Chapter 12
Investor-State Arbitrations and the Human Rights of the Host State's Population: An Empirical Approach to the Impact of *Amicus Curiae* Submissions

Sarah Schadendorf

12.1 Introduction

Foreign investment activities bear the potential to negatively affect the human rights of the people living under the host State's jurisdiction. Projects of foreign investors might mainly interfere with the rights to life and human health, the economic and social rights of the population, with indigenous peoples' collective rights or labour rights.[1] Legislative and administrative measures that the host State adopts in furtherance of its human rights obligations towards the population potentially violate investment protection standards. A conflict between the State's human rights obligations and its investment treaty obligations, between inhabitants' human rights and the investor's rights (possibly human rights by themselves[2]) arises.

12.1.1 The Negligence of Human Rights Arguments in Investor-State Arbitration

Human rights concerns of the host State's population can be invoked in international investor-State arbitration either by directly using them as arguments, for example in favour of a certain interpretation of investment rules, or by relying on the host State's human rights obligations in order to justify its measures. In several investor-State disputes, the host State employed its human rights obligations as a

[1] For details, see Kriebaum (2009), pp. 654–655.

[2] See de Brabandere (2013), p. 194.

S. Schadendorf (✉)
Bucerius Law School, Hamburg, Germany
e-mail: sarah.schadendorf@law-school.de

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defence.[3] However, in a number of arbitrations, host States did not make use of obvious human rights arguments.[4] This omission of human-rights-based reasoning might result from the States' fear of acknowledging obligations for themselves in other settings.[5] It might also be due to the fact that many human rights violations by the investor occur in complicity with the host State.[6]

12.1.2 Amicus Curiae *Submissions as a Potential Remedy?*

Since the 1990s, the practice of submitting *amicus curiae* briefs has been more and more recognised by international courts and tribunals.[7] During the last decade, a number of international investment tribunals have been faced with written statements and other claims of participation by various actors of civil society in its broadest sense, such as NGOs, trade unions, business associations, and indigenous communities. The admission of *amicus* briefs has entailed a scholarly debate about their compatibility with the features of investment arbitration (e.g., confidentiality, consensual nature) and about their potential benefits for the arbitration process (e.g., improved quality of the awards, increased transparency, and legitimacy).[8] With regard to the human rights implications of international investment disputes, *amicus* briefs offer an opportunity to present facts about the human rights situation or elaborate a human-rights-based reasoning. If the host State leaves out the human rights dimensions of the case in its pleadings, *amici* submissions are the main "legal avenue" by which human rights considerations enter investor-State arbitrations and the main mechanism to represent the affected citizens, consumers, or workers.

12.1.3 Empirical Approach to the Impact of Amicus Curiae *Submissions*

This chapter will examine the existing practice of dealing with those *amicus* submissions whose purpose is to promote human rights concerns of the host State's population. The aim is to evaluate whether *amicus* briefs by civil society actors are an effective means for incorporating human rights issues in international investment arbitrations. If so, we will discover how human rights arguments influence

[3] See Kriebaum (2009), pp. 672 et seq.; Reiner and Schreuer (2010), p. 89; de Brabandere (2013), pp. 202 et seq.

[4] See, e.g., Suda (2006), pp. 140 et seq.

[5] Harrison (2010), p. 414; Simma and Kill (2009), p. 680, fn. 11.

[6] Gray and Peterson (2003), pp. 16 et seq.; Reiner and Schreuer 2010, p. 89.

[7] Bartholomeusz (2005), p. 209.

[8] Gomez (2012), pp. 543 et seq.; Levine (2011), pp. 118 et seq.

arbitral decisions on investors' rights. If, on the contrary, *amicus* briefs prove to be ineffective, there will be a need to reconsider the *amicus* mechanism and possibly think of other ways to introduce human rights arguments to investment arbitration.

