

**РОССИЙСКИЙ УНИВЕРСИТЕТ ДРУЖБЫ НАРОДОВ  
ЮРИДИЧЕСКИЙ ФАКУЛЬТЕТ  
КАФЕДРА МЕЖДУНАРОДНОГО ПРАВА**

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**АКТУАЛЬНЫЕ ПРОБЛЕМЫ  
СОВРЕМЕННОГО МЕЖДУНАРОДНОГО  
ПРАВА**

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Ответственные редакторы:  
доктор юридических наук, профессор *А.Х. Абашидзе*;  
доктор юридических наук, профессор *М.Н. Копылов*;  
кандидат юридических наук *Е.В. Киселева*

**А 43** **Актуальные проблемы современного международного права:**  
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ников ежегодной межвузовской научно-практической конференции, по-  
священной памяти профессора И.П. Блищенко (к 80-летию со дня рожде-  
ния), состоявшейся в РУДН 9–10 апреля 2010 г.

Материалы конференции представляют интерес для практических  
работников, профессоров, преподавателей, научных сотрудников, аспи-  
рантов и студентов юридических факультетов, а также всех интересую-  
щихся актуальными проблемами современного международного права и  
международных отношений.

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## ПРЕДИСЛОВИЕ

Нынешняя конференция, посвященная памяти профессора И.П. Блищенко, по счёту — VIII. В 2010 г., 10 апреля, Игорю Павловичу Блищенко исполнилось бы 80 лет.

В связи с тем, что в работе конференции изъявили желание участвовать его друзья — коллеги из стран СНГ — Казахстана, Белоруссии, Украины, а также директор Европейской магистерской программы по правам человека профессор Фабрицио Моррелла (г. Венеция, Италия) и координатор программы УВКПЧ в Российской Федерации г-н Рашид Алуаш нынешняя конференция из формата российской межвузовской превратилась в международную конференцию.

Прошедшие годы (2002–2010) следует охарактеризовать образно как период «количественного» роста конференции. Если сравнить число участников первой конференции 2002 г. с числом участников, заявивших о своем желании принять участие в работе нынешней конференции, то оно выросло в 5 раз: с 20 до 100. Этот период достаточен для того, чтобы уверенно судить о том, что следует сохранить и что следует изменить для совершенствования организации и проведения будущих конференций, традиционно проводимых каждый год 10 апреля в день рождения профессора И.П. Блищенко.

Вначале хотелось бы обратить ваше внимание, на наш взгляд, на беспрецедентный случай в доктрине международного права Западной Европы. В 2009 г. в издательстве Martinus Nijhoff (г. Лейден, Нидерланды) вышел фундаментальный труд по международному уголовному праву, авторами которого являются выдающиеся ученые Западной Европы и Америки. Они посвятили данный труд памяти профессора И.П. Блищенко в знак признания его вклада в развитие международного права<sup>1</sup>.

Касаясь положительных моментов накопленного опыта, на наш взгляд, необходимо и далее сохранять широкий подход в проведении конференции, который был характерной чертой ученого и педагога Игоря Павловича Блищенко, почти 20 лет возглавлявшего кафедру междуна-

<sup>1</sup> См.: The Legal Regime of the International Criminal Court: Essays in Memory of Professor Igor Blishchenko / Jose Doria, Hans-Peter Gasser, M. Cherif Bassiouni (eds.) — Martinus Nijhoff Publishers. — Leiden, The Netherlands, 2009.

## ОБРАЩЕНИЕ К УЧАСТНИКАМ БЛИЩЕНКОВСКИХ ЧТЕНИЙ

Дорогие коллеги!

С огромным удовлетворением узнал, что Блищенковские чтения стали традиционными. Как известно, не каждый доктор наук, профессор удостоивается такого почтительного и уважительного отношения к себе, чтобы в его честь регулярно проводились такие научные чтения. А Игорь Павлович Блищенко этой чести удостоился. Удостоился потому, что он был ДОКТОРОМ ЮРИДИЧЕСКИХ НАУК, ПРОФЕССОРОМ международного права и является ВЫДАЮЩИМСЯ УЧЕНЫМ нашего времени. Его замечательные труды «Соотношение международного и внутригосударственного права», «Дипломатическое и консульское право», «Прецеденты в международном праве», «Дипломатическое право», «Обычное оружие и международное право» не только обучили и воспитали целый ряд поколений юристов-международников, дипломатов, специалистов международных отношений разных направлений, но и сохранили глубину юридического мышления, свежесть мысли для современного этапа, элегантность формулировок, блеск и лоск научно-аристократического духа.

