a “noise” and a “signal” has been seen as the means by which social justice issues are moved from simply representing the voice of public concern to being mooted before courts and tribunals, where they can no longer be ignored. See also Robyn

willingness on the part of investment arbitration tribunals to grant non-disputing party rights to CSOs and other non-state actors. The move has been bolstered by the issuance of the NAFTA FTC Statement in 2003, concerning non-disputing party participation in Chapter 11 investment arbitration.⁷⁵ This was followed three years later by an amendment to the ICSID Rules in 2006,⁷⁶ which henceforth allow for the filing of *amicus curiae* briefs before ICSID arbitral tribunals. Subsequently, Canada, the United States, and Norway each have chosen to incorporate direct reference to the rights of non-disputing parties in their model BITs.⁷⁷

A. Non-Disputing Party Participation in NAFTA Investment Arbitration

The story starts in North America with the *Methanex* case, a NAFTA Chapter 11 dispute involving a Canadian investor against the United States, which we came across in the previous section. The Tribunal in *Methanex*, at the jurisdictional stage, when applying Article 15 of the UNCITRAL Arbitration Rules,⁷⁸ concluded that it had the discretionary power to accept an *amicus curiae* submission⁷⁹ from the International Institute for Sustainable Development (“IISD”) and a joint submission from the Commission for a Better Environment, the Bluewater Network of Earth Island Institute, and the Center for International Environmental Law (“Communities/Bluewater/Center petition”).⁸⁰ However, at the jurisdictional stage, it decided that it did not have the power to authorize access to materials or to allow the petitioners to attend the hearings at this stage.⁸¹

Eckersley, *A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUR. J. INT’L RELS. 329, 337 (2007).

75. NAFTA FTC Statement 2003, *supra* note 3, § A, ¶¶ 1-3 (setting out the rationale behind non-disputing party participation, i.e. that the NAFTA itself does not “[limit] a Tribunal’s discretion to accept written submissions from [a non-disputing party]” nor does it in any way “[prejudice] the rights of NAFTA parties under Article 1128 of the NAFTA.”).

76. ICSID Arbitration Rules, *supra* note 5.

77. See generally Savarese, *supra* note 73; Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. OF EUR. CMTY. & INT’L ENVTL. L. 230, 230–42 (2007).

78. G.A. Res. 31/98, art. 15(1), U.N. Doc. A/Res/31/98 (Dec. 15, 1976), 15 I.L.M. 701 (allowing an arbitral tribunal to conduct proceedings in the manner it considers appropriate, provided that the parties are treated equally) [hereinafter UNCITRAL Arbitration Rules 1976].

79. See generally *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (NAFTA Ch. 11 Arb. Trib. 2001) available at <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf> [hereinafter *Methanex Amicus Curiae* Order 2001].

80. Savarese, *supra* note 73, at 101.

81. *Methanex Amicus Curiae* Order 2001, *supra* note 79, ¶¶ 47–53; see Howard Mann, *Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex*

Almost contemporaneous with *Methanex* is the decision by another NAFTA investment tribunal, also operating under UNCITRAL Arbitral Rules, to allow *amicus curiae* intervention at the jurisdictional stage in *UPS v. Canada*, with the hearings being made open to the public before *Methanex*.⁸² In this NAFTA Chapter 11 dispute, UPS, a U.S. corporation, alleged discrimination by its competitor, Canada Post, which used its monopoly over the delivery of posted letters to run a courier service that allowed it to collect parcels from post offices. UPS was denied the opportunity to operate a similar courier service to compete with Canada Post. The Tribunal accepted *amicus* submissions on behalf of a joint submission by the Canadian Union of Postal Workers (“CUPW”) and the Council of Canadians.⁸³ The *Amicus Curiae* Petitioners argued against a potential breach of the minimum treatment standard in Article 1105 of NAFTA, calling upon the Tribunal to dismiss UPS’s claims of alleged unfair competition between it and Canada Post. They claimed that the use of Canada Post was as a result of the lower costs of the Canadian postal workers, who allegedly did not enjoy the same collective bargaining powers as UPS employees.

Both the *Methanex* and *UPS* decisions, at the earlier jurisdictional phase, pre-date and anticipate the NAFTA FTC Statement, which besides stipulating who can intervene as a non-disputing party before an arbitral tribunal in NAFTA Chapter 11 proceedings,⁸⁴ includes guidelines for the submission of *amicus curiae* briefs. The Statement suggests how a Chapter 11 Tribunal should exercise its discretionary power in deciding whether to grant leave to file a non-disputing party submission. It should consider “the extent to which:”

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.⁸⁵

v. United States, 10 REV. OF EUR. CMTY. & INT’L ENVTL. L. 241, 241–45 (2001) (describing how the *Methanex* Tribunal arrived at its decision).

82. *UPS, Inc. v. Canada, Award on Jurisdiction* (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftaclaims.com>.

83. *UPS, Inc. v. Canada, Award on Jurisdiction: Decision on Petition for Intervention and Participation as Amicus Curiae* (NAFTA Ch. 11 Arb. Trib. 2001), available at <http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>.

84. NAFTA FTC Statement 2003, *supra* note 3, §B, ¶¶ 1–10 (setting out procedures for non-disputing party participation before Chapter 11 investment tribunals).

85. *Id.* § B, ¶ 6.

