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## ENVIRONMENTAL IMPACT ASSESSMENT IN INVESTMENT DISPUTES: METHOD, GOVERNANCE AND JURISPRUDENCE

[K]nowledge consists, not in doctrine, not in propositional statements stored away in the brain; but in the capacity to solve problems as they are actually presented in life; the capacity to see all the implications ... of the action to be taken; the capacity to bring to bear in the taking of decisions the maximum of the available experience of mankind.<sup>1</sup>

### Abstract

*Environmental Impact Assessment (EIA) is an instrument of environmental governance that ensures that the environmental implications of decisions are taken into account before the decisions are made. As such, environmental impact assessment constitutes the legal response to risk management needs and an integral component of sound decision making. However, a series of recent investment treaty claims have questioned the methodology, i.e. the way of conducting EIA. This article critically assesses this recent jurisprudence, and questions whether, instead of representing a cause*

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<sup>1</sup> Letter from Professor Henry M. Hart, Jr. to John H. Williams, who was then Dean of the Graduate School of Public Administration at Harvard University, dated October 15, 1941 and quoted by W. N. Eskridge, Jr. & P. P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in W. N. Eskridge, Jr. & P. P. Frickey (eds.) *Henry M Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law*, Foundation Press, 1994, lxix-lxx at lxxvi.

for dispute, EIA can constitute an effective dispute prevention mechanism. If so, this article shall investigate the way this integration can take place, with reference to the World Bank's practice.

## INTRODUCTION

Environmental Impact Assessment (EIA) is an instrument of environmental governance that ensures that the environmental implications of decisions are taken into account before the decisions are made. As such, environmental impact assessment constitutes the legal response to risk management needs and an integral component of sound decision-making. This article explores whether by integrating environmental considerations into investment law through transparent and participatory procedures, EIA can become an instrument of dispute prevention.<sup>2</sup>

Which lessons, if any, can be learnt from the legislative and adjudicative developments concerning EIA? A series of recent investment treaty claims have questioned the way of conducting EIA. This article critically assesses these investment disputes, and examines whether EIA can constitute an effective dispute prevention mechanism. If so, this article shall investigate the way this integration can take place, with reference to the World Bank's practice.

This article shall proceed as follows. First, the rationale and main characteristics of EIA will be sketched out, as reflected in EIA legislation, regulations and guidelines. Information and insights about EIA requirements, theory and practice will be given. Second, the investment law framework will be scrutinized. Third, the interplay between environmental considerations and investor rights in investment treaty law and arbitration will be scrutinized. While EIA already appears in many law instruments at the national, regional and international levels, investment treaties rarely, if ever, mention such a specific tool. Fourth, this article argues that EIA may represent a useful method of dispute avoidance. *De jure condendo*, the introduction of this specific mechanism in investment treaties can help reconciling the different interests at stake. Finally, some remarks will conclude the article.

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<sup>2</sup> See, F. Francioni, *Dispute Avoidance in International Environmental Law*, in A. Kiss, D. Shelton & K. Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, Kluwer Law International, The Hague: 2003, p. 235.

## 1. ENVIRONMENTAL IMPACT ASSESSMENT AS A TOOL OF ENVIRONMENTAL GOVERNANCE

EIA is an instrument of environmental governance which is used to identify, predict and assess the likely environmental consequences of any development project. Its main purpose is “to give the environment its due place in the decision making process by clearly evaluating the environmental consequences of a proposed activity before action is taken.”<sup>3</sup> Its essential feature is that EIA provides a “procedural framework for decision making” but “does not regulate the substance of the decision.”<sup>4</sup> As Holder correctly points out, however, the procedural-substantive dichotomy is more apparent than real, as EIA is highly material to the outcome of the decision making process,<sup>5</sup> and is usually “viewed as a technique for implementing the principle of preventive action.”<sup>6</sup> As a planning tool, EIA has both an information gathering and decision making component which provides the decision-maker with a basis for granting or denying approval for a proposed development. While recommendations emerging from EIA do not bind decision makers, the overall effect of completing EIA leads to environmentally-sensitive decisions. As one author puts it, “the notion of command and control regulation disappears under EIA. Authorities are empowered with exercising various options to effect the compromise between the competing goals of economic development and environmental protection”.<sup>7</sup>

### 1.1. The legal framework

The legal status of the requirement of EIA in international law is controversial. While some authors deny that EIA requirements forms part of customary international law,<sup>8</sup> others deem the precautionary principle as a norm of

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<sup>3</sup> A. Gilpin, *Environmental Impact Assessment – Cutting Edge for the Twenty First Century*, Cambridge University Press, Cambridge: 1995.

<sup>4</sup> J. Holder, *Environmental Assessment – The Regulation of Decision Making*, Oxford University Press, Oxford: 2004, chapter 1.

<sup>5</sup> *Ibidem*.

<sup>6</sup> R. Pavoni, *Environmental Rights, Sustainable Development, and Investor-State Case-Law: A Critical Appraisal*, in P.-M. Dupuy, F. Francioni & E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford: 2009, p. 476.

<sup>7</sup> K. R. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 *Colorado Journal of International Environmental Law & Policy* 83 (2000), p. 88.

<sup>8</sup> See, e.g., J. H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment* 96(2) *American Journal of International Law* 291 (2002), p. 291 (deeming that EIA does not reflect state practice but a “collective ideal of the international community” [internal

customary international law.<sup>9</sup> In this context, the International Court of Justice has recently stated:

The principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. (...) A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation is now part of the corpus of international law relating to the environment.<sup>10</sup>

More carefully (and perhaps more accurately) the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has observed that:

[t]he precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.<sup>11</sup>

Other international courts and tribunals have adopted a different stance.<sup>12</sup> As long as EIA concretizes a method of environmental governance, rather than a procedural expression of the precautionary principle, it may be deemed to have assumed the status of a customary norm of international law.<sup>13</sup> In this sense, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

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citations omitted]); B. R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 *Boston College Environmental Affairs Law Review* 447 (1994-1995).

<sup>9</sup> See, e.g., O. McIntyre and T. Mosedale, *The Precautionary Principle as a Norm of Customary International Law* 9(2) *Journal of Environmental Law* 221 (1997), p. 221.

<sup>10</sup> *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, available at <http://www.icj-cij.org/docket/files/135/15877.pdf> (accessed on 7 March 2011), para. 101.

<sup>11</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011, available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (accessed on 7 March 2011), para. 135.

<sup>12</sup> For an excellent analysis of the approaches adopted by the panels and the Appellate Body of the World Trade Organization, see L. Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010.

<sup>13</sup> In the *Pulp Mills Case*, Argentina indeed referred to the “need to carry out an environmental impact assessment” as a “customary principle”. *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 205.

a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.<sup>14</sup>

In a similar fashion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has expressly stressed that “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”.<sup>15</sup>

At the normative level, over one hundred national regulations and a number of regional and international treaties require EIA in specified circumstances.<sup>16</sup> The Rio Declaration on Environment and Development<sup>17</sup> states that “[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”<sup>18</sup> The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)<sup>19</sup> requires that EIAs be conducted by states which may have caused pollution that crosses international borders. Both the 2001 International Law Commission

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<sup>14</sup> *Ibidem*, para. 204.

<sup>15</sup> Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, para. 145, *supra* note 11, p. 4.

<sup>16</sup> For a comparative overview, see C. Wood, *Environmental Impact Assessment: A Comparative Review*, II ed., Pearson Education Limited, Harlow: 2003.

<sup>17</sup> Rio Declaration on Environment and Development, 31 ILM 874 (1992).

<sup>18</sup> *Ibidem*, Principle 17.

<sup>19</sup> The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was signed on 25 February 1991 and entered into force on 10 September 1997, 30 ILM 800 (1991).

Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,<sup>20</sup> and the UNEP Goals and Principles<sup>21</sup> require EIA.

EIA procedures are included in the Convention on Biological Diversity (CBD),<sup>22</sup> which *inter alia* requires state parties to “introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.”<sup>23</sup>

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>24</sup> requires that “[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.”<sup>25</sup> UNCLOS also requires the parties to provide technical assistance to developing countries concerning the preparation of environmental assessments.<sup>26</sup> This provision is of particular relevance for renewable energy investments.

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<sup>20</sup> Article 7 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In 2001, the International Law Commission adopted and submitted to the General Assembly the final text of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In transmitting the final draft to the General Assembly, the Commission recommended that the General Assembly elaborate a convention on the basis of the Draft Articles. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, paras. 91, 92, 94, 97 and 98. The text of the Draft Articles is also available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_7\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf) (accessed on 28 December 2010).

<sup>21</sup> United Nations Environment Program, Goals and Principles of Environmental Impact Assessment, Decision 14/25 of the Governing Council of UNEP of 17 June 1987. As Craik puts it, the UNEP Goals and Principles of Environmental Impact Assessment were “aimed at creating a set of foundational principles that could be used as a guide for the formulation of domestic and international EIA requirements.” N. Craik, *International Law of Environmental Impact Statements*, Cambridge University Press, Cambridge: 2008, p. 93.

<sup>22</sup> The Convention on Biological Diversity was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development and entered into force on 29 December 1993, 1760 UNTS 79; 31 ILM 818 (1992).

<sup>23</sup> CBD, Article 14 (1)(a).

<sup>24</sup> The United Nations Convention on the Law of the Sea was signed on 10 December 1982 and entered into force on 16 November 1994, 1833 UNTS 3; 21 ILM 1261 (1982).