In its first part, the chapter will explore the rationale for accepting *amicus* submissions and take stock of *amicus* submissions in NAFTA and ICSID investor-State arbitration. The second part will be dedicated to an analysis of the cases in which human rights of the host State's population were invoked by *amici* in substantive submissions. The analysis will extend to the submitted *amicus* briefs, as well as to the procedural orders, decisions, and awards of NAFTA and ICSID investment tribunals–as far as they have already been issued and are publicly available. This section will explore which human rights the *amici* refer to and in how far the tribunals respond to the alleged human rights arguments. This rather empirical approach is supposed to evaluate the relevance of *amicus* briefs containing human rights arguments related to the host State's population. Their actual influence is hard to measure. Nevertheless, the results will help to assess the impact of human-rights-related *amicus* submissions on contemporary investment arbitration and international investment law in general.

12.2 *Amicus Curiae* Submissions in NAFTA and ICSID Investor-State Arbitration

12.2.1 Legal Basis and Conditions for Admitting Amicus Curiae *Submissions*

During the last decade, investor-State tribunals adjudicating under UNCITRAL and ICSID Arbitration Rules have consistently relied on their procedural powers to admit submissions by various civil society actors as *amici curiae*. The pioneer tribunal in the *Methanex v. US* arbitration (governed by NAFTA Chapter 11 and UNCITRAL Arbitration Rules) inferred from its general procedural powers under Art. 15(1) UNCITRAL Arbitration Rules the discretionary power to allow *amicus* submissions.[9] In contrast to the first ICSID tribunal confronted with *amicus* applications (*Aguas del Tunari, S.A. v. Bolivia*),[10] the ICSID tribunal in *Suez/Vivendi v. Argentina* came to the conclusion that its procedural powers under Art. 44 ICSID Convention granted the same power.[11]

[9] *Methanex Corp. v. US*, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae", 15 January 2001, paras 24 et seq.

[10] *Aguas del Tunari, S.A. v. Bolivia*, ICSID ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 17–8; Appendix III, Letter from the Tribunal to Earthjustice, Counsel for Petitioners, 29 January 2003.

[11] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 March 2005, paras 9–16.

Both the NAFTA and the ICSID regimes have reacted to this development in non-disputing party participation by issuing the NAFTA Free Trade Commission (FTC) Statement in 2003 and by introducing Rule 37(2) ICSID Arbitration Rules in 2006, respectively. UNCITRAL Working Group II currently discusses the adoption of an explicit rule on *amicus* participation.[12] According to the FTC Statement and the *Suez/Vivendi* jurisprudence, one of the criteria that tribunals should consider in exercising their discretion is a public interest in the subject matter.[13]

The increasing admission of *amicus* briefs by subsequent tribunals suffered a setback in 2012. Two identically composed tribunals (*Pezold/Border Timbers v. Zimbabwe*) adopted a very restrictive reading of certain criteria of Rule 37 (2) ICSID Arbitration Rules and found, among others, that the human-rights-related content of the *amicus* submissions was unrelated to the matters before the tribunal and outside the scope of the dispute.[14] This narrow understanding of the conditions of Rule 37(2) precludes civil society actors from initiating human rights arguments.[15] It has to be awaited whether this strict view will be upheld by other ICSID tribunals.

12.2.2 Public Interest as a Rationale for Admitting Amicus Curiae *Submissions*

In the very first case, *Methanex*, the tribunal's discretion in admitting *amicus* applications was co-determined by the fact that the subject matter of the case implied a public interest in this arbitration.[16] The *UPS* tribunal picked up the "important public character of the matters" and stated that it was of importance to consider whether *amici* petitioners are able to provide assistance beyond that provided by the disputing parties.[17] In *Glamis Gold*, the tribunal held the view that "given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally".[18] Another NAFTA tribunal that rejected an *amicus* application argued that, in matters of public interest, the tribunal should have "access to the widest possible range of views"

[12] See Report of Working Group II (Arbitration and Conciliation) on the work of its 57th session, UN Doc. A/CN.9/760, 12 October 2012, paras 39–57.

[13] For the ICSID Arbitration Rules, see Triantafilou (2008), pp. 584–585.

[14] *Bernhard von Pezold et al./Border Timbers Ltd. et al. v. Zimbabwe*, ICSID ARB/10/15 and ARB/10/25, Procedural Order No. 2, 26 June 2012, paras 57, 60.

[15] For details, see Schadendorf (2013), pp. 10 et seq.; Mowatt and Mowatt (2013), pp. 37–44.