Soon after the NAFTA FTC Statement was issued, the claimant, Methanex Corporation, wrote to the Tribunal on behalf of both disputing parties, suggesting that it adopt the NAFTA FTC Statement guidelines for the acceptance of *amicus* submissions,⁸⁶ which it did. Consequently, six months later, in March, 2004, the first *amicus curiae* filings on the merits in *Methanex* were received by the Tribunal from IISD and the Communities/Bluewater/Center, filed on their behalf by Earthjustice. Acting on the NAFTA FTC Statement 2003, the Tribunal, at the merits stage, also provided access to documentation and allowed the *amici* to be present during the oral hearing, although it did not allow the *amici* to make any oral statement themselves.⁸⁷

Ultimately the effect of the *amici* on the substance of the dispute in the final *Methanex* award on the jurisdiction and merits is questionable, given that the Tribunal made little express reference to the Petitioners' submissions.⁸⁸ Where it did, it chose to highlight the procedural aspects of the non-disputing parties' participation in the dispute.⁸⁹ The tribunal did, however, endorse the arguments advanced by IISD concerning the notion that trade law approaches cannot simply be transferred to the arena of international investment law.⁹⁰ Similarly, in the Final *UPS Award*⁹¹ the Tribunal chose to make no mention whatsoever of the non-disputing parties' participation, including their previously accepted *amicus curiae* briefs.

A rather different approach is evident in *Glamis Gold*⁹² where Glamis Gold, Ltd., a publicly-held Canadian corporation, claimed damages arising from the need to comply with state and federal land reclamation requirements and cultural protection measures involving the sacred sites of local indigenous people in the Californian desert. A total of four *amicus curiae* briefs were filed by non-disputing parties, including two from environmental lobbyists, Friends of the Earth and a coalition of Sierra Club, Earthworks and the Western Mining Action Project;⁹³ one from an industry

86. Letter from Methanex Corporation to the Tribunal, Oct. 31, 2003, <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexAgreementReScope.pdf> (expressing disputing parties' agreement on *amicus* participation).

87. Methanex, *supra* note 34, at part II, ch. C, ¶ 27, App. 5 (referring to the earlier Methanex *Amicus Curiae* Order 2001, *supra* note 79).

88. Savarese, *supra* note 73, at 102.

89. Methanex, *supra* note 34, at part II, ch. C, ¶¶ 26–30.

90. *Id.* part IV, ch. B, ¶ 27.

91. UPS, Inc. v. Canada, Final Award, 46 I.L.M. 922 (NAFTA Ch. 11 Arb. Trib. 2007).

92. Glamis Gold, *supra* note 46.

93. Brief for Friends of the Earth Canada & Friends of the Earth United States as Amici Curiae Supporting Claimants, *Glamis Gold, Ltd. v. United States*, (NAFTA Ch. 11 Arb. Trib. 2009), available at <http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-FOE-01B--30-09-05.pdf>; Application of Non-Disputing Parties for Leave to File a Written Submission, *Glamis Gold, Ltd. v. United States*, (NAFTA Ch. 11 Arb. Trib. 2009),

group, the National Mining Association;⁹⁴ and one from the indigenous or first nations group, the Quechan Indian Nation,⁹⁵ whose land and related cultural and religious rights were affected. The *amicus curiae* brief from the Quechan Indian Nation argued for the interpretation of the relevant provisions in NAFTA in accordance with international law,⁹⁶ relevant provisions in the International Covenant on Civil and Political Rights (ICCPR),⁹⁷ the ILO Convention No. 69, concerning Indigenous and Tribal Peoples in Independent Countries,⁹⁸ and the U.N. Declaration on the Rights of Indigenous Peoples.⁹⁹

In seeking to balance issues of cultural heritage and environmental protection against the private property rights and the right of the host state to regulate, the Tribunal in *Glamis Gold* not only provided CSOs and the indigenous Quechan Nation with the opportunity to present their views through written *amicus curiae* submissions, but also fully articulated the guidelines contained in the NAFTA FTC Statement.¹⁰⁰ Additionally, following a request from two sets of *amici*, the Tribunal made arrangements for public access to the oral hearings and facilitated the viewing by the Quechan Nation at a remote location of the “otherwise restricted discussion of tribal locations.”¹⁰¹

A further point about the *Glamis Gold* award is that the Tribunal recognised the value of “significant involvement by non-disputing parties

available at http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-USA-Amicus-Sierra_Club_Earthworks-Application.pdf.

94. Submission of Non-Disputing Party National Mining Association, *Glamis Gold, Ltd. v. United States*, (NAFTA Ch. 11 Arb. Trib. 2009), available at http://www.naftaclaims.com/disputes_us_glamis.htm.

95. Submission of Non-Disputing Party Quechan Indian Nation, *Glamis Gold, Ltd. v. United States*, (NAFTA Ch. 11 Arb. Trib., 2009), available at <http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-USA-Amicus-Quechan-01--19-08-05.pdf> [hereinafter First Quechan Indian Nation Amicus]; Supplemental Submission of Non-Disputing Party Quechuan Indian Nation, *Glamis Gold, Ltd. v. United States*, (NAFTA Ch. 11 Arb. Trib., 2009), available at http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-USA-Amicus-Quechan_Band-Submission_2/pdf [hereinafter Second Quechan Indian Nation Amicus].

96. First Quechan Indian Nation Amicus, *supra* note 95, at 8–15.

97. International Covenant on Civil and Political Rights arts. 18, 27, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; First Quechuan Indian Nation Amicus, *supra* note 95, at 8; Second Quechan Indian Nation Amicus, *supra* note 95, at 4.

98. ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (adopted by the General Conference of the International Labour Office at its 67th Session and entered into force Sept. 5, 1991); First Quechan Indian Nation Amicus, *supra* note 95, at 10–12; Second Quechan Indian Nation Amicus, *supra* note 95, at 2–3.

99. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Oct. 2, 2007); Second Quechan Indian Nation Amicus, *supra* note 95, at 4, 6–7.

100. *Glamis Gold*, *supra* note 46, ¶¶ 268–74, 284–86.