<sup>25</sup> UNCLOS, Article 206.

<sup>26</sup> *Ibidem*, Article 202.

Analogously, the United Nations Framework Convention on Climate Change (UNFCCC),<sup>27</sup> whose primary objective is to maintain the greenhouse gases in the atmosphere at a level that would prevent dangerous human consequences,<sup>28</sup> requires states to “take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.”<sup>29</sup>

Even within the Antarctic Treaty System, the Madrid Protocol<sup>30</sup> requires that “activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment.”<sup>31</sup> Annex I of the Madrid Protocol entirely refers to EIA.

With regard to the content and scope of application of EIA requirements, given that international law does not provide a single notion of EIA, but EIA requirements appear in a number of multilateral environmental agreements (MEAs), soft law instruments and emerging norms of customary law, the scope of application of such requirements remains vague and ultimately depends either on the interpretation provided by relevant international courts and tribunals or the relevant provisions of MEAs and soft law instruments.<sup>32</sup> In the *Pulp Mills Case*, the International Court of Justice recently observed that general international law does not “specify the scope and content of an environmental impact assessment”:<sup>33</sup>

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<sup>27</sup> The United Nations Framework Convention on Climate Change was opened for signature on 9 May 1992 at the United Nations Conference on Environment and Development (UNCED) and entered into force on March 21, 1994, 31 ILM 849 (1992).

<sup>28</sup> WTO-UNEP, *Trade and Climate Change*, (2009) paper available at <http://www.wto.org> (accessed on 26 December 2010), p. 2.

<sup>29</sup> UNFCCC, Article 4(1)(f).

<sup>30</sup> Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) was signed in Madrid on October 4, 1991 and entered into force in 1998. 30 ILM 1455 (1991).

<sup>31</sup> Madrid Protocol, Article 3(2)(c).

<sup>32</sup> See, e.g., K. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 Colorado Journal of International Environmental Law & Policy 83 (2000), p. 94 (“EIA requirement as an emerging norm of customary law is restricted to activities adversely affecting shared natural resources, another country’s environment or the earth’s commons.”).

<sup>33</sup> The court pointed out that Argentina and Uruguay are not parties to the Espoo Convention, and it noted that “the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties,

it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.<sup>34</sup>

Within this varied normative framework, EIA requirements may vary, and eventually include social or public health elements or even cultural elements, depending on the scope of application of the relevant MEAs.<sup>35</sup>

EIA may be required not only with regard to state activities, but also with regard to the activities of private persons. The World Bank has introduced EIA and public consultation procedures in project financing since 1989.<sup>36</sup> Several projects have been modified as a result of an EIA. For instance, in the Botswana Tuli Blocks Roads project a road was rerouted in order to preserve an archeological site.<sup>37</sup> A number of soft law instruments also make reference to EIA with regard to the conduct of multinational corporations. According to the UN Norms on the Responsibility of Transnational Corporations:<sup>38</sup>

transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, (...) and the precautionary principle, and shall generally

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but, as guidelines issued by an international technical body, has to be taken into account by each Party (...) in adopting measures within its domestic regulatory framework." *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, para. 205.

<sup>34</sup> *Ibidem*.

<sup>35</sup> For instance, the World Health Organization does not recommend the use of a separate health impact assessment, but the inclusion of health consideration within the existing EIA tool. A. Gilpin, *Environmental Impact Assessment: Cutting Edge for the Twenty First Century*, Cambridge University Press, Cambridge: 1995, p. 87.

<sup>36</sup> See, World Bank Operational Directive 4.00 (1989).

<sup>37</sup> Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2000/08/26/000094946\\_00081405575920/Rendered/INDEX/multi\\_page.txt](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2000/08/26/000094946_00081405575920/Rendered/INDEX/multi_page.txt).

<sup>38</sup> United Nations Economic and Social Council, Commission on Human Rights, Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights (UN Norms on the Responsibility of Transnational Corporations), E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En) (accessed on 29 December 2010).



conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>39</sup>

The Commentary to the UN Norms specifies, among other things, that:

in decision-making processes and on a periodic basis (preferably annually or biannually), transnational corporations and other business enterprises shall assess the impact of their activities on the environment and human health including impacts from (...) natural resource extraction activities, the production and sale of products or services, and the generation, storage, transport and disposal of hazardous and toxic substances.<sup>40</sup>

Although the Draft Norms, which ultimately sought to impose binding obligations on companies directly under international human rights law, were not adopted by the Commission on Human Rights, they paved the way to the UN Framework.<sup>41</sup> In elaborating the corporate responsibility to respect human rights, the UN Framework puts particular emphasis on impact assessments:

Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context. While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.<sup>42</sup>

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<sup>39</sup> See, Norm 14 of the UN Norms on the Responsibility of Transnational Corporation.

<sup>40</sup> Commentary to the UN Norm 14 at (c).

<sup>41</sup> The then Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative with the goal of moving beyond the stalemate and clarifying the roles and responsibilities of states and companies in the business and human rights sphere. The Special Representative, Professor John Ruggie, presented the "Protect, Respect and Remedy" Framework (UN Framework) to the Human Rights Council in June 2008. The UN Framework rests on three pillars: 1) the state duty to protect human rights; 2) the corporate responsibility to respect human rights; and 3) effective remedies. Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on 9 March 2011).

<sup>42</sup> *Ibidem*, para. 61.

The OECD Guidelines also stress the need for life-cycle impact assessments,<sup>43</sup> while the International Finance Corporation (IFC)<sup>44</sup> also requires environmental assessments on the projects which it funds and expands the notion to include cumulative impacts and possible global impacts through consideration of applicable multilateral environmental agreements.<sup>45</sup>

In conclusion, EIAs are now a well-established international and domestic legal method for States to integrate environmental concerns into development and decision-making<sup>46</sup> and to make better-informed decisions.<sup>47</sup> Although the status and scope of EIA in customary international law are not entirely clear, there is no doubt that this is a key environmental tool, as demonstrated by its growing recognition in treaties, regional instruments, domestic legislation, and judicial practice.<sup>48</sup> According to some authors, whether or not the State in which a private company operates requires through national legislation that foreign and national enterprises undertake EIAs, an international standard has emerged that may require the private sector to assess, prior to undertaking certain activities,

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<sup>43</sup> OECD Guidelines, Ch. V, para 3: "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should: (...) assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment." The OECD Guidelines for Multinational Enterprises were completed in June 2001 and are available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed on 29 December 2010). Adhering countries are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate.

<sup>44</sup> The International Finance Corporation is part of the World Bank Group and its goal is to foster sustainable economic growth in developing states by financing private sector loans for specific projects such as dams, and other large-scale projects that may have environmental impact.

<sup>45</sup> See, D. Collins, *Environmental Impact Statements and Public Participation in International Investment Law*, 7(2) *Manchester Journal of International Economic Law* 4 (2010), p. 10.

<sup>46</sup> See, P. Sands, *Principles of International Environmental Law*, Manchester University Press, Manchester: 2003, p. 800.

<sup>47</sup> K. R. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 *Colorado Journal of International Environmental Law & Policy* 83 (2000), p. 88.

<sup>48</sup> See, Pavoni, *supra* note 6, p. 476.

the possible impacts on the environment, on the basis of scientific evidence and communication with likely affected communities.<sup>49</sup>

## 1.2 The participatory dimension of environmental impact assessment

Most impact assessments include some form of public participation and public consultation.<sup>50</sup> EIA legislation usually requires that the environmental impacts of proposed activities be made known not only to regulatory authorities but also to the private stakeholders such as local communities. The public is granted “the opportunity to understand the implications of the project and express its views to policy-makers”,<sup>51</sup> and the opportunity to access justice when it considers that its views and comments have not been duly taken into account in the decision-making process.

There are two fundamental arguments for opening the process: first, public participation in decision-making is deemed to “enshrine state action with legitimacy”:<sup>52</sup> “such decisions are not merely technical choices, but matters of public governance.”<sup>53</sup> The people in the areas where the resources are located “tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.”<sup>54</sup> Second, public involvement can provide additional data to the decision-making authorities<sup>55</sup> and “guarantee that conflicting views must be considered as a matter of record.”<sup>56</sup>

The participatory dimension of EIA acquires particular relevance when the assessed economic activity involves areas inhabited by minorities or indigenous people.<sup>57</sup> Natural resources extraction is increasingly taking place in, or very close

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<sup>49</sup> See, E. Morgera, *Human Rights Dimensions of Corporate Environment Accountability*, in P.-M. Dupuy *et al.*, *supra* note 6.

<sup>50</sup> See, Craik, *supra* note 21, p. 31. See for instance, at the international level, Espoo Convention, Article 2(6). At the regional level, see the EU Directive on Environmental Impact Assessment 2003/35/EC, Article 3.

<sup>51</sup> Francioni, *supra* note 2, p. 235.

<sup>52</sup> Collins, *supra* note 45, p. 4.

<sup>53</sup> R. N. A. L. Andrews, *Environmental Impact Assessment and Risk Assessment: Learning From Each Other*, in P. Wathern (ed.), *Environmental Impact Assessment: Theory and Practice*, Routledge, London: 1988, p. 94.

<sup>54</sup> L. Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water* 11 Ann. Surv. Int'l & Comp. L. (2005), p. 6.

<sup>55</sup> See, Collins, *supra* note 45, p. 4.

<sup>56</sup> Andrews, *supra* note 53, p. 94.