[16] *Methanex Corp. v. US*, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae", 15 January 2001, para 49.

[17] *United Parcel Services of America, Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, para 70.

[18] *Glamis Gold, Ltd. v. US*, Award, 8 June 2009, para 286.

and should ensure "that all angles on, and all interests in, a given dispute are properly canvassed".[19]

The ICSID tribunals in *Suez/Vivendi* and *Suez/InterAguas* reasoned that courts "have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case". The particular public interest in the cases originated from the fact that the investments at issue concerned "basic public services to millions of people" that may raise "complex public and international law questions, including human rights considerations".[20] After the introduction of Rule 37(2) ICSID Arbitration Rules, the *Biwater Gauff* tribunal stated that granting leave to file *amicus* submissions is "an important element in the overall discharge of the Arbitral Tribunal's mandate"[21] and cited passages from the *Methanex* and *Suez* decisions relating to the public interest dimension of the disputes.[22] The tribunals in *Pezold/Border Timbers*, on the contrary, recognised that the indigenous communities had "some interest in the land" and that therefore the determinations in the case would probably have an "impact on the interests of the indigenous communities"[23] but rejected any human rights considerations.

Hence, the pioneer tribunals, as well as most of the following decisions on *amicus* applications, seem to have been guided by the potential impacts of investment projects and investor-State arbitrations on the rights of other than the disputing parties. In many cases, the public interest and human rights implications were one of the main considerations when accepting *amicus* submissions.

12.2.3 Stocktaking of Amicus Curiae *Submissions*

All in all, there are seven cases under ICSID Arbitration Rules, six cases under NAFTA Chapter 11 and UNCITRAL Arbitration Rules, and one case governed by NAFTA Chapter 11 and ICSID Arbitration Rules with *amicus* applications from

[19] *Apotex Inc. v. US*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para 22.

[20] Suez, *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 March 2005, para 19; *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID ARB/03/17, Order in response to a Petition for Participation as Amicus Curiae, 17 March 2006, para 18.

[21] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID ARB/05/22, Procedural Order No. 5, 2 February 2007, para 50.

[22] Ibid., paras 51–55.

[23] *Bernhard von Pezold et al./Border Timbers Ltd. et al. v. Zimbabwe*, ICSID ARB/10/15 and ARB/10/25, Procedural Order No. 2, 26 June 2012, para 62.

civil society (status: August 2013). The number of arbitrations where tribunals authorised and actually received substantive *amicus* submissions amounts to three governed by ICSID Arbitration Rules and three under NAFTA Chapter 11 and UNCITRAL Arbitration Rules. Set in relation to the total number of known ICSID and NAFTA Chapter 11 arbitrations,[24] these cases represent less than 1 % of all ICSID and approximately 6 % of all NAFTA arbitrations.

12.3 Human Rights Arguments in *Amicus Curiae* Submissions in NAFTA and ICSID Arbitrations

In six out of the seven arbitration cases with authorised substantive *amicus* briefs, at least one of the submissions used international human rights law as an argument for their position.

12.3.1 Methanex Corp. v. US

In the NAFTA case *Methanex*, several *amici* argued in favour of a Californian ban on the gasoline additive MTBE. The leakage of MTBE into the groundwater posed danger to the environment and human health. In their joint submission, the *amici* pointed to obligations of States to protect human rights, in this case the right to water and linked rights like the rights to health, to life, and to own means of subsistence. They shortly asserted that California's measures to protect the integrity of groundwater sources were thus mandated by international law.[25]

In its Award, the *Methanex* tribunal mentioned the *amicus* submissions only as part of the procedural history and stated that it would not summarise the contents of the submissions as they "were detailed and covered many of the important legal issues that have been developed by the disputing parties".[26] In the merits, the tribunal did not deal with any human rights arguments.

[24] Total number of arbitration cases registered under the ICSID Convention and Additional Facility Rules as of June 30, 2013: 424. See the ICSID Caseload Statistics (Issue 2013–2), p. 8. Total number of NAFTA claims (a summary based on several sources): 66. See NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010), Canadian Center for Policy Alternatives, p. 22.