101. *Id.* ¶ 290 (referencing Procedural Order No. 11, ¶15 (Jul. 9, 2007), available at http://www.naftaclaims.com/Disputes/USA/Glamis?Glamis-USA-Tribunal-Order_11.pdf).

and civil society, in general” and more particularly “the helpful involvement of the Quechan Nation in assisting both the Tribunal and the Parties in ensuring the confidentiality of information concerning tribal lands.”¹⁰²

B. Non-Disputing Party Participation in ICSID Arbitration

In the case of ICSID arbitration, there has been a similar development with respect to the growing recognition of *amici* in investment disputes, which has led to the introduction, and subsequent formal recognition, of *amicus curiae* briefs before ICSID tribunals. Just as the initial impetus for change in *Methanex* and *UPS* came with the interpretation of Article 15 of the UNCITRAL Arbitration Rules, ICSID tribunals have turned to Article 44 of the ICSID Convention,¹⁰³ which grants a residual power to an ICSID tribunal to determine procedural issues.¹⁰⁴

Social and environmental concerns were first raised in 2003 before an ICSID tribunal by a group of *amici* in the case of *Aguas del Tunari*,¹⁰⁵ to which I made reference in Section II. However, the petition was dismissed by the Tribunal on the grounds that the “interplay of the ICSID Convention and the BIT, and the consensual nature of arbitration” left the core issue of such participation with the parties to the dispute.¹⁰⁶

A couple of years later the issue of non-disputing party participation arose again in two Argentinean water distribution and sewerage systems cases before ICSID tribunals. Both tribunals followed the earlier 2001 NAFTA decisions of *Methanex* and *UPS* and reversed the stand taken in 2003 by the ICSID tribunal in *Aguas del Tunari*. In *Suez/Vivendi* the Tribunal set out three conditions, upon which, five CSOs, representing

102. *Id.* ¶ 12, fn. 10(2).

103. ICSID, *supra* note 4, art. 44 (giving tribunals the discretionary power to decide upon any questions of procedure not covered in ICSID, the ICSID Arbitration Rules, or any rules agreed upon by the parties to the dispute).

104. Savarese, *supra* note 73, at 104; *Suez, et al. v. Argentine Rep.*, ¶ 10, Order in Response to a Petition for Permission to make an Amicus Curiae Submission, ICSID Case No. ARB/03/19, (ICSID Arb. Trib. 2007) [hereinafter *Suez/Vivendi Amicus Curiae Order*].

105. On August 29, 2002, a petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado was submitted on their behalf to the Tribunal by Earthjustice. See James D. Wolfensohn, et al., *Demanda de Participación Pública* (Demand for Participation), *Aguas del Tunari S.A. v. Bolivia*, Case No. ARB/02/3 (ICSID Arb. Trib. 2002), available at http://www.ciel.org/Publications/CIADI_CARTA_DEAPOYO.pdf.

106. *Aguas del Tunari*, Decision on Jurisdiction, *supra* note 40, ¶ 17, in which the President of the Tribunal referred to a letter of Jan. 29, 2003, sent to the Earthjustice, on behalf of the petitioners denying their request for non-disputing party participation, including the right to submit an *amicus curiae* brief. *Id.* app. III; see also Alexis Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?* 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 257, 259 (2006).

environmental and consumer welfare concerns,¹⁰⁷ would be considered as *amici*, although it denied them access to the arbitral hearings, which they had also requested. The three conditions they had to meet were “appropriateness of the subject matter”, “suitability of a . . . non-party to act as *amicus curiae*”, and “the procedure by which the *amicus* submission is made and considered.”¹⁰⁸

Based upon the evidence before it, the Tribunal took the view that the subject matter of the investment dispute was of “significant public interest since the underlying dispute relates to water and sewerage systems serving millions of people” and could raise “a variety of complex public and international law questions, including human rights considerations.”¹⁰⁹ Moreover, it was prepared to accept *amicus* submissions, but only from persons who could satisfy the Tribunal that they had “the expertise, experience, and independence to be of assistance” to it.¹¹⁰ In the end, the Tribunal denied the non-disputing parties’ request to attend the hearings and chose to defer a decision on their request for access to documents until such time as the Tribunal might grant a non-disputing party leave to file an *amicus curiae* brief.¹¹¹

In *Suez/Interaguas*,¹¹² the Tribunal was faced with a similar request to that in *Suez/Vivendi*. One CSO and three further individuals requested to be allowed to file *amicus curiae* briefs and to have access to the hearings.¹¹³ But despite the Tribunal being composed of the same members as *Suez/Vivendi*, it reached a different conclusion. While it laid down the same three conditions for the *amici* as it had done in *Suez/Vivendi*,¹¹⁴ it decided that the Petitioners had only met the first of the three conditions, i.e. the subject matter of the investment dispute was of significant public interest. However, on the second condition they had failed to provide “sufficient specific information and reasons to . . . qualify as *amici curiae*,” although it was pointed out that if they were to do so the Tribunal would be able to consider their request.¹¹⁵

107. Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

108. *Suez/Vivendi Amicus Curiae* Order, *supra* note 104, ¶ 17.

109. *Id.* ¶¶ 18, 19.

110. *Id.* ¶ 24.

111. *Id.* ¶ 33.

112. *Suez, et al. v. Argentine Rep.*, Order in Response to a Petition for Participation as *Amicus Curiae* ICSID, Case No. ARB/03/17 (ICSID Arb. Trib. 2006), available at <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf>.

113. The Fundación para el Desarrollo Sustentable, as well as Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren and Dr. Omar Darío Heffes, had all filed a petition seeking to participate in the hearings. *Id.*

114. *Id.* ¶ 4.

115. *Id.* ¶ 34.