Желаю всем Вам, дорогие коллеги, успешно провести Блищенковские чтения, желаю Вам огромных успехов в науке и практике международного права!

С огромным уважением к Вам,

Ваш *Марат Алдангорович Сарсембаев*,  
доктор юридических наук, профессор,  
личный представитель председателя ОБСЕ,  
член Центральной избирательной комиссии  
Республики Казахстан

## THE HUMAN RIGHT TO WATER AND ICSID ARBITRATION: TWO SIDES OF A SAME COIN OR AN EXAMPLE OF FRAGMENTATION OF INTERNATIONAL LAW?

**Fabrizio Marrella**

Prof. of International Law,  
University «Ca' Foscari» of Venice;  
E.MA Programme Director, European Inter-University Center  
for Human Rights and Democratisation

### Introduction

With the adoption of the United Nations Millennium Declaration in 2000, the need to promote social and economic development, especially in the poorest countries, has been further recognized by the international community, identifying a series of targets that have become known as the Millennium Development Goals (MDGs)<sup>1</sup>. Historically, human development has been dependent upon the access to clean water and a country's ability to exploit the potential of water resources as a productive resource. Up to now, this has not changed: water is fundamental for human life, to preserve people's dignity and health, to maintain unaltered the environmental system and to get food, energy, services and commodities from it.

Nevertheless, the number of people lacking access to water and sanitation services in present days is simply striking and the consequences of these privations affect them in terms of social, economic and environmental rights. For these reasons, in the light of water and sanitation importance for development and of the crisis affecting these sectors, the international community has explicitly recognized their social and economic relevance and committed itself, through the MDG 7, to halve the proportion of people without access to safe drinking water and basic sanitation.

<sup>1</sup> See *United Nations Millennium Declaration*, GA Res. 55/2, UN GAOR, 55<sup>th</sup> Sess., 8<sup>th</sup> plen. mtg., Agenda Item 60(b), UN Doc. A/RES/55/2 (2000).

The World Health Organization (WHO) defines basic access to water, to meet the fundamental needs of drinking, cooking and cleaning, as the availability of a minimum of 20 liters per day per person, gathered from a source within one kilometer of distance. Moreover, water is safe when it respects the accepted quality standards and does not constitute a threat to health<sup>1</sup>.

According to the latest statistics<sup>2</sup>, 884 million people (more than one out of six worldwide), cannot enjoy these minimum standards of availability and quality. In spite of that, ten years after the establishment and adoption of the UN Millennium Declaration, fairly good progress has been done towards the water target. In fact, projections based on current trends suggest that the proportion of people without access to freshwater will be halved by 2015. Nonetheless, if and when the target will be reached, still 672 million of people will lack access to water, a situation which is worsened by a very uneven distribution. For instance, Sub-Saharan Africa is the region that lies behind the most, accounting for 37% of the global population without access to improved water sources, with only 60% of average coverage rate.

On the other hand, the goal of halving the proportion of people without access to sanitation facilities is far from being reached. Access to basic sanitation is defined as the availability of facilities which allow the hygienic separation of excrements from human contact and immediate environment<sup>3</sup>. In 2010, 2.6 billion people, more than one-third of the world population and of which almost one billion children, live without access to these services. Current trends point toward small progresses in the next five years, with an expected decrease of people lacking access to improved sanitation of 5%. This means that almost half of the population in developing countries does not have, and will not have in 2015 this kind of services at their disposal. As a matter of fact, in many countries one of the main challenges affecting water systems is that of keeping water and excrements separated. In Latin America, less than 14% of the sewage is treated, with the rest being dumped into lakes or rivers. Even in China, 16 cities with a population of over 500,000 are not equipped with sewerage systems and at national level less than the 20% of sewage is treated. The consequences of this lack of infrastructures has huge repercussions in terms of diseases and poisoning, a matter that will be discussed into more detail below.