[25] *Methanex Corp. v. US*, Submission of non-disputing parties, Bluewater Network, Communities for a Better Environment, Center for International Environmental Law (represented by Earthjustice), 9 March 2004, paras 3, 16–18.

[26] *Methanex Corp. v. US*, Final Award, para 29.

12.3.2 *United Parcel Services of America, Inc. v. Canada*

The claimant UPS itself argued that a Canadian law prohibiting certain postal workers from exercising collective bargaining rights constituted a breach of Canada's international human rights and labour rights obligations and therefore a breach of Art. 1105 NAFTA.[27] In a joint *amici* submission, the Canadian Union of Postal Workers and the Council of Canadians agreed with the claimant that the Canadian law violated international labour law obligations. They supported Canada's position by arguing that the NAFTA dispute settlement procedure was an inappropriate forum for claims based on violations of international labour law provisions as the most directly affected persons, the workers, had no rights in these proceedings at all. Only the International Labour Organization with its special tripartite structure should be able to adjudicate labour rights infringements. Otherwise, Canada's obligations under NAFTA and those under the ILO would be placed in conflict.[28] Therefore, from the *amici*'s perspective, the tribunal "must seek an interpretation of NAFTA investment disciplines that most readily accords with Canada's obligations under ILO and other treaties".[29] With regard to the other human rights instruments invoked by UPS, the *amici* reinforced their argument concerning the exclusion of victims of human rights violations by citing Art. 26 ICCPR. They stated that the claims offended the spirit and "letter of the very human rights instruments it [UPS] seeks to rely on".[30]

In its Award, the *UPS* tribunal briefly mentioned the submission in the procedural history[31] yet did not respond to the *amici*'s arguments. The labour rights arguments raised by the claimant failed because UPS did not provide sufficient factual or legal arguments.[32]

12.3.3 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*

At the core of the arbitration *Suez/Vivendi* was Argentina's privatisation of water and sewerage systems in the area of Buenos Aires. The claimants, holding the concession for running these systems, brought a claim under the relevant BITs against several measures Argentina had taken during the Argentine financial crisis.

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[27] *United Parcel Services of America, Inc. v. Canada*, Investor's Memorial (Merits Phase), 23 March 2005, paras 645–671.

[28] *United Parcel Services of America, Inc. v. Canada*, Application for Amicus Curiae Status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras 26–35.

[29] Ibid., para 37.

[30] Ibid., paras 55–58.

[31] United Parcel Services of America, Inc. v. Canada, Award on the Merits, 24 May 2007, para 3.

[32] Ibid., para 187.

In their joint submission, five NGOs described in detail the human rights implications of the dispute and their legal relevance to the adjudication. They demonstrated the recognition and importance of the right to water and linked rights and Argentina's obligation to respect and protect these human rights.[33] They argued that the measure of freezing the water tariffs served to fulfil Argentina's human rights obligations and that, for this reason, human rights law should be applicable to the dispute as part of the "international law as may be applicable" under Art. 42 (1) ICSID Convention.[34] *Amici* also claimed a "systemic integration of the international legal system" according to Art. 31(3)(c) Vienna Convention on the Law of Treaties, stating that "human rights law can add color and texture to the standard of treatment included in a BIT" and that "contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law".[35] Subsequently, they provided suggestions on the interpretation of the BIT provisions on the standard of fair and equitable treatment and indirect expropriation from a human rights' perspective.[36] Finally, they submitted that there are two situations in which human rights law could displace investment law: in a conflict of norms situation and in a situation of necessity.[37]

In its Decision on Liability, the tribunal acknowledged that it had benefited from the submission "that further developed the relationship of the human rights law to water and to the issues in this case" and gave a very brief summary of the *amici*'s legal argumentation and claims.[38] Argentina, too, had invoked the human rights to water and to health by stating that it had a "responsibility to assure the continuation of a public service that was vital to the health and well-being of its population" and, more explicitly, by explaining that the State "adopted the measures in order to safeguard the human right to water of the inhabitants".[39] Furthermore, Argentina had asserted that the tribunal "must take account of the context in which Argentina acted and that the human right to water informs that context".[40] In considering Argentina's defence of necessity, the tribunal accepted the health and well-being of nearly ten million people as essential interest of the Argentine State yet argued that Argentina could have attempted more flexible means to assure the functioning of the water and sewerage services, which, at the same time, respected its obligations under the BIT. The human rights and BIT obligations were "by no means mutually

[33] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, ICSID ARB/03/19, Amicus Curiae Submission, 4 April 2007, pp. 4–12.