Meanwhile, a further stage in the enhanced recognition of non-party participation in investment arbitration came about against the backdrop of this second request in the Argentinean water and sewerage disputes. In April 2006, ICSID updated its Arbitration Rules in order to allow non-disputing parties to address environmental and other public policy issues of which an arbitral tribunal may not be adequately informed by either the claimant or the respondent.

While Rule 32 was amended to permit “with the consent of the parties,” persons other than the parties to attend the arbitral hearings,¹¹⁶ the most significant change was to Rule 37. A new second paragraph, dealing with “Visits and Inquiries,” stipulates:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.¹¹⁷

Moreover, the amended ICSID Arbitration Rule calls for “[t]he Tribunal . . . to ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”¹¹⁸

At the end of 2006, the Petitioners in *Suez/Vivendi* requested permission to file one joint *amicus curiae* brief, due to the matters of public interest arising in the dispute, and to be allowed access to the arbitration documents.¹¹⁹ However, the Tribunal, in responding to the Petition,¹²⁰ noted that the new ICSID Rule did not apply to these proceedings. Instead, it followed the criteria that it had set out in its 2005 Order,¹²¹ which nonetheless were very close to those in the amended ICSID Rule. Having

116. ICSID Arbitration Rules, *supra* note 5, art. 32(2); *see also* Savarese, *supra* note 73, at 104–105.

117. ICSID Arbitration Rules, *supra* note 5, art. 37(2).

118. *Id.*

119. *Suez/Vivendi Amicus Curiae Order*, *supra* note 104, ¶ 7.

120. *Id.* ¶ 11.

121. *Id.* ¶¶ 14–15.

determined that the CSOs in question fulfilled these criteria,¹²² the Tribunal considered that there was sufficient public interest in the outcome of the investment dispute to warrant the filing of an *amicus curiae* brief contrary to Claimant's views.¹²³ However, the Tribunal denied the Petitioners' request for access to the record of the proceedings, noting that the new ICSID Rule did not provide any guidance on the matter. They were also of the view that the *amici* already had a good deal of information about the case from other sources.¹²⁴

It was not until the case of *Biwater Gauff v. United Republic of Tanzania* that Rule 37(2) of the amended ICSID Arbitration Rules was finally applied by an ICSID tribunal.¹²⁵ Following a number of skirmishes over transparency of the proceedings and access to pleadings and other documents, for which the Tribunal in *Biwater Gauff* issued Special Orders on Confidentiality, five CSOs¹²⁶ were given leave to file one joint *amicus curiae* brief.

The Tribunal's Order on admission of *amicus curiae* briefs was handed down in February, 2007.¹²⁷ In line with previous decisions, but more particularly the revised Rule 37 of ICSID Arbitration Rules, it allowed the submission of the joint *amicus curiae* brief on the grounds *inter alia* that it could potentially assist the Tribunal by providing a perspective or knowledge that was different from that of the disputing parties, and the petitioners demonstrated "sufficient interest" in the proceedings.¹²⁸ It also noted that "allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate and in securing wider confidence in the arbitral process itself."¹²⁹ However, the *amici* request for access to the documents,¹³⁰ and to attend the hearings, was denied.¹³¹

Furthermore, in issuing its Order, the Tribunal remarked on the relevance of the recent addition of Article 37(2) to the ICSID Rules and proceeded to apply it throughout. It did, however, also acknowledge the decisions of the

122. *Id.* ¶ 16.

123. *Id.* ¶¶ 18–22.

124. *Id.* ¶¶ 24–25.

125. Savarese, *supra* note 73, at 105.

126. The Lawyers Environmental Action Team ("LEAT"), the Legal and Human Rights Centre ("LHRC"); the Tanzania Gender Networking Programme ("TGNP"); the Center for International Environmental Law ("CIEL") and the International Institute for Sustainable Development ("IISD"). *Biwater Guff*, *supra* note 43.

127. *Biwater Gauff v. United Rep. of Tanzania*, Procedural Order No. 5, (ICSID Arb. Trib. 2007) [hereinafter *Biwater Gauff* Procedure Order No. 5].

128. *Id.* ¶ 50.

129. *Id.* ¶ 62–68; *see also* Tienhaara, *supra* note 77 (providing a detailed overview of both the non-disputing party aspect and the relationship of that participation to broader issues of transparency and legitimacy in investment arbitration proceedings).

130. *Biwater Gauff* Procedural Order No. 5, *supra* note 127, ¶¶ 62–68.

131. *Id.* ¶ 69–72.

other two ICSID Tribunals in the *Suez* water and sewerage cases, who had employed similar terms and conditions for non-disputing party participation in the matter of *amicus curiae* briefs.¹³²

Noteworthy is the fact that, in their Petition,¹³³ the *amici* in *Biwater Gauff* stressed the importance of investor responsibility,¹³⁴ especially in the context of human rights (the right to water in this case)¹³⁵ and sustainable development.¹³⁶ They also emphasized the emerging issue of international corporate social responsibility (ICSR) in the sphere of investment, relying on certain international corporate and industry codes of conduct, which can be considered as “ethical standards” that serve as a “benchmark” against which TNCs may be judged.¹³⁷ The inclusion of ICSR standards in BITs and other IIAs is an issue to which I return in Section IV below.

C. Formalizing the Basis for Advancing Social and Environmental Justice Issues in Investment Treaties

In the case of both NAFTA Chapter 11 and ICSID arbitration, we see a move from the mere noise of *amici* to a signal for governments to work proactively towards the extension of non-disputing party rights and greater transparency in investment arbitration. NAFTA and ICSID case law, an interpretative statement and an amendment to the rules governing arbitration respectively have brought about incremental changes in non-disputing party participation.