<sup>57</sup> See generally, L. Crippa, *Cross-Cutting Issues in the Application of the Guatemalan “NEPA”: Environmental Impact Assessment and the Rights of Indigenous Peoples* 24 American University International Law Review 103 (2008); V. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law* 42(3) Columbia Human Rights Law Review (forthcoming, 2011).

to, traditional indigenous areas.<sup>58</sup> While development analysts point to extractive projects as anti-poverty measures and international economic organizations similarly advocate for foreign direct investment as a major catalyst for development,<sup>59</sup> some states have adopted a *laissez-faire* approach and enable companies to obtain rights over land without the consent of indigenous communities.<sup>60</sup> This has led to inadequate protection of indigenous peoples' rights.<sup>61</sup>

For instance, in the recent *Saramaka People v Suriname Case*,<sup>62</sup> which concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people without their full consultation, the Inter-American Court of Human Rights examined the rights of indigenous peoples in international law and concluded that Suriname could grant concessions for the extraction of mineral resources only when such concessions did not deny the Saramaka's survival.<sup>63</sup> Together with prior informed consent and benefit sharing, a prior and independent environmental and social impact assessment was deemed to be an essential safeguard by which the state should abide.<sup>64</sup> According to the Court, "these safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people."<sup>65</sup> In this context, had the

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<sup>58</sup> See, K. M. Gast, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 *Transnational Law & Contemporary Problems* 253 (2004-2005), p. 255; Barrera-Hernández, *supra* note 54, p. 13.

<sup>59</sup> See, OECD, *Foreign Direct Investment for Development* (OECD: Paris 2002), p. 3.

<sup>60</sup> See, M. Satterwhite & D. Hurwitz, *The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects*, 22 *Arizona Journal of International & Comparative Law* 1 (2005), pp. 1-2.

<sup>61</sup> *Ibidem*.

<sup>62</sup> *Saramaka People v Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 28 November 2007. Series C, No. 72 at <http://www.corteidh.or.cr>.

<sup>63</sup> Since Suriname had not ratified ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (28 ILM 1382) and its legislation did not recognize the concept of communal property, the Court utilized systemic interpretation, and made reference to Articles 1 and 27 of the International Covenant on Civil and Political Rights (99 UNTS 171) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (99 UNTS 3). Common Article 1 refers to self-determination, while article 27 ICCPR refers to culture.

<sup>64</sup> *Saramaka People v Suriname*, para. 129: "(...) the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment."

<sup>65</sup> *Ibidem*.

host state required an EIA, such an instrument would have immediately assessed whether the proposed economic activities would be compatible or not with environmental protection, and more importantly, the Saramaka people's human rights. This case also highlights how EIA can evolve from being an instrument of pure environmental governance to a procedural safeguard that can indirectly protect other fundamental values.<sup>66</sup>

The European Court of Human Rights (ECtHR) has similarly stated that lack of EIA, or insufficient regard for participatory rights within the EIA process, may entail a violation of the right to private life and, in the most serious situations, of the right to life (Articles 8 and 2 of the ECHR).<sup>67</sup> For instance, in the *Taşkin* case, the ECtHR stressed the importance of participatory rights "where a State must determine complex issues of environmental and economic policy",<sup>68</sup> and concluded that Turkey had violated the applicants' right to private life by nullifying the procedural safeguards formally available to them during the authorization's process for the gold mine at stake.<sup>69</sup>

In the *Pulp Mills* case,<sup>70</sup> Argentina and Uruguay *inter alia* disagreed on the extent to which the populations likely to be affected by the construction of a mill were consulted in the course of the EIA.<sup>71</sup> The case concerned a large industrial project for the production of cellulose to be developed by two European (Finnish and Spanish) corporations on a section of the River Uruguay constituting the border between Uruguay and Argentina.<sup>72</sup> The project was fiercely opposed by Argentina and the affected local population on account of its allegedly negative environmental effects. While both Parties agreed that consultation of the affected populations should form a part of EIA, Argentina asserted that international

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<sup>66</sup> Social Impact Assessments can be considered different, yet related animals to EIA. Social impact assessments review the social effects of infrastructure projects, cultural impact assessment. See W. R. Freudenburg, *Social Impact Assessment*, 12 Annual Review of Sociology 451 (1986), p. 451.

<sup>67</sup> See, ECtHR, *Giacomelli v. Italy*, (59909/00), Judgment, ECHR 2 November 2006, paras. 83-94. See also *Hatton and Others v. The United Kingdom*, (36022/97), Judgment, ECHR 8 July 2003, para. 128; *Taşkin and Others v. Turkey*, (46117/99), Judgment, ECHR 10 November 2004, paras. 119-25.

<sup>68</sup> *Taşkin*, para. 119.

<sup>69</sup> *Ibidem*, paras. 124-6.

<sup>70</sup> *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 205.

<sup>71</sup> *Ibidem*, para. 215.

<sup>72</sup> *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Order on Provisional Measures of 13 July 2006, para. 48.

law imposed specific obligations on States in this regard.<sup>73</sup> In support of this argument, Argentina referred to Articles 2.6 and 3.8 of the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles.<sup>74</sup> Uruguay submitted that the provisions invoked by Argentina could not serve as a legal basis for an obligation to consult the affected populations and added that in any event the affected populations had indeed been consulted.<sup>75</sup> The Court concluded that “no legal obligation to consult the affected populations arise[d] for the Parties from the instruments invoked by Argentina.”<sup>76</sup>

## 2. INTERNATIONAL INVESTMENT LAW

While environmental law has a recent pedigree,<sup>77</sup> the law of foreign investment is one of the oldest and most complex areas of international law.<sup>78</sup> More than three thousand investment treaties govern foreign investments and provide exten-

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<sup>73</sup> *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 215.

<sup>74</sup> *Ibidem*.

<sup>75</sup> *Ibidem*.

<sup>76</sup> *Ibidem*, para. 216. In any case, the Court noted that “both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river.” (*Ibidem*).

<sup>77</sup> See, E. Fisher, B. Lange, E. Scotford & C. Carlarne, *Maturity and Methodology: Starting a Debate about Environmental Law Scholarship*, 21(2) *Journal of Environmental Law* 213 (2009), p. 214.

<sup>78</sup> Here, I draw on the scholarship of Francesco Francioni and Roberto Ago. While Bilateral Investment Treaties are a recent phenomenon, the protection of foreign direct investment is an ancient phenomenon and both national and international law norms existed in this respect even before the advent of bilateral investment treaties. See F. Francioni, *Access to Justice, Denial of Justice, and International Investment Law* in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds) *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford: 2009, p. 63 (“Even before the formation of the modern nation state, the need for a minimum degree of protection of the life, security and property of aliens established in, or visiting, a foreign land had emerged in the late Middle Ages, especially in the context of the flourishing trade between the Italian maritime Republics – such as Venice and Genoa – and the Mediterranean areas under Muslim dominion”). See generally R. Ago, *Pluralism and the Origin of the International Community*, 3 *Italian Yearbook of International Law* (1977), p. 3. On the historical developments of international investment law, see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties Standards of Treatment*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 7 ff.

sive protection to investors' rights in order to encourage foreign direct investment (FDI) and to foster economic development.<sup>79</sup> While investment treaties differ in their details, their scope and content have been standardized over the years, as negotiations have been characterized by an ongoing sharing and borrowing of concepts.<sup>80</sup> Some commentators have noted the development of a "common lexicon" of investment treaty law.<sup>81</sup>

At the substantive level, investment treaties typically define the scope and definition of FDI and provide for protection against discrimination, fair and equitable treatment, full protection and security, treatment no less favorable than required by customary international law, and assurances that the host country will honor its commitments regarding the investment.<sup>82</sup> Other common provisions in investment treaties concern the repatriation of profits and prohibit currency controls worse than those originally in place when the treaty was signed.<sup>83</sup> Investment treaties generally guarantee compensation in the event of nationalization, expropriation, or indirect expropriation, and clarify what level of compensation will be owed in such cases.<sup>84</sup>

Treaty provisions lack precise definition of these standards and their language encompasses a potentially wide variety of state regulations that may interfere with investors' property rights. Therefore, a potential tension exists when a State adopts regulatory measures interfering with foreign investments, as regulation may be deemed to violate substantive standards of treatment under investment treaties and the foreign investor may demand compensation before arbitral tribunals. For instance, there is no settled approach in cases where investors allege that certain regulatory measures constitute a compensable form of expropriation.<sup>85</sup>

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<sup>79</sup> See, A. Aust, *Handbook of International Law* (2nd ed.), Cambridge University Press, Cambridge: 2010, p. 345.

<sup>80</sup> See, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly* 279 (2005), p. 284.

<sup>81</sup> C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration*, Oxford University Press, Oxford: 2007, p. 6.

<sup>82</sup> On the substantive standards of protection of foreign direct investment, see generally A. Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, Oxford: 2008.

<sup>83</sup> See, K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 *American Journal of International Law* 621 (1998) p. 631. But see K. Gallagher, *Trading Away Financial Stability*, *Guardian*, 04.05.2010.

<sup>84</sup> See, Vandevelde, *supra* note 83, p. 631.

<sup>85</sup> The literature on regulatory expropriation is extensive: e.g., J. Mariles, *Public Purpose, Private Losses, Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 *Journal of Transnational Law and Policy* 257 (2006-07); S. Subedi, *The Challenge of Reconciling the Competing Principles of Within the Law of Foreign Investment With Special Reference to the Term "Expropriation"* 40 *International Law* 121 (2006).