[34] Ibid., pp. 13 f.

[35] Ibid., p. 15.

[36] Ibid., pp. 16–26.

[37] Ibid., pp. 26–28.

[38] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, ICSID ARB/03/19, Decision on Liability, 30 July 2010, para 256.

[39] Ibid., paras 202 and 252.

[40] Ibid., para 252.

exclusive".[41] The tribunal reaffirmed this view when addressing an argument that had been brought forward by Argentina, as well as by the *amici*. They had both argued that Argentina's human rights obligations could overrule obligations under the BIT and provide the authority to take actions in breach of its BIT obligations. The tribunal rejected this assumption as it found no basis for it in the BIT or in international law. Rather, the arbitrators held the view that Argentina had to respect its human rights and BIT obligations that were, under the circumstances of the present case, "not inconsistent, contradictory, or mutually exclusive".[42]

Until today, *Suez/Vivendi* remains the only case of a tribunal explicitly responding to a human rights argument raised by *amici*. This may result from the very complex and detailed human rights analysis provided by the *amici* in this case. However, very probably the tribunal only dealt with the relationship of human rights law and investment law because this argument had also been brought forward by the respondent State. Strikingly, the tribunal did neither make use of any human rights argument in support of its findings where appropriate, nor did it comment on the influence of human rights on the relevant investment norms. Considering that only those arguments were treated that Argentina had raised as well, the influence of the *amici*'s submission on the Decision on Liability seems to have been limited.

12.3.4 Biwater Gauff (Tanzania) Ltd. v. Tanzania

The *Biwater Gauff* case dealt with a water and sewerage lease contract between a UK investor and Tanzania concerning the area of Dar es Salaam. The government of Tanzania cancelled the contract because the inhabitants had to cope with erratic supplies and water shortages. In consequence, the Republic of Tanzania was sued for expropriation and breach of fair and equitable treatment. Five NGOs petitioned for *amicus* participation, emphasising the "salient" relationship of service delivery to basic human rights in the water sector and the "substantial influence" of the arbitration process on the population's ability to enjoy basic human rights.[43] In their submission, the *amici* professed to be motivated by human rights and sustainable development considerations[44] and requested the tribunal to take these into consideration. However, the NGOs admitted that human rights law would not be their legal starting point[45] and provided instead an investment-law-oriented analysis. In the course of their reasoning, the *amici* claimed that the human right to water and

[41] Ibid., para 260.

[42] Ibid., para 262.

[43] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Petition for Amicus Curiae Status, 27 November 2006, pp. 7 and 8.

[44] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Amicus Curiae Submission, 26 March 2007, paras 7 and 10.

[45] Ibid., para 7.

sustainable development goals should be understood as increasing the standards of responsibility of investors in the water sector. They submitted that "human rights and sustainable development issues must be factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and host State".[46] According to the *amici*, foreign investors "engaged in projects intimately related to human rights" should have the "highest level of responsibility to meet their duties and obligations".[47] Finally, the *amici* switched from the investor's responsibilities to those of the host State. They argued that the Tanzanian government had to take action under its obligations under human rights law to ensure access to water for its citizens and that therefore there was no breach of contract.[48]

The Award includes a section about the *amici* brief in which the tribunal extensively reproduced these arguments.[49] In the merits, the tribunals stated that it had "taken into account the submissions" in relation to one of the *amici*'s arguments in the context of determining the threshold for a violation of fair and equitable treatment.[50] Neither the strict human-rights-based standard proposed by the *amici* nor Tanzania's human rights obligations towards its population were considered.[51] As the tribunal found violations of investment protection standards but did not award any compensation, there remains at least "a smack of the acknowledged public interest concerns".[52]