However, this is not the end of the story. Soon after the NAFTA FTC issued its Statement in 2003, both Canada and the United States revised their model BITs, in line with the trend towards the acceptance of *amicus curiae* briefs and greater transparency in proceedings, which had been signaled by some arbitral tribunals. The Canadian Government had been a

132. *Id.* ¶ 52.

133. Brief for The Lawyers Environmental Action Team, et al. as *Amici Curiae* Supporting Defendants, *Biwater Gauff, Ltd. v. United Rep. of Tanzania*, Case No. ARB/05/22 (ICSID Arb. Trib. 2007), available at http://www.iisd.org/pdf/2007/investment_amicus_final_march_2007.pdf [hereinafter *Biwater Gauff Amicus Curiae*].

134. *Id.* ¶¶ 48–49 (making specific reference to the right to water as a human right).

135. *Id.*; see Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

136. Likewise, the *Biwater Gauff* Joint *Amicus Curiae* Submission references the importance of environmentally sustainable safe drinking water. *Biwater Gauff Amicus Curiae*, *supra* note 133, ¶¶ 45–46. This finds support from the U.N. Millennium Development Goals (MDGs), Goal #7 on Environmental Sustainability (Target 3 – safe drinking water) and is further supported by the World Summit on Sustainable Development (WSSD). See WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2009 47 (2009), available at <http://www.un.org/millenniumgoals/>; World Summit on Sustainable Development [WSSD], <http://www.un.org/events/wssd/> (last visited Oct. 8, 2009); World Business Council for Sustainable Development [WBCSD], <http://wbscd.org/> (last visited Oct. 8, 2009).

137. *Biwater Gauff Amicus Curiae*, *supra* note 134, ¶¶ 52–53.

long-time supporter of non-disputing party participation in NAFTA Chapter 11 disputes. Not surprisingly its model FIPA of 2003 institutionalizes the role of *amicus curiae* submissions before arbitral tribunals in investment disputes.¹³⁸ Article 39 of the Canada Model FIPA follows the text of the guidelines contained in the NAFTA FTC Statement almost to the letter,¹³⁹ although it points out that it is at the discretion of a tribunal to determine whether non-disputing parties have access to the proceedings on the basis of Article 38.¹⁴⁰

Since 2003, Canada has entered into a FIPA with Peru, which contains the language of Article 39.¹⁴¹ Moreover, the Government of Canada has recently concluded FIPAs with the Czech Republic, Hungary, India, Jordan, Kuwait, Latvia, Madagascar, Romania, and Slovakia, and is currently in negotiations with Bahrain, China, Indonesia, Mongolia, Poland, Tanzania, Tunisia, and Vietnam¹⁴² based on its model FIPA.

Similarly, the U.S. Model BIT states at Article 28(3) that “[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”¹⁴³ This particular provision found its way into the U.S.-Uruguay BIT.¹⁴⁴ It has also been included in U.S. free trade agreements (“FTAs”), which have investment chapters. These include the U.S. FTAs with *inter alia* Singapore,¹⁴⁵ Chile,¹⁴⁶ Morocco,¹⁴⁷ and Oman,¹⁴⁸ as well as the U.S.-Dominican

138. Tienhaara, *supra* note 77, at 232–233.

139. Canada Model FIPA (2003), *supra* note 57, art. 39.

140. *Id.* art. 39(8) (referencing art. 38).

141. Agreement for the Promotion and Protection of Investments, Can.-Peru, Nov. 14, 2006, available at http://www.unctad.org/sections/dite/iaa/docs/bits/canada_peru.pdf (entered into force June 29, 2007).

142. See Foreign Affairs & International Trade Canada, Canada’s Foreign Investment Promotion and Protection Agreements, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx> (last visited Nov. 9, 2009) (listing all of Canada’s FIPAs and current treaty negotiations); Tienhaara, *supra* note 77, at 233.

143. U.S. Model BIT (2004), *supra* note 56, art. XXVIII, ¶ 3.

144. U.S./Uruguay BIT 2005, *supra* note 63, art. XXVIII, ¶ 3.

145. Free Trade Agreement, U.S.-Sing., art. 15.19(3), May 6, 2003, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> (entered into force Jan. 1, 2004).

146. Free Trade Agreement, U.S.-Chile, art. 10.19(3), June 6, 2003, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> (entered into force Jan. 1, 2004).

147. Free Trade Agreement, U.S.-Morocco, art. 10.19(3), June 15, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> (entered into force Jan. 1, 2006).

148. Free Trade Agreement, U.S.-Oman, art. 10.19(3), Jan. 19, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text> (entered into force Jan. 1, 2009).

Republic/Central America,¹⁴⁹ and its Trade Promotion Agreements (“TPAs”) with Colombia and Peru.¹⁵⁰

The draft Norwegian Model BIT states, in more expansive terms than its U.S. counterpart, that an arbitral tribunal hearing an investment dispute “shall have the authority to accept and consider written *amicus curiae* submissions from a person or entity that is not a disputing Party, provided that the Tribunal has determined that they are directly relevant to the factual and legal issues under consideration.”¹⁵¹ Unlike, the U.S. Model BIT, the draft Norwegian Model BIT also provides that “[t]he Tribunal shall conduct hearings open to the public”¹⁵² as part of the commitment to transparency process surrounding the arbitral proceedings. The right of parties to the dispute to request that the hearings be closed wholly or partially is, however, retained.¹⁵³

IV. EMBEDDING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY STANDARDS IN BITS: FROM THE PERIPHERY TO THE CORE

In this Section, I turn my attention away from the substantive issues of social and environmental protection clauses in the regulation of foreign investment and procedural rights before investment arbitration tribunals to examine the potential incorporation of so-called “international corporate social responsibility” (“ICSR”) standards in investment treaty instruments, such as BITs and other IIAs. What could this mean for claims of social and environmental justice before investment arbitration tribunals? It has been argued that ICSR obligations are “the *quid pro quo* for the protection of investors and investments under international investment protection agreements,”¹⁵⁴ but they can be problematic.