The concept of expropriation is broadly construed in investment treaties which do not only protect foreign assets from direct and full taking of property, but also from *de facto* or indirect expropriation, i.e. measures of equivalent effect.<sup>86</sup>

At the procedural level, bilateral investment treaties (BITs) provide investors direct access to international arbitral tribunals. In doing so, BITs create a set of procedural rights for the direct benefit of investors, although individual investors *are* not party to the treaties.<sup>87</sup> This is a major novelty in international law, as customary international law does not provide such a mechanism.<sup>88</sup> The rationale for internationalizing investor-state disputes lies in the assumed independence and impartiality of international arbitral tribunals, while national dispute settlement procedures are often perceived as biased or inadequate.<sup>89</sup> Arbitration is also used because of perceived advantages in confidentiality<sup>90</sup>

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<sup>86</sup> Expropriation is *direct* where an investment is nationalized or otherwise directly expropriated through formal transfer of title or physical seizure. Expropriation is *indirect* where the host state interferes in the use of property or with the enjoyment of its benefits even where the property is not seized and the legal title of the property is not affected. The so-called *creeping expropriation* – i.e. where the host state effectively expropriates an investment by a series of measures that, over time, deprive the investor of its use and enjoyment – may constitute a form of indirect expropriation. See OECD, “*Indirect Expropriation and The “Right to Regulate” in International Investment Law*”, Working Paper on International Investment No. 4, OECD, Paris: 2004, pp. 3-4.

<sup>87</sup> See, J. Paulson, *Arbitration Without Privity*, 10 ICSID Review-Foreign Investment Law Journal 232 (1995).

<sup>88</sup> See, D. Sedlak, *ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold?* 23 Pennsylvania State International Law Review 147 (2004).

<sup>89</sup> See, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, Aalphen an den Rijn: 2009, p. 24.

<sup>90</sup> Confidentiality is one of the main features of arbitral proceedings as generally hearings are held *in camera* and documents submitted by the parties remain confidential in principle. Final awards may not be published, depending on the parties’ will. Even the names of the parties and much less the details of the dispute may be not disclosed. Because investment disputes are settled using a variety of arbitral rules – not all of which provide for public disclosure of claims – there can be no accurate accounting of all such disputes. In recent years, efforts to make investment arbitration more transparent have been undertaken in various *fora*. In response to calls from civil society groups, the three parties to the North American Free Trade Agreement (NAFTA), Canada, the United States, and Mexico, have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public. See NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, 7 October 2003, 16 W.T.A.M (2004). Similarly, the International Centre for Settlement of Investment Disputes (ICSID) requires public disclosure of dispute proceedings under its auspices. See Regulation 22: “(1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of



and effectiveness.<sup>91</sup> The arbitral process in investment arbitration thus presents characteristics similar to those in a typical international commercial arbitration.<sup>92</sup> The composition of the tribunal is determined by the parties who generally choose law scholars or professionals. Only recently, investment arbitration tribunals have allowed public interest groups to present *amicus curiae* briefs.<sup>93</sup> ICSID Rules have undergone amendments, and now also grant ICSID Tribunals discretion to allow interested third parties to make written submissions in arbitral proceedings.<sup>94</sup> These important developments, however, involve the conduct of the proceedings of a limited number of investment disputes. Indeed, the vast majority of existing treaties do not mandate such public scrutiny and participation.<sup>95</sup>

Finally, awards rendered against host states are, in theory, readily enforceable against host state property worldwide, due to the widespread adoption of the New York<sup>96</sup> and Washington Conventions.<sup>97</sup> Under the New York Convention, the recognition and enforcement of the award may be refused only on limited grounds.<sup>98</sup> Arbitration under the ICSID rules is wholly exempted from the super-

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the date and method of the termination of each proceeding (...)." The Administrative and Financial Regulations of ICSID are available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (accessed on 16 November 2010).

<sup>91</sup> See, I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1(1) ICSID Review Foreign Investment Law Journal 1 (1986), p. 4.

<sup>92</sup> See, N. Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)* in J. Lew & L. Mistelis (eds.), *Pervasive Problems in International Arbitration*, Kluwer Law International, The Hague: 2006, pp. 217-33.

<sup>93</sup> On the issue of *amicus curiae* briefs in investor state arbitration, e.g. A. Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae*, in M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague: 2010, pp. 275-95.

<sup>94</sup> ICSID Arbitration Rule 37; ICSID Arbitration Rules are available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (accessed on 6 December 2010).

<sup>95</sup> In the NAFTA context, the NAFTA States Parties have agreed to support open hearings (see *supra* note 90). A detailed discussion of transparency in investor state arbitration is outside the narrow scope of this article. See generally J. Delaney and D. Barstow Magraw, *Procedural Transparency*, in P. Muchlinski, F. Ortino and C. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford: 2008, pp.721-788; C. Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration* 23(2) *Arbitration International* 327 (2007).

<sup>96</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed on June 10, 1958, and entered into force on 7 June 1959, 330 UNTS 38.

<sup>97</sup> The Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID or Washington Convention) was signed on 18 March 1965 and entered into force on 14 October 1966, 575 UNTS 159.

<sup>98</sup> New York Convention, Article V.

vision of local courts, with awards subject only to an internal annulment process.<sup>99</sup> In the context of other procedures, if arbitration is sited in a country other than the host state, then there may be no capacity whatsoever for the host government to challenge the award in its own legal system.<sup>100</sup>

Given the characteristics of the arbitral process, a significant issue is whether environmental goods can be protected within a framework aimed primarily at protecting private interests.<sup>101</sup> While arbitration structurally constitutes a private model of adjudication, investment treaty arbitration can be viewed as public law adjudication.<sup>102</sup> Arbitral awards ultimately shape the relationship between state, on the one hand, and private individuals on the other.<sup>103</sup> Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.<sup>104</sup> As environmental goods are a shared interest of humanity, one may wonder whether investment arbitration provides an adequate forum to adjudicate cases with environmental elements. At the end of the day, litigation before arbitral tribunals focuses on the protection of foreign direct investments and the alleged violation of relevant investment treaty provisions. Whether arbitral tribunals make reference to environmental goods is *incidenter tantum*; the protection of environmental goods does not give rise to an independent cause of action before investor-state arbitral tribunals. In other words, arbitrators cannot adjudicate on the violation of MEAs as these are outside their arbitral mandate. What they can do is to make reference to environmental protection as embodied in the national law of the host state or in international law standards, provided these are binding on the host state. This will ultimately depend on the applicable law.<sup>105</sup>

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<sup>99</sup> ICSID Convention Article 52; on the ICSID Annulment process, see C. Schreuer, *ICSID Annulment Revisited*, 30 *Legal Issues of Economic Integration* (2003) p. 103-122.

<sup>100</sup> See, L. E. Peterson, *Bilateral Investment Treaties and Development Policy Making*, International Institute for Sustainable Development: 2004, p. 22.

<sup>101</sup> The very process of investor state arbitration may not represent the best forum to adjudicate environmentally sensitive cases. For a similar argument, see G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2008.

<sup>102</sup> See, G. Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 (2) *International & Comparative Law Quarterly* 371 (2007), p. 372.

<sup>103</sup> See, G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2007, p. 70.

<sup>104</sup> See, A. K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, *Penn State Law Review* 1269 (2009), p. 1272.

<sup>105</sup> ICSID Convention, Article 42.

Furthermore, the mere possibility of a dispute with a powerful investor can exert a chilling effect on government's decisions to regulate in the public interest. This is particularly true with regard to developing countries, which may find it attractive to race to the bottom by lowering their environmental standards in order to attract foreign investments. For instance, commentators have reported that in 2002 a group of mainly foreign owned mining companies threatened to commence international arbitration against the government of Indonesia in response to its ban on open-pit mining in protected forests.<sup>106</sup> Six months later, the Ministry of Forestry agreed to change the forest designation from *protected* to *production* forests.<sup>107</sup>

Finally, as Gal-Or has pointed out, investor-state arbitration distinguishes between two types of non-state actors:<sup>108</sup> 1) the investor engaged in foreign direct investment; and 2) everyone else, including the affected communities which are impacted by the FDI.<sup>109</sup> While foreign investors have direct access to investor-state arbitration under the relevant BIT, the affected communities do not have direct access to investor-state arbitration and their participation is only possible through the submission of *amicus curiae* briefs. The submission of *amicus curiae* is not a right, though, but a mere option that will be considered by the arbitral tribunal on a case by case basis. It is true that affected communities have access to local courts, but since the resolution of investment disputes is delegated to an international dispute settlement mechanism, "this delegation undercuts the authority of national courts to deal with [such] disputes."<sup>110</sup> Furthermore, as Francioni highlights, "court decisions in the host state upholding complaints brought by private parties against a foreign investor may be attacked by the investor before an arbitral tribunal on the ground that they constitute wrongful interference with the investment."<sup>111</sup>

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<sup>106</sup> See, S. Grass, *Inordinate Chill: BITs, Non-NAFTA MITs and Host-State Regulatory Freedom – An Indonesian Case Study*, 24 Michigan Journal of International Law 893 (2002-2003), p. 894.

<sup>107</sup> *Ibidem*.

<sup>108</sup> For a penetrating critique of the concept of non-state actors, see P. Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in Philip Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, Oxford: 2005.

<sup>109</sup> N. Gal-Or, *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*, 32 Suffolk Transnational Law Review 271(2008-2009).

<sup>110</sup> F. Francioni, *Access to Justice, Denial of Justice, and International Investment Law* in P.-M. Dupuy et al., *supra* note 78, p. 72.