12.3.5 Glamis Gold, Ltd. v. US

In the NAFTA case *Glamis Gold*, the US government and California imposed several measures on open-pit miners in order to avoid further damages to the environment and the sacred land of American native tribes. A Canadian mining company whose mining rights were affected alleged a breach of Art. 1110 and Art. 1105 NAFTA. Among several *amici*, only one raised human rights arguments: the Quechan Indian Nation. They provided information on the nature of the cultural resources and sacred places at issue and the cultural and environmental impacts of the proposed mine and invoked several human rights law instruments related to indigenous peoples' rights like religious and cultural rights and land rights. The Quechan argued that the preservation and protection of indigenous rights in ancestral land was an obligation of customary international law that had to be taken into

[46] Ibid., para 51.
[47] Ibid., para 53.
[48] Ibid., paras 96 and 98.
[49] *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, Award, paras 370–391.
[50] Ibid., para 601.
[51] For details, see Harrison (2010), pp. 411–412.
[52] Kulick (2012), p. 255.

consideration for the interpretation of the relevant NAFTA provisions.[53] In their supplemental submission, the Indian Nation worked out these arguments in far more detail, specifying each indigenous right and referring to Art. 1131(1) NAFTA and Art. 31(3) of the Vienna Convention on the Law of Treaties.[54] The Tribe expressed its concern that an award in favour of the investor's claims could "result in cultural and environmental harms".[55]

In its Award, the tribunal explained that it was aware of the context in which it operated, namely of concerns on environmental regulation and interests of indigenous people. Nevertheless, the tribunal found itself to be "not required to decide many of the most controversial issues raised in the proceedings".[56] Its "case-specific mandate" was seen as an argument to limit the tribunal's decision to the "issues presented", meaning presented by the parties. The tribunal appreciated the "thoughtful submissions" made by the various *amici* and stated "that it should address the filings explicitly in its Award to the degree that they bear on decisions that must be taken".[57] It continued by announcing that it would not reach the particular issues raised by the *amici*. Apparently, the tribunal deemed the human rights issues as irrelevant to their decision-making process, and thus neither provided a summary nor any analysis of the human rights arguments brought forward by the Quechan Indian Nation. As the tribunal upheld the regulatory measures and action and thus effectively protected the Nation's human rights, the tribunal could have mentioned the relevant human rights norms in support of its investment-law-based findings.[58]

12.3.6 Pac Rim Cayman LLC v. El Salvador

The arbitration *Pac Rim Cayman LLC* centred on mining activities in El Salvador. After having invested in the mineral exploration of certain areas with the approval of the government, the claimant was not permitted to proceed to the extraction and exploitation phase and therefore alleged breaches of several CAFTA provisions. In their *amicus* submission, eight NGOs disclosed the human rights implications of the mining activities, namely, the critical water supply in the area of the investment and

[53] *Glamis Gold, Ltd. v. US*, Amicus Curiae Submission, Quechan Indian Nation, 19 August 2005, pp. 8–14.

[54] *Glamis Gold, Ltd. v. US*, Non-Party Supplemental Submission, Quechan Indian Nation, 16 October 2006.

[55] *Glamis Gold, Ltd. v. US*, Amicus Curiae Submission, Quechan Indian Nation, 19 August 2005, pp. 14–15.

[56] *Glamis Gold, Ltd. v. US*, Award, 8 June 2009, para 8.

[57] Ibid., para 9.

[58] Karamanian (2012), pp. 262–263. Cf. also Kulick (2012), pp. 303–304.

possible negative environmental and health impacts.[59] Furthermore, they submitted that the investor's lobbying strategies had caused "violence and denial of human rights", which is why the investment "should not receive the protection of international law".[60] As to the legal aspects in the jurisdictional phase, human rights arguments were invoked to deny jurisdiction of the ICSID tribunal. The NGOs held the view that bringing claims to an ICSID tribunal, a forum for governmental actions where the affected communities as "genuine opponent" have no rights as a party but only as *amici*, was abusive.[61] They stated that it is a "bedrock principle of international law that where the rights of a third party 'would not only be affected by a decision, but would form the very subject-matter of the decision,' exercise of jurisdiction otherwise granted is inappropriate".[62] This resembles the argumentation elaborated by the *amici* in *UPS v. Canada*. Lastly, in a footnote, the petitioners found it worth considering that "accepting jurisdiction over Pac Rim's claim would essentially punish the Republic for fulfilling its own international law obligations to be response [*sic*] to its citizens and to secure their rights, including their economic, social, and cultural rights",[63] and thus returned to the standard reasoning in defence of a State's measures.