In discussing ICSR, there are some preliminary questions which need to be addressed, otherwise it may be difficult to realize the concept in practice. First, to what extent are multinational enterprises (“MNEs”), or

149. Dominican Republic-Central American States Free Trade Agreement, art. 10.20(3), Aug. 5, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (entered into force Jan. 1, 2009). The countries that are a party to this agreement include Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic, and the United States. *Id.*

150. Trade Promotion Agreement, U.S.-Colom., art. 10.20(3), Nov. 22, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> (not yet in force); Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (entered into force Feb. 1, 2009). A second, additional sentence in Art. 10.20(3) in both treaties calls for the proper identification of *amicus curiae* and details of any financial or other assistance they may have had in preparing their submission. *See* Tienhaara, *supra* note 77, at 230, 233.

151. Norwegian Model BIT (2007), *supra* note 58, art. 18(3).

152. *Id.* art. 21(2).

153. *Id.*

154. *See Corporate Social Responsibility*, *supra* note 16, at 643.

transnational corporations (“TNCs”), directly, or even indirectly, responsible for corporate wrongs? Where direct corporate responsibility is lacking, to what extent can governments in host states, where multinational corporations operate, be held accountable for their conduct? Second, can international human rights instruments impose duties on non-governmental entities in the private sphere?

In answering these questions, various attempts have been made to try and hold TNCs or MNEs accountable for standards of minimum social and environmental protection in the jurisdictions in which they operate, but the problem is that most of those efforts are on a voluntary, non-binding basis. This is because soft law instruments, such as codes of conduct, guidelines, declarations, and so forth are favoured for the regulation of ICSR in the field of foreign investment but may prove weak and ineffectual when it comes to enforcement.

The issue is complicated by the fact that under international law, the state, rather than a corporation, is traditionally considered to be the bearer of responsibility for securing and enforcing fundamental human rights — many of which underpin social and environmental protection clauses. Where a TNC or MNE, which is operating overseas, acts in a manner that fails to uphold basic economic, social, and cultural rights, there is no legal redress for an individual against that corporation, except before the national courts of the host state.¹⁵⁵

A. Developments in International Corporate Social Responsibility Standards

Notwithstanding this problem, there have been successive attempts over the past four decades to recognize a role for corporations to respect human rights, labour standards, and environmental protection in the conduct of their activities. An early attempt to do just that is the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977.¹⁵⁶ For example, in the matter of social policy with respect to employment, the ILO Tripartite Declaration aims to set out the principles in the field of employment; training; conditions of work and life; and industrial relations which governments, employers, and workers’ organisations and which multinational enterprises are recommended to observe on a voluntary basis.¹⁵⁷

155. Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 ITALIAN Y.B. INT’L L. 23, 26, 30 (2004).

156. ILO Tripartite Declaration 1977, *supra* note 7.

157. *Id.* at recital 7.

The ILO Tripartite Declaration takes, as its starting point, the international bill of rights,¹⁵⁸ the ILO constitution, and the ILO fundamental principles of freedom of expression and association.¹⁵⁹ The Declaration then calls upon Member governments of the ILO to ratify ILO Conventions 87, 98, 111, 122, 138, and 182, if they have not yet done so, and to the greatest extent possible, through national policies. Also, the Declaration calls for the Members to apply the principles embodied therein and in Recommendations 111, 119, 122, 146 and 190, which relate to freedom of association, collective bargaining, elimination of discrimination in employment and the prohibition of the worst forms of child labour and the prohibition on forced labour.¹⁶⁰

The revised OECD Guidelines for Multinational Enterprises of 2000,¹⁶¹ which form part of the OECD Declaration on International Investment and Multinational Enterprises,¹⁶² are intended to provide a set of voluntary principles and standards for responsible business conduct consistent with applicable laws. One of their stated aims is to ensure a harmonious relationship between these enterprises and government policies in the jurisdictions in which they operate. To that end, they should seek to strengthen the basis of mutual confidence between MNEs and the societies in which they operate. Similarly, MNEs should also “help improve the foreign investment climate” and “enhance the contribution to sustainable development.”¹⁶³

The OECD Guidelines also contain general policy requirements with respect to economic and social rights as well as environmental protection, when they states that, “[e]nterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development.”¹⁶⁴

However, this particular guideline does not make any specific reference to internationally recognised labour standards or relevant international environmental protection. It is also purely voluntary and non-binding in

158. The International Bill of Rights consists of: the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948); the ICCPR, *supra* note 97; and the ICESCR, *supra* note 135.

159. ILO Tripartite Declaration 1977, *supra* note 7, recital 8.

160. These fundamental principles and rights at work have latterly been endorsed in the ILO Declaration 1998, *supra* note 62, which is considered to have declaratory force and currently acts as a minimum benchmark for the implementation of core labor rights around the globe.

161. OECD Guidelines 2000, *supra* note 8.

162. OECD Declaration on International Investment and Multinational Enterprises, June 26, 1976, <http://www.oecd.org/document/24/0,3343,d in 1979, 1984, and 1991>.

163. OECD Guidelines 2000, *supra* note 8, at 5.

164. *Id.* at 14.

nature and operates more by way of a set of recommendations to corporations and other business enterprises when investing overseas.