<sup>111</sup> *Ibidem*.

Given the “increasing impact of foreign investment on the social sphere of the host state”, Francioni has asked whether “the principle of access to justice, as successfully developed for the benefit of investors through the provision of binding arbitration in BITs, ought to be matched by a corresponding right to remedial process for individuals and groups adversely affected by the investment in the host state.”<sup>112</sup> While the reasons for differentiating procedural remedies still exist, since BITs are meant to encourage investment, when investment arbitrations deal with fundamental policy issues, the reasons for procedural transparency and public participation become even more compelling.

### 3. ENVIRONMENTAL PROTECTION IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION

Environmental issues have been addressed by investment treaties only in recent decades, but have become a constant feature since the inception of the North American Free Trade Agreement (NAFTA).<sup>113</sup> NAFTA presents several clauses concerning environmental measures. First, NAFTA parties have recognized that “it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures.”<sup>114</sup> Second, at a more general level, NAFTA Article 104, in relation to Environmental and Conservation Agreements, gives priority to these treaties over the provisions in other parts of NAFTA, “provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this agreement.”<sup>115</sup> Therefore, if the environmental measures are mandatory under one of the listed MEAs, they will be permissible under NAFTA. If they are not mandatory, but merely designed to implement one of the listed agreements, they will need to be as consistent with NAFTA as far as possible.<sup>116</sup> Third, the NAFTA preamble commits the Parties to attain trade and investment goals in a manner consistent with environmental protection and conservation, preserving the flexibility to safeguard the public welfare and

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<sup>112</sup> *Ibidem*, p. 71.

<sup>113</sup> The North American Free Trade Agreement was signed in December 1992 and entered into force on January 1, 1994, 32 I.L.M. 289 (Parts 1-3) and 32 I.L.M. 612 (Parts 4-8).

<sup>114</sup> See, NAFTA, Article 1114.

<sup>115</sup> NAFTA Article 104.

<sup>116</sup> See, J. Freedman, *Implications of the NAFTA Investment Chapter for Environmental Regulation*, in A. Kiss *et al.*, *supra* note 2, p. 90.

promote sustainable development. Although preambular language is not deemed to be binding on the Parties, it expresses the general objectives of the agreement.

Fourth, the NAFTA was complemented by a side agreement, the North American Agreement on Environmental Cooperation (NAEEC), which is directed at fostering environmental cooperation amongst the Parties.<sup>117</sup> Articles 2 and 10.7 of the NAAEC mandate EIA. According to Article 2 of the NAAEC, “[e]ach Party shall, with respect to its territory ... assess, as appropriate, environmental impacts.” Indeed, the domestic law of each of the North American nations requires potential environmental impacts of certain activities to be assessed before such activities are undertaken. However, as Gaines points out, there is no “established mechanism to bridge the gap between environmental co-operation and investor compensation or (...) explicit consideration of the environmental and economic ramifications of the NAFTA Chapter 11 disputes.”<sup>118</sup>

Other subsequent investment treaties and the Energy Charter Treaty (ECT)<sup>119</sup> equally reflect environmental concerns in a variety of ways. They may include hortatory language in the preamble or separate provisions that emphasizes the importance of environmental protection, environmental exceptions and so on and so forth.<sup>120</sup> The ECT specifically requires the Parties to promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of environmental impacts of significant energy investment projects.<sup>121</sup> Even during the negotiations of the Multilateral Agreement on Investment, several proposals paralleled the NAFTA “not lowering standards” clause.<sup>122</sup>

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<sup>117</sup> NAAEC, the parallel side agreement to the NAFTA, came into force on January 1, 1994 and established the Commission for Environmental Co-operation to facilitate cooperation on the conservation, protection and enhancement of the environment in North America, 32 I.L.M. 1480 (1993).

<sup>118</sup> S. Gaines, *Protecting Investors, Protecting the Environment - The Unexpected Story of NAFTA Chapter 11* in D. Markell & J. H. Knox (eds.), *Greening NAFTA: The North American Commission for Environmental Co-operation*, Stanford University Press, Stanford: 2003, p. 157.

<sup>119</sup> The Energy Charter Treaty was signed on December 17, 1994, 34 I.L.M. 374 (1995).

<sup>120</sup> For an exhaustive overview, see generally, A. Newcombe, *Sustainable Development and Investment Treaty Law*, 8(3) *Journal of World Investment & Trade* 357 (2007).

<sup>121</sup> ECT, Article 19.1.i.

<sup>122</sup> The Multilateral Agreement on Investment (MAI) was a draft agreement negotiated between members of the Organization for Economic Co-operation and Development (OECD) in 1995–1998. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures. The initiative failed because of the opposition of NGOs which pointed to a perceived threat to national sovereignty.

There seems to be no irreconcilable conflict between investment treaties and environmental objectives, at least at a theoretical-normative level. However, authors have stressed that the investment treaty clauses referring to environmental protection include “purely hortatory” language with unenforceable character.<sup>123</sup> For instance, the breach of NAFTA Article 1114(1) would give rise to no more than consultations among parties, while “it may be questioned whether [Article 1114(2)] provides any meaningful relief for environmental regulations, or whether it is tautological, protecting only measures that are in any event ‘consistent with this chapter’.”<sup>124</sup> While environmental concerns have been somehow integrated in investment treaties, environmental clauses remain rather vague and even subordinate environmental measures to consistency with investment treaty provisions.<sup>125</sup> The very fact that the balancing process occurs in the context of investor-state arbitration could lead to the procedure being deemed biased in favour of the investors. Finally, environmental disputes invariably raise competing scientific claims. The question then becomes: how should adjudicators approach inconclusive data and diverging scientific opinions without adjudicating on scientific truths?

Turning our attention to the emerging case law, it is becoming clear that there is no such thing as a typical “environmental dispute”. From an investor’s perspective, EIA may constitute a “far-reaching form of interference with investment activities”.<sup>126</sup> An EIA may conclude that a given project or business is not environmentally safe or that the project or business should be authorized, or continue to be carried out, only if additional information is provided, or technical precautions implemented, at the investor’s expense. The question is whether such “interferences” with foreign investment amount to a violation of investor protections, such as the prohibition of expropriation without compensation and/or the fair and equitable treatment. While investors have not contested the rationale for imposing EIAs, they have increasingly challenged the methodology, i.e. the way national authorities have conducted EIAs.

Furthermore, environmental cases operate *across the board*, arising in relation to investment in mineral exploitation, waste treatment, water management and numerous other sectors. While economic activities may generally present some risks to health and safety, certain industries present specific risks.

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<sup>123</sup> J. Kelsey, *International Economic Agreements and Environmental Justice*, in K. Bosseman & B. J. Richardson (eds.), *Environmental Justice and Market Mechanisms*, Kluwer Law International, The Hague: 1999, p. 168.

<sup>124</sup> Freedman, *supra* note 116, p. 94.

<sup>125</sup> See, S. Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18(2) *Journal of Environmental Law* 207 (2006), p. 222.

<sup>126</sup> Pavoni, *supra* note 6, p. 476.

For instance, the chemical industry may involve hazardous activities with associated safety risks. Similarly, mineral exploitation can have a negative impact on public health through air and water pollution. For example, gold extraction may involve the use of toxic substances such as cyanide and mercury, and the inadequate handling of such substances is a source of environmental health problems.<sup>127</sup>

In conclusion, while theoretically there may be synergy between foreign investment promotion and environmental protection, concretely it is difficult to find the right balance between the different interests concerned. Therefore, it is important to analyze recent arbitral awards that have involved EIAs, in order to ascertain whether arbitral tribunals conform to the recent normative and jurisprudential trends discussed above in Sections I and II. The following analysis will scrutinize the way in which investment treaty guarantees have been interpreted in cases involving EIAs.<sup>128</sup>

#### 4. ENVIRONMENTAL IMPACT ASSESSMENT IN INVESTMENT ARBITRATION

EIAs have come to the forefront of legal debate in investment disputes. In abstract terms, detecting the environmental consequences of the project before it is implemented, and ensuring that planned activities are compatible with sound environmental management and sustainable development may prevent the risks of environmental damage and ensure the reconciliation of private and public interests. However, EIA needs to respect international standards of transparency and fairness. Recent investment treaty claims have questioned the methodology, i.e. the way of conducting EIA, and arbitral tribunals have clarified important methodological aspects that EIAs need to comply with in order to be legitimate and in conformity with international investment law. This section scrutinizes two pending disputes and the awards that have clarified important procedural aspects of the EIA process.

In a pending NAFTA case, recently initiated against the Government of Canada, the Clayton family and their US corporation, Bilcon, object to the manner

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<sup>127</sup> See, UNCTAD, *Transnational Corporations, Extractive Industries and Development - World Investment Report 2007*, World Bank, New York: 2007, p. xxiv.

<sup>128</sup> See generally, V. Vadi, *Reconciling Environmental Health and Investor's Rights in International Investment Law* in J. R. Engel, L. Westra & K. Bosselmann (eds.), *Democracy, Ecological Integrity and International Law*, Cambridge Scholars Publishing, Newcastle upon Tyne: 2010, pp. 226-46.

in which an environmental assessment has been undertaken.<sup>129</sup> The investors proposed to mine basalt, a key ingredient in the production of asphalt, in the coastal Canadian province of Nova Scotia and then ship it by tankers to their New Jersey site. The project attracted a large amount of public discussion in Nova Scotia, and was ultimately rejected following the EIA. The claimants acknowledge that an EIA was required for their project, but they claim that the process was unusually protracted, discretionary, and ultimately politically motivated. Because of failure of due process and the rule of law, the claimants allege violation of Article 1102 (National Treatment), Article 1103 (Most-Favoured Nation Treatment) and Article 1105 (Fair and Equitable Treatment) of the NAFTA.