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<sup>1</sup> WHO and UNICEF Joint Monitoring Programme for Water Supply and Sanitation, 2000. *Global water supply and sanitation assessment 2000 report*. New York: WHO and UNICEF Joint Monitoring Programme, pp. 77 and 78.

<sup>2</sup> See WHO, 2010. *Progress on Sanitation and Drinking-water: 2010 Update*. Geneva: WHO.

<sup>3</sup> WHO and UNICEF Joint Monitoring Programme for Water Supply and Sanitation, 2008. *Progress on Drinking Water and Sanitation: Special Focus on Sanitation*. New York: WHO and UNICEF Joint Monitoring Programme, p. 39.

The statistics regarding the progresses made in the last two decades toward the MDG 7 show that the greatest developments have been achieved in large and densely populated countries. China and India, accounting for one-third of the global population, have proved that relevant progresses can be made. In China, the share of the population without access to clean water decreased from 33% to 11% between 1990 and 2008. Similarly, in India, the share moved in the same time lapse from 28% to 12%. Considered together, India and China account for 47%, 1.8 billion in absolute terms, of people that gained access to improved water sources in the last two decades. As for sanitation, although the two countries made some progresses (China and India moved respectively from a coverage of 41% and 18% to a coverage of 55% and 31%), they are still not on track to meet the target established by the MDG 7.

In this respect, following the criticisms on the shortcomings of the already available statistics and monitoring tools, alternatives have been proposed for the calculation of a Water Poverty Indexes (WPIs). The aim of these indicators is to account for both physical and socioeconomic factors related to water scarcity and its impact on the population. The most common version of the WPI is the one proposed by Lawrence, Meigh and Sullivan<sup>1</sup>. They proposed a version of the WPI with five components: resources, access, capacity, use and environment. The advantage granted by this composite index is based on the recognition of the multidimensionality of water poverty. In fact, as the Human Development Index (HDI) tries to measure social and economic progress adopting a wider angle as for the Gross Domestic Product (GDP), accounting also for life expectancy and educational attainment, the WPI seeks to go beyond the water availability, encompassing the ability to sustain access over time, the use of water, and the assessment of environmental factors impacting the water quality. However, despite the reasonable impact of this index, since it has been conceived its use has been scarce. Although its conceptual framework is appealing, it attracted many criticisms regarding its applicability<sup>2</sup>, mainly focused on the fact that attempting to combine several dimensions of water scarcity comes at the cost of combining different (and often correlated) pieces of information with arbitrary weights.

Water is treated both as a public good and an economic good. In the last decade, we have witnessed the commoditisation through privatization and liberalisation of an essential good for each individual's life. In this perspective,

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<sup>1</sup> See Lawrence, P., Meigh, J., Sullivan, C., 2002. *The Water Poverty Index: An International Comparison*. Keele Economic Research Papers 2002/19. Keele: Keele University.

<sup>2</sup> See for instance: Molle, F. and Mollinga, P., 2003. Water Poverty Indicators: Conceptual Problems and Policy Issues. *Water Policy*, 5(5), 529-544.

an assessment of the gradual convergence of International Economic Law with the human right to water has become unavoidable.

If water is essential for human survival (water-contamination, *inter alia*, weakens or destroys natural ecosystems that support human health, food production, and biodiversity), then it is logical to consider access to water as a Human Right.

How should this right than be protected, respected and fulfilled by States? Proponents of market-based solutions believe that putting a price on water and allowing the private sector to deliver water services is the most efficient way to maintain water resources and bring new capital to the sector. Advocates of water as a public good, on the other hand, emphasize the unique characteristics of water and the market failures (actual or potential) to deliver water to the poor, not to speak about the ecological and non-economic values of water. Therefore, in the latter case, water should be the object of a State monopoly under strict regulation and full transparency management.

Recent international practice has evidenced that some investment treaties and State contract provisions may unduly constrain the host Government's ability to achieve its policy objectives, including its international human rights obligations<sup>1</sup>.

That is because under threat of taking the host State to binding international arbitration, a foreign private investor may end up being able to obtain significant advantages in terms of regulation, or seek compensation from the Government for the cost of compliance.

At the same time, however, the right to regulate by the State must be consistent with the private investors' need for predictability, rule of law, treatment, protection and guarantee about the actions of the host State, including compensation in the event of expropriation.

Every State needs foreign private investments and, therefore