In its Decision on the Respondent's Jurisdictional Objections, the tribunal summarised the matters addressed in the *amicus* submission and compared them to those raised by the respondent.[64] In the context of the abuse of process issue, the tribunal reproduced some of the *amici*'s arguments and cited three passages of the submission; two of these passages indicated the potential human rights impacts on the communities living in the area of investment, one of them contained the wrong forum argument.[65] Nonetheless, the tribunal decided only to address the arguments related to issues that had also been invoked by the respondent[66] and eventually rejected them.[67] At no point did the tribunal return to the rights of the affected communities. It remains to be seen whether the tribunal will take up human-rights-related facts or legal arguments in its final award.

[59] *Pac Rim Cayman LLC v. El Salvador*, ICSID ARB/09/12, Application for Permission to proceed as *Amici Curiae*, 2 March 2011, p. 8.

[60] Ibid., p. 11.

[61] Ibid., p. 19.

[62] Ibid., p. 20.

[63] Ibid., p. 20, fn. 85.

[64] *Pac Rim Cayman LLC v. El Salvador*, ICSID ARB/09/12, 1 June 2012, Decision on the Respondent's Jurisdictional Objections, paras 1.33–1.38.

[65] Ibid., paras 2.36–2.40.

[66] Ibid., paras 1.38 and 2.39.

[67] Ibid., para 2.43.

12.3.7 Conclusions

In three of six cases with submitted human rights arguments, the arbitral tribunals at least summarised the *amici*'s position. In each of the same three cases, the arbitrators responded to one of the *amici*'s arguments, yet only one out of these arguments was human rights related (*Suez/Vivendi*). The general attitude towards human rights arguments brought forward by *amici* seems to be rather dismissive and limited to the respondents' statements. Human rights arguments provided by *amici*, sometimes detailed and well founded, were not observably employed by the tribunals in support of their findings, and sometimes even explicitly disregarded. Two investment tribunals (*Glamis Gold* and *Pezold/Border Timbers*) even refused to accord any role to human rights considerations for lack of mandate. Concerns that investment arbitration might not be the right forum when arbitral awards will affect human rights of the population (*UPS, Pac Rim Cayman* and, to some extent, *Glamis Gold*) have been ignored. However, the human rights and public interest dimensions of the disputes might have influenced the tribunals' decision-making process. As most of the cases have been effectively decided in line with the *amici*'s position, the tribunals might have given thought to human rights implications–although they preferred to base their written decisions exclusively on investment law.

12.4 Final Conclusion

Amici curiae have provided useful and relevant human rights arguments in investor-State arbitrations. However, they have not succeeded in provoking a substantiated statement on the role of human rights in international investment law and arbitration. Heightened sensibility to public interests and human rights involved in investment disputes as expressed in the rationales for accepting *amicus* submissions has so far not been mirrored in the rendered arbitral decisions and awards. NAFTA and ICSID tribunals have not made any notable efforts to develop a human-rights-oriented interpretation of investment law standards or a methodology to balance human rights and investment concerns.[68] Tribunals formally recognise the need to open up to human rights concerns but appear unwilling to substantially engage in them.

Given the results of this analysis, human-rights-related *amicus* submissions by civil society actors have not proved to be an effective means for the sincere connection of the two legal regimes. As they completely depend on the discretion of the tribunals, changes in the *amicus* mechanism or even the introduction of further-reaching intervention rights for affected citizens and groups should be considered.[69] Besides, the involvement of regional organisations as *amici* could

[68] For a recently suggested approach, cf. Karamanian (2013), pp. 432 et seq.

[69] Wieland (2011), pp. 357 et seq.

prove more successful.[70] Initiatives and pressure from human rights organisations and judicial dialogue between international investor-State tribunals and human rights courts should increase to promote a meaningful interaction and to improve coherence between these two branches of international law.

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[70] Cross and Schliemann-Radbruch (2013), pp. 33 et seq.

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