In its Statement of Defence, Canada points out that the project is comprised in a biosphere reserve designated by UNESCO in 2001,<sup>130</sup> and that the Bay of Fundy “is recognized worldwide as an extremely productive ecosystem with diverse plant and marine life.”<sup>131</sup> Canada also states that an environmental assessment is required by Canada and Nova Scotia’s environmental assessment laws<sup>132</sup> “to promote sustainable development in the context of the conservation, protection and enhancement of the environment.”<sup>133</sup> Canada points out that the Environmental Impact Statement that was prepared by Bilcon was assessed by the panel (composed by experts in oceanography, planning and environmental studies) which collected all relevant information and solicited public comment.<sup>134</sup> After thirteen days of public hearings, the panel recommended the relevant authorities to reject the proposed project in its entirety due to “the significant adverse environmental effects that [it] would cause to the physical, biological and human environment on Digby Neck and in the Bay of Fundy, including on the ‘core community values’ of the affected communities.”<sup>135</sup> Both the Nova Scotia Minister of the Environment and the Government of Canada accepted the conclusions

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<sup>129</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Notice of Arbitration, May 26, 2008, available at <http://www.pca-cpa.org/upload/files/BilconNoticeofArbitration.pdf> (accessed on 29 December 2010).

<sup>130</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Statement of Defence, para. 10.

<sup>131</sup> *Ibidem*, para. 9.

<sup>132</sup> Due to Canada’s constitutional division of powers, the project required environmental assessment at both the federal and the provincial level and a joint environmental assessment was undertaken. *Clayton and Bilcon v. Canada*, *supra* note 129, para. 21.

<sup>133</sup> *Ibidem*, para. 16.

<sup>134</sup> *Ibidem*, paras. 60-4.

<sup>135</sup> *Ibidem*, para. 66.



of the panel and rejected Bilcon's project. Canada argued that its measure had not breached Chapter 11 of NAFTA.

At the time of this writing, another arbitration is pending against the Republic of El Salvador under the US Central America Free Trade Agreement (CAFTA).<sup>136</sup> According to the claimant, Pac Rim, which plans to explore and develop gold deposits there, El Salvador breached international and national standards, because of its failure, within its own mandated timeframes and pursuant to the terms of applicable laws, to issue exploration and exploitation permits, after an EIA was submitted by the company in 2006. Until the EIA is approved, the company cannot obtain the permit necessary for exploiting gold mines. Accordingly, the company is requesting compensation for damages.<sup>137</sup> While it is still too early to attempt to predict how these cases will be settled, both cases present crucial legal issues concerning procedural aspects of EIA. More interestingly, there are some interesting "persuasive precedents"<sup>138</sup> that the arbitral tribunal may find of relevance.

In *Maffezini v Spain*,<sup>139</sup> an Argentine investor brought a claim for denial of fair and equitable treatment with regard to an EIA that had blocked his chemical plant in Spain. In 1992, the construction of the chemical plant had to be discontinued because of the investor's financial crisis. In the subsequent ICSID arbitration, Maffezini *inter alia* complained that the Spanish authorities had misinformed it about the costs of the project, and pressured the company to make the investment before the EIA process was finalized and before its implications were known. Therefore, according to the claimant, the Spanish authorities would have been responsible for the additional costs resulting from the environmental impact assessment. The arbitral tribunal dismissed these claims holding that "the environmental impact assessment procedure is basic for adequate protection of the

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<sup>136</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, Notice of Intent, December 9, 2008, available at [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=26:otros-documentos&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63) (accessed on 29 December 2010).

<sup>137</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, Notice of Arbitration, 9 December 2008, para. 38 available at [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=26:otrosdocumentos&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otrosdocumentos&Itemid=63) (accessed on 29 December 2010).

<sup>138</sup> There is no such rule as binding precedent in international law. See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, (stating that a "decision of the Court has no binding force except between the parties and in respect of that particular case."). However, arbitral tribunals do take previous cases into account when arbitrating investment disputes. See V. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5(3) *Transnational Dispute Management* 1 (2008), pp. 1-16.

<sup>139</sup> *Emilio Augusto Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award of the Tribunal, 13 November 2000, 5 ICSID Reports 419.

environment and the application of appropriate environmental measures.”<sup>140</sup> The tribunal acknowledged that this was true “not only under Spanish<sup>141</sup> and EEC Law,<sup>142</sup> but also increasingly so under international law.”<sup>143</sup> The tribunal pointed out that both national law and European Law required chemical industries to undertake EIA,<sup>144</sup> and that Spain had required compliance with its environmental laws in a manner consistent with its investment treaty commitments.<sup>145</sup> In sum, the tribunal had the perception that “the investor, as happens so often, tried to minimize this requirement so as to avoid additional costs or technical difficulties.”<sup>146</sup>

More recently, the *Chemtura* case concerned the question of whether the Government of Canada should pay compensation to a United States agricultural pesticide manufacturer for its ban of an agro-chemical called Lindane. As Canada’s Pest Management Regulatory Agency (PMRA) banned Lindane on the basis of the chemical’s health and environmental effects,<sup>147</sup> Chemtura – formerly known as Crompton – initiated arbitral proceedings, requesting by way of restitution, the reinstatement of all registrations relating to its Lindane products and/or the damages resulting from Canada’s alleged breaches.<sup>148</sup> According to Chemtura, the regulation was not based on a rigorous scientific risk assessment but was motivated by a politically-charged conflict between Canada and the United States.<sup>149</sup> According to the claimant, the ban of Lindane also provoked a discriminatory

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<sup>140</sup> *Ibidem*, para. 67; the Tribunal quoted P. Sands, *Principles of International Environmental Law* (1995).

<sup>141</sup> *Ibidem*, para. 68; the Tribunal cited Article 45 of the Spanish Constitution of 1948 which states that “the public authorities, relying on the necessary public solidarity, shall ensure that all natural resources are used rationally, with a view to safeguarding and improving the quality of life and restoring the environment.”

<sup>142</sup> *Ibidem*, para. 69. The relevant directives are the 1985 Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Council Directive 85/337/EEC, OJ L 175, 5 July 1985, p. 40) and the 1997 Environmental Assessment Directive (Council Directive 97/11/EC, OJ L 73, 14 March 1997, p. 5). Although the Tribunal could consider only the first directive because of the principle *tempus regit actum*, it also cited the second directive, which came into force on 14 March 1999. *Ibidem*, fn 26.

<sup>143</sup> *Ibidem*, para. 67.

<sup>144</sup> *Ibidem*, para. 69.

<sup>145</sup> *Ibidem*, para. 71.

<sup>146</sup> *Ibidem*, para. 70.

<sup>147</sup> *Chemtura v Canada*, Award, August 2010, para. 29: “the PMRA announced that it had completed the Special review and that it had formed the view that the risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations.”

<sup>148</sup> *Crompton Corp. v. Government of Canada*, Notice of Arbitration, 10 February 2005.

<sup>149</sup> *Ibidem*, para. 35 and 41.

effect requiring the use of substitute Canadian products in lieu of Lindane. Therefore, according to the firm, Canada was in violation of NAFTA Article 1103 (Most Favoured Nation Treatment), Article 1105 (Minimum Standard of Treatment) and 1110 (Expropriation).

The Tribunal noted that “it [wa]s not its task to determine whether certain uses of lindane [we]re dangerous ... the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies’.<sup>150</sup> The Tribunal added, however, that “it c[ould] not ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s.”<sup>151</sup> The tribunal considered that a large number of countries had already banned lindane, and the fact that lindane is in the list of chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants.<sup>152</sup> In the Tribunal’s view, “the evidence of the record [di]d not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary it show[ed] that the Special review was undertaken by the PMRA in pursuance of its mandate and as a result of Canada’s *international obligations*.”<sup>153</sup>

As the tribunal stressed, “[e]ven assuming *ratio arguendi* that the content of such notice were insufficient to inform the Claimant of the concerns underlying the process and the manner in which registrants were able to participate, such fact alone would not be sufficient to justify a finding of a failure of due process sufficient to constitute a breach of Article 1105 of the NAFTA.”<sup>154</sup> With regard to the propriety of the assessment process, the tribunal found that the Special review was not conducted in a manner that reached the threshold to violate the FET: “[A]s a sophisticated registrant experienced in a highly regulated industry, the Claimant could not reasonably ignore the PMRA’s practices and the importance of the evaluation of exposure risks within such practices.”<sup>155</sup> More importantly, the Tribunal affirmed that “scientific divergence (...) cannot in and of itself serve as a basis for a finding of breach of Article 1105 of NAFTA.”<sup>156</sup>

With regard to the allegation of expropriation, the tribunal held that, since the sales from lindane products were a relatively small part of the overall sales of

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<sup>150</sup> *Chemtura Corp. v. Government of Canada*, Award, para. 134.

<sup>151</sup> *Ibidem*, para. 135.

<sup>152</sup> *Ibidem*, paras. 135-6.

<sup>153</sup> *Ibidem*, para. 138 [emphasis added].

<sup>154</sup> *Ibidem*, para. 147.

<sup>155</sup> *Ibidem*, para. 149.

<sup>156</sup> *Ibidem*, para. 154.