In 1999, the former U.N. Secretary-General, Kofi Anan, challenged business leaders to abide by internationally recognised principles in the fields of human rights (two principles), labour (four principles — the core labour standards contained in the ILO Declaration 1998), the environment (three principles, including the precautionary principles), and anti-corruption (one principle). This call to arms was transformed into the UN Global Compact, which was officially launched in 2000,¹⁶⁵ and is still ongoing.

A different approach has been taken by the European Union when in January, 1999, the European Parliament passed a resolution on a code of conduct for European enterprises operating in developing countries.¹⁶⁶ The resolution encouraged voluntary company codes of conduct “with effective and independent monitoring and verification, and stakeholder participation in the development, implementation, and monitoring of these codes.”¹⁶⁷ It also recommended a model code of conduct for European businesses, which should consist of internationally recognised minimum standards in the matter of *inter alia* human rights, labour standards and environmental protection.¹⁶⁸

The original resolution also requested the European Commission to establish an independent body of experts to monitor and verify implementation of the code of conduct, to identify best practices, and to receive complaints about corporate conduct from interested parties.¹⁶⁹ It was intended that, in monitoring the compliance of MNEs or TNCs, due attention should be paid to human rights norms and core labour standards. Finally, we should not forget the ongoing effort to provide a more tenable link between business and human rights generally, which is spearheaded by John Ruggie, the Special Representative of the U.N. Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises.¹⁷⁰

The earlier draft U.N. Norms on Responsibilities of TNCs,¹⁷¹ which were drawn up well before Ruggie embarked upon his mandate and preceded his work on the U.N. Framework,¹⁷² have been described as “a train wreck” by a developing country representative for the way in which they alienated

165. U.N. Global Compact, *supra* note 9.

166. Code of Conduct for European Enterprises Operating in Developing Countries, Res. A4-0508/98, 1999 O.J. (C104) 180.

167. *Id.* ¶ 1.

168. *Id.* ¶ 12.

169. *Id.* ¶¶ 14, 16, 17.

170. See Ruggie, U.N. Framework, *supra* note 6.

171. U.N. Norms on Responsibilities of TNCs, *supra* note 10.

172. U.N. Framework, *supra* note 6.

various communities across the business and human rights divide.¹⁷³ While the U.N. Norms on Responsibilities of TNCs are no longer in the picture, the ongoing work of John Ruggie within the U.N. Framework has gathered pace. There is now agreement among business, states and civil society on the content of the relationship of business to human rights, which is manifest in the responsibility of corporations to respect human rights. In operational terms, this translates into an emerging recognition that in order to discharge the responsibility to respect corporations must carry out due diligence.¹⁷⁴

B. Incorporating Corporate Social Responsibility into Legally Binding BITs

What is significant about these various soft law approaches to ICSR is that they could be made to bite if incorporated into bilateral treaty instruments in order “to ensure the observance of higher standards throughout the network of countries in which an MNE operates.”¹⁷⁵ The point is that, as Alex Wawryk explains, the incorporation of a code of conduct into a treaty can “create a legal basis for international administration and enforcement of the code” and the treaty format “formally binds the parties [to the treaty] to give effect to the code through good faith implementation and enforcement.”¹⁷⁶

In fact, the draft Norwegian Model BIT incorporates, by reference, an ICSR-style provision in Article 32, whereby “[p]arties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines on Multinational Enterprises and to participate in the United Nations Global Compact.”¹⁷⁷ While this text on corporate social responsibility was perceived by some CSOs as containing weak language,¹⁷⁸ the Norwegian Government defended its inclusion. It did so on the grounds that the provision was primarily aimed at countries outside the OECD area, noting that some non-OECD countries like Argentina, Brazil, Chile, and

173. Special Representative of the Secretary-General, *Opening Statement to the United Nations Human Rights Council*, June 5, 2008 (prepared by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-statement-mandate-review-5-Jun-2008.doc> [hereinafter SRSO *Opening Statement*].

174. Ruggie, U.N. Framework, *supra* note 6, paras. 56-64.

175. SRSO *Opening Statement*, *supra* note 173.

176. Alex Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 53, 56 (Jedrzej George Frynas & Scott Pegg eds., 2003).

177. Norwegian Model BIT (2007), *supra* note 58, at 24.

178. SOUTH CENTRE, *supra* note 58, at 12 (recommending that the text on corporate social responsibility be strengthened and calling for Norwegian investors to be held responsible for applying the U.N. Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (May 2, 1980) (adopted by G.A. Res. 35/63 (Dec. 5, 1980))).

Slovakia had already committed themselves to such efforts, and it was trying to encourage Norwegian commerce and industry to respect the guidelines and report potential breaches.¹⁷⁹ Subsequently, the Norwegian Government withdrew its draft Model BIT in June 2009, following widespread public criticism.¹⁸⁰ The Norwegian Ministry of Foreign Affairs simultaneously took the unprecedented step of distributing an English-language version of its ICSR policy.¹⁸¹

Such national policy approaches may be the first step on the way to hardening up some of the soft ICSR standards found in a range of instruments, provided enough states follow in sufficient number to create a critical mass in support of such standards. Those soft ICSR standards could eventually be made to resonate in the same way by being “incorporated” into BITs and other forms of IIAs.

Similarly, the work of John Ruggie may lead to an embedding of international standards for corporations with respect to human rights, as part of their ICSR. This could lead to a renewed emphasis on making these norms enforceable at the international level.¹⁸² If the latter exercise is successful — if only from a monitoring and verification point of view — a further aspect of the Special Representative’s work could be that of ICSR benchmarks for corporations and other business entities when investing overseas. However, there are early indications that the future relationship of business and human rights could take on an altogether different character, based on due diligence requirements as defined in the UN Framework.