Chemtura, “the interference of the Respondent with the Claimant’s investment c[ould] not be deemed ‘substantial’”<sup>157</sup> and that “in any event (...) the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. The PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation.”<sup>158</sup> Thus, the Tribunal found that no expropriation had occurred.<sup>159</sup>

In *Parkerings v Lithuania*,<sup>160</sup> Parkerings, a Norwegian enterprise, stipulated an agreement with the Municipality of Vilnius, Lithuania, for the construction of parking facilities. In the wake of substantial technical difficulties, legislative changes and growing public opposition due to the cultural impact of the investor’s project on the city’s Old Town,<sup>161</sup> the Municipality terminated such agreement and subsequently signed another contract with a Dutch company for the completion of the project. The new project, however, would not excavate under the Vilnius historic centre - the Old Town - which has been included in the UNESCO World Heritage List since 1994.

Parkerings filed a claim before an ICSID Arbitral Tribunal, claiming that Lithuania had breached the MFN clause as a result of the allegedly preferential treatment granted to the Dutch competitor. The Tribunal dismissed this claim as it deemed that Parkerings and the Dutch competitor were not in *like* circumstances. Differential treatment was deemed to be justified because of the different impact of the projects on the Old Town: the project presented by the Norwegian investor was larger and included excavation works under the Cathedral. Notably, the Tribunal said: “[t]he historical and archaeological preservation and environ-

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<sup>157</sup> *Ibidem*, para. 263.

<sup>158</sup> *Ibidem*, para. 266.

<sup>159</sup> *Ibidem*, para. 267.

<sup>160</sup> *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/08, Award of 11 September 2007, available at [icsid.worldbank.org/ICSID/Index.jsp](http://icsid.worldbank.org/ICSID/Index.jsp).

<sup>161</sup> The National Monument Protection Commission objected to the parking plan for the following reason: “Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages (...) would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer... The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss” (*Ibidem*, para. 142).

mental protection could be and in this case were a justification for the refusal of the [claimant's] project."<sup>162</sup> While the tribunal did not mention any hierarchy among different international law obligations, it concretely balanced the different norms.<sup>163</sup> Although the arbitral tribunal dismissed all the investor claims in their entirety, it required each party to bear its own costs: in doing so, it admitted that "[e]ven if no violation of the BIT or international law occurred, the conduct of the city of Vilnius was far from being without criticism."<sup>164</sup> In a sense, while legislative changes may be seen as a normal business risk, this does not exempt States from a general duty of good faith and transparency.

In the *Methanex* case, an EIA process determined that the use of MTBE as a gasoline oxygenate, was not environmentally safe and should accordingly be discontinued.<sup>165</sup> Given that scientific evidence showed that MTBE (methyl tertiary-butyl ether) contaminated groundwater and was difficult and expensive to clean up, the State of California enacted legislation to prevent the commercialization and use of MTBE. Methanex, a Canadian investor, initiated arbitration against the United States of America, claiming compensation resulting from losses caused by the ban on the use of a gasoline additive. Methanex submitted that the Californian regulation was tantamount to expropriation within NAFTA Article 1110 as the US measures would not be meant to serve a public purpose, but rather to seize the company's market share to favour the domestic ethanol industry. Since no compensation was paid, Methanex argued that this violated due process of law and the minimum standard of treatment. However, the tribunal decided that there was no expropriation because it held that:

as a matter of general international law, a *non-discriminatory* regulation for a *public purpose*, which is enacted in accordance with *due process* and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless *specific commitments* had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.<sup>166</sup>

The arbitral tribunal ascertained the non-discriminatory character of the measure and its public purpose, by looking at the procedure through which the

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<sup>162</sup> *Ibidem*, para. 392.

<sup>163</sup> *Ibidem*, para. 396.

<sup>164</sup> *Ibidem*, paras. 335 and 464.

<sup>165</sup> *Methanex Corporation v United States of America*, UNCITRAL, NAFTA Arbitral Tribunal, Final Award, August 3, 2005, <http://www.state.gov/documents/organization/51052.pdf> (accessed on 29 December 2010).

<sup>166</sup> *Ibidem*, Part IV, Chapter D, p. 4 (emphases added).

national measure had been adopted. By examining the scientific study carried out by the University of California (the UC Report),<sup>167</sup> the tribunal held that the UC Report reflected serious, objective and scientific approach, and that it was also subjected to open and informed debate such as public hearings, testimony and peer-review.<sup>168</sup> “its emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham.”<sup>169</sup> The award did not suggest that the Report was scientifically correct, nor did it take a position on scientific truths. Nonetheless, the reasoning highlights that governments may regulate risks where there are competing scientific views: in this context, emphasis will be put on *due process*.

Since no specific commitments were ever given to Methanex, the tribunal held that the ban did not breach the legitimate expectations of Methanex.<sup>170</sup> Methanex had no reasonable expectation, as an investor, that it would be allowed to sell a product that was discovered to cause significant risk to the environment and public health. Furthermore, as the Tribunal pointed out, Methanex invested in a state where environmental regulations commonly prohibited or restricted the use of some chemical compounds for environmental and health reasons. Therefore, Methanex did not enter the United States market because of special representations made to it, but it was aware of and actively participating in the local lobbying process. The Tribunal concluded that “the California ban was made for a public purpose, was non-discriminatory, and was accomplished by due process, (...) [thus] from the standpoint of international law, it was a lawful regulation and not an expropriation.”<sup>171</sup>

In the *Glamis Gold* case, Glamis Gold, a Canadian mining company asserted that the EIA process resulting in the final rejection of its proposed plan of operation of a major open-pit gold mine located in the California Desert Conservation Area (CDCA), as well as legislation on open-pit mining, had the effect of depriving of all value its investment and therefore constitute an expropriation and a denial of FET.<sup>172</sup> According to the claimant, the expropriation began with the federal government’s unlawful refusal to approve claimant’s plan of operations.<sup>173</sup> As the 2000 environmental impact study indicated that the best option was that

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<sup>167</sup> *Methanex*, Final Award on Jurisdiction and Merits, Part III, Ch. A, para. 102(2).

<sup>168</sup> *Ibidem*, Part II, Ch. D, paras. 7-22, and Part. III, Ch. A, paras. 1-36.

<sup>169</sup> *Ibidem*.

<sup>170</sup> *Ibidem*, Part IV, Chapter D, p. 5.

<sup>171</sup> *Ibidem*, para. 15.

<sup>172</sup> *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009, available at [www.state.gov/s/l/c10986.htm](http://www.state.gov/s/l/c10986.htm), (accessed on 29 December 2010), para. 10.

<sup>173</sup> *Ibidem*, para. 321.

of “no action,” the Department of the Interior withdrew the Imperial Project from further mineral entry for 20 years to protect historic properties.<sup>174</sup> The area in and around the Imperial Project was heavily utilized by pre-contact Native Americans as a travel route.<sup>175</sup> Furthermore, the Quechan, a Native American tribe, opposed the project because it would destroy the Trail of Dreams, a sacred path still used while performing ceremonial practices.<sup>176</sup>

In 2002, however, permission for the project was granted and the State Mining and Geology Board enacted emergency regulations requiring the backfilling of all open-pit mines to re-create the approximate contours of the land prior to mining.<sup>177</sup> The Claimant contended that expropriation continued with the backfilling requirement, as this requirement was uneconomical and arbitrary since it was not rationally related to its stated purpose of protecting cultural resources.<sup>178</sup> The Claimant pointed out that “once you take the material out [of] the ground and if there are cultural resources on the surface, they are destroyed. Putting the dirt back in the pit actually does not protect those resources” but may lead to the burial of more artifacts and cause greater environmental degradation.<sup>179</sup> Thus, the Claimant argued that the California measures aimed “to stop the Imperial project from ever proceeding while seeking to avoid payment of compensation it knew to be required had it processed transparently and directly through eminent domain.”<sup>180</sup>

The arbitral tribunal found the claimant’s argument to be without merit.<sup>181</sup> The Tribunal held that Claimant had not established that the individual measures taken by the federal and California state governments fell below the customary international law minimum standard of treatment and constituted a breach of Article 1105 in that they were not egregious or shocking. Thus, there was no showing of a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.<sup>182</sup> The Tribunal also denied Glamis’ Article 1110 claim that its federally granted mining right was expropriated on the ground that the right was never rendered substantially without value by the actions of the U.S federal and State of California governments.

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<sup>174</sup> *Ibidem*, para. 152.

<sup>175</sup> *Ibidem*, paras. 100-1.

<sup>176</sup> *Ibidem*, para. 107.

<sup>177</sup> *Ibidem*, para. 183.

<sup>178</sup> *Ibidem*.

<sup>179</sup> *Ibidem*, para. 687.

<sup>180</sup> *Ibidem*, para. 703.

<sup>181</sup> *Ibidem*, para. 360.

<sup>182</sup> *Ibidem*, para. 824.

With regard to the Environmental Impact Statement (EIS), the arbitral tribunal recalled that as the Respondent had pointed out,

no previous – or subsequent – EIS for any mining project in the CDCA had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites, and thus the Department of the Interior (DOI) had never previously had the occasion to determine the parameters of its authority to deny a mining project in the CDCA in such a situation.<sup>183</sup>

However, the “circumstances of the Imperial Project taken together made this review unique.”<sup>184</sup> The 1997 cultural survey concluded that “the Quechan regarded the project area as spiritually significant in part because it intersected with this trail, which members of the Tribe described as facilitating dream travel by knowledgeable religious practitioners.”<sup>185</sup> Respondent asserted that the review followed a normal course, was not predetermined, and utilized effective and customary public hearings and site visits.<sup>186</sup>

The Tribunal also held that the complained measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis’ investment.<sup>187</sup> Furthermore, the tribunal deemed the measures to be rationally related to its stated purpose.<sup>188</sup> The tribunal admitted that “some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling,”<sup>189</sup> but concluded that:

The sole inquiry for the Tribunal, however, is whether or not there was a manifest lack of reasons for the legislation. In these circumstances, it appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy.<sup>190</sup>

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<sup>183</sup> *Ibidem*, para. 654.

<sup>184</sup> *Ibidem*, para. 673: “[t]hese characteristics are the density of the archeological features discovered in and around the Imperial Project area... The second characteristic is the strong... Native American concerns expressed about the effect of the Project on that area. Three is the convergence of the concerns expressed by the Native Americans and the archeological evidence, and ... fourth, ... that this Project was in a place that they found to be substantially undeveloped and had not been subject to any significant historic mining activity.”

<sup>185</sup> *Ibidem*, para. 668.

<sup>186</sup> *Ibidem*, para. 669.

<sup>187</sup> *Ibidem*, para. 536.

<sup>188</sup> *Ibidem*, para. 803.

<sup>189</sup> *Ibidem*, para. 805.

<sup>190</sup> *Ibidem*.



In conclusion, the Tribunal agreed with Respondent's assertion that "governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless."<sup>191</sup>

## 5. ENVIRONMENTAL IMPACT ASSESSMENT AS A DISPUTE AVOIDANCE MECHANISM

What lessons can be learned from this case law? First, environmental impact assessment is an "analytical process" whose legitimacy "is dependent upon adherence to both procedural and substantive requirements."<sup>192</sup> Substantively, environmental impact assessment must reflect quality, effectiveness, and good practice and needs to be based on sound science; in case of scientific uncertainty, EIA needs to be "well reasoned ... and candid about unresolved uncertainties."<sup>193</sup> Second, while the relationship between uncertainty and EIA needs further exploration,<sup>194</sup> methodological aspects of EIA are crucial.<sup>195</sup> Procedurally, national legislations requiring EIA need to be in conformity with international standards, and need to be non-discriminatory. Arbitral tribunals have attached paramount importance to procedural fairness in decision-making. EIA procedures respecting procedural fairness, public participation and transparency can integrate environmental concerns within economic activities while respecting the investment law obligations of the host state.

Third, EIA has been re-oriented to better integrate social and economic concerns, and collaborative planning. Administrative law scholars are observing that the traditional "command and control" model of the administrative state – where regulatory agencies with expertise issue rules that regulated entities must follow – is giving way to a mode of "collaborative governance", where agencies and the public work together to define and revise standards.<sup>196</sup> EIA has been made "open to public scrutiny and debate"<sup>197</sup>: the participatory dimension of EIA can improve the legitimacy of decision-making and ultimately improve its quality.

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<sup>191</sup> *Ibidem*, para. 804.

<sup>192</sup> Craik, *supra* note 21, p. 20.

<sup>193</sup> Andrews, *supra* note 53, p. 94.

<sup>194</sup> See, P. de Jongh, *Uncertainty in EIA*, in P. Wathern (ed) *supra* note 53, pp. 62-83.

<sup>195</sup> For a detailed discussion on how EIA should be carried out, see P. Morris & R. The-rivel (eds) *Methods of Environmental Impact Assessment* (3rd ed.), Routledge, London: 2009.

<sup>196</sup> J. Freeman, *Collaborative Governance in the Administrative State*, 45(1) *University of California Los Angeles Law Review* (1997), pp. 33-4.

<sup>197</sup> Andrews, *supra* note 53, p. 94.

Arbitral awards have assessed the legitimacy of environmental impact assessment in light of the public participation and transparency criteria: even without making express reference to the parallel jurisprudence of human rights courts and the ICJ, arbitral tribunals have reached analogous conclusions. While it is up to the states to set up relevant EIA regulations and procedures, certain common standards have emerged. In the context of investment disputes, investors have rarely challenged the rationale of imposing EIA, but have contested the methodology of the relevant process. In this sense, arbitral tribunals are contributing to the emergence of a global jurisprudence which have assessed the legitimacy and propriety of EIA in the light of the transparency and public participation criteria.

Several authors have highlighted the potential educational or “cultural” function of EIA.<sup>198</sup> These authors stress that EIA may educate relevant stakeholders – both public administrations and private actors – as it imposes the consideration of environmental concerns in decision-making. In other words, “EIA instils environmental values among decision makers” and is considered “capable of reforming the culture of administrative decision making ... by enhancing the administration’s concern about environmental effects.”<sup>199</sup> Through public debate in an environmental assessment, it is held that people move beyond strict self-interest to adopt a more farsighted perspective and to take decisions based on the common weal.

As mentioned above, most state legislations require some forms of EIA. If the applicable law is the law of the host state, EIA will be part of the applicable law. If one accepts the view that the requirement of EIA has reached the status of customary international law,<sup>200</sup> it is possible to emphasize both the dispute-prevention and legal functions that EIA may play in the context of international investment law. If customary international law required EIA for major investment projects according to international standards, many disputes might be prevented on this basis. However, since customary international law and MEAs are binding on states only,<sup>201</sup> this article suggests that a better solution would be to insert a specific provision in investment treaties. According to such a clause, EIA procedures for certain categories of investment would be deemed legitimate if they conform with specified international investment treaty criteria. For the time being, while investment treaty law does not require EIAs to be transparent or involving

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<sup>198</sup> Holder, *supra* note 4, chapter 1.

<sup>199</sup> *Ibidem*.

<sup>200</sup> *Ibidem* chapter 2.

<sup>201</sup> See, J. H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 *American Journal of International Law* 291 (2002).

public participation, if EIA is not carried out in a transparent way and in good faith, it is likely to be held to violate investment treaty provisions (FET standard or prohibition of unreasonable measures, or other).<sup>202</sup>

A further step would require assessing the environmental impact of investment treaties in order to avoid inconsistencies between state international obligations. Investment provisions would be then shaped in a manner compatible with environmental protection. For instance, the Thai National Human Rights Commission prepared a human rights impact assessment of the FTA that Thailand was negotiating with the United States, concluding that it would have violated the human rights of Thai people.<sup>203</sup> In this regard, Professor Head recently highlighted the importance of “careful project appraisal and design”, with regard to the use of environmental impact assessment and social impact assessment.<sup>204</sup> Similarly, the High Commissioner for Human Rights suggested that “consideration could be given to the development of methodologies for human rights impact assessments of trade and investment rules and policies and the appropriate assistance needed to undertake them.”<sup>205</sup>

## CONCLUSION

Foreign investment represents a potentially positive force for development. Still, state policy and practice concerning resource exploitation must be mindful of its environmental implications. The discourse on the possible role of EIA in international investment law and arbitration fits in the current debate on the legitimacy crisis of international investment law.<sup>206</sup> While FDI is deemed to foster

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<sup>202</sup> See, *Metalclad Corporation v. United Mexican States* (Merits), 3 August 2005, 44 International Legal Materials 1345.

<sup>203</sup> See, S. Smith, *Thai Human Rights Commission Attacks FTA with US*, 6176 South-North Development Monitor, 25.01.2007, [http://www.bilaterals.org/article-print.php3?id\\_article=7012](http://www.bilaterals.org/article-print.php3?id_article=7012) (accessed on 30 December 2010).

<sup>204</sup> J. W. Head, *Losing the Global Development War. A Contemporary Critique of the IMF, the World Bank, and the WTO*, Martinus Nijhoff Publishers, Leiden: 2008, p. 185 and 187.

<sup>205</sup> Economic and Social Council, Commission on Human Rights, Sub-commission on the promotion and protection of Human Rights, *Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003, p. 5.

<sup>206</sup> On the legitimacy crisis of investment arbitration, see generally S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions* 73 Fordham Law Review 1571 (2005); but see C. N. Brower & S. W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9 Chicago Journal of International Law 473 (2008-2009).

economic development and peaceful relations among nations, investment treaty provisions remain vague. Therefore, a potential tension exists when a State adopts regulatory measures interfering with foreign investments, as the regulation may be deemed to infringe investment treaty standards and the foreign investor may require compensation before arbitral tribunals.

Given the features of the arbitral process, significant concerns arise in the context of disputes involving environmental elements. If one conceives the regulatory development as a dynamic interaction of regulatory regime and public opinion, one perceives the perils posed by the democratic deficit and one-sided structure of investment treaty law and arbitration. This article suggests that EIA can contribute to the legitimacy of the system, by integrating environmental considerations into investment law through transparent and participatory procedures.

Several lessons can be learnt from the recent legislative and adjudicative developments concerning EIA. First, EIA must reflect quality, effectiveness, and good practice. Second, EIA has been re-oriented to better integrate: 1) procedural fairness, and 2) collaborative planning. With regard to procedural fairness, national legislations requiring EIA need to be in conformity with international standards, and need to be non-discriminatory: in case of scientific uncertainty, arbitral tribunals have attached paramount importance to procedural fairness in decision making. The participatory dimension of EIA can improve the legitimacy of decision making, taking into account economic, social and cultural concerns, and ultimately improve its quality. EIA procedures respecting procedural fairness, public participation and transparency can integrate environmental concerns within economic activities while respecting the investment law obligations of the host state.