Given that such putative forms of ICSR or even corporate due diligence requirements with respect to human rights may be difficult if not impossible to enforce, do host state governments risk a chilling effect by incorporating such clauses into their investment treaties? What might be the reaction of foreign investors? Will they welcome the inclusion of ICSR provisions in investment instruments designed for their protection but also to monitor their behaviour? What are the potential business and reputational costs of doing this?

Answers to some of these questions may, as Peter Muchlinski suggests, arise in the course of litigation. It is entirely possible that where an investor claims that there has been a breach of a fundamental investor protection

179. Comments on the Model for Future Investment Agreements, Government of Norway, § 4.6.3, Dec. 19, 2007, [http://www.regjeringen.no/upload.NHD/Vedlegg/hoeringer/2008?Forklarende%20vedlegg%20\(engelsk\)%20-%20final.doc](http://www.regjeringen.no/upload.NHD/Vedlegg/hoeringer/2008?Forklarende%20vedlegg%20(engelsk)%20-%20final.doc).

180. Vis-Dunbar, *supra* note 58.

181. Norwegian Ministry of Foreign Affairs, Corporate Social Responsibility in a Global Economy, Report No. 10 (2008–2009) to the Storting (Norwegian Parliament), <http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907>.

182. See Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, IISD, Feb. 2008, http://www.iisd.org/pdf/2008/ii_a_business_human_rights.pdf for a carefully-crafted and well-considered response to John Ruggie’s work.

standard or a property right in a BIT, the host State will respond by reference to the foreign investor's corporate social responsibility as a justification for, either failing to comply with basic standards of ICSR, or as part of its regulatory reaction.¹⁸³ It may well be that some investment arbitration tribunals will take the investor's conduct into account in determining the nature of the host state's response, but it is equally possible that arbitral tribunals will construe ICSR provisions narrowly or disregard them altogether due to their soft, "best efforts" language.

V. CONCLUSIONS

On the balance of developments so far in the field of BITs and other IIAs, it is clear that there is a growing trend in investor-state relations towards balancing investor standards and protection of property rights against the right of a state to regulate in the matter of social and environmental protection. Some of the more advanced third generation model BITs and other IIAs have begun to reflect these changes with the inclusion of specific social and environmental protection clauses and a non-lowering of standards in such investment treaty instruments. What is less appreciated perhaps is that this remains a difficult balancing act for many governments when negotiating BITs and other IIAs.

The movement towards greater transparency in investor-state arbitration has been propelled by the active role of CSOs, seeking social and environmental justice in North American investment treaty practice, principally under NAFTA, which has been followed by similar action before ICSID tribunals. These events have triggered important changes in the way some investment arbitration tribunals conduct their proceedings. It has led to a greater recognition of non-disputing party participation, including the right to submit *amicus curiae* briefs on human rights, social, environmental, and cultural policy grounds, and, in some cases, to be permitted to attend the proceedings. More significant is the fact that in practice this change has now been entrenched in some of the newer IIAs, which are based on the Canadian Model FIPA¹⁸⁴ or the U.S. Model BIT.¹⁸⁵

However, greater acceptance of non-disputing party rights in international investment arbitration is not yet universal. Despite the NAFTA FTC Statement of 2003¹⁸⁶ and the amendment to ICSID Arbitration Rules in 2006,¹⁸⁷ any investment arbitration, which is conducted strictly in accordance with UNCITRAL Arbitral Rules 1976,¹⁸⁸ and which is not a NAFTA tribunal, does not offer the same non-disputing party rights. In

183. *Corporate Social Responsibility*, *supra* note 16, at 682.

184. *See* Canadian Model FIPA (2003), *supra* note 57.

185. *See* U.S. Model BIT (2004), *supra* note 56.

186. *See generally* NAFTA FTC Statement, *supra* note 3.

187. ICSID Arbitration Rules, *supra* note 5.

188. UNCITRAL Arbitration Rules 1976, *supra* note 78.

fact, the UNCITRAL Working Group on Arbitration in February, 2008, rejected calls by many states and observer CSOs, such as IISD and CIEL, both of which have been active *amici* in a number of NAFTA Chapter 11 and ICSID arbitral awards, to discuss the introduction of transparency requirements, including the submission of *amicus curiae* briefs, into international rules governing investor-state arbitration.¹⁸⁹ Further attempts over the past year to advocate for more transparency in investor-state arbitration have continued in UNCITRAL Working Group II on Arbitration, including statements by John Ruggie to the UNCITRAL Commission on the matter,¹⁹⁰ have yet to bear fruit.

Finally, the move to try and develop social and environmental protection clauses in order to make them part of the broader panoply of ICSR standards, and to embed them in BITs and other IIAs, is just beginning. Yet, as the experience of Norway's draft Model BIT¹⁹¹ demonstrates, there is a long way to go. It seems that the world may not yet be ready for extensive inclusion of such ICSR standards, alongside enhanced social, environmental, and cultural protection, in investment treaty instruments. The question also arises as to the enforceability of these ICSR standards, even if taken up in BITs or other IIAs. Nevertheless, once an investment arbitration tribunal reaches a decision in which it holds a foreign corporate investor to account on the basis of one or more of these standards, the spell will have been broken. Such embedded ICSR standards could turn out to be the defining issue of investor-state relations in the decade to come.

189. Center for International Environment Law, *Block of Countries Refuse to Discuss Transparency in Investor-State Relations*, Joint Press Release, IISD/CIEL (Feb. 15, 2008), available at http://www.ciel.org/Tae/UNCITRAL_15Feb08.htm.

190. Statement of the Special Representative of U.N. Secretary General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie to the UNCITRAL Commission, 41st Session, New York, USA, Jun 16 – July 3, 2008.

191. See generally Norwegian draft Model BIT (2007), *supra* note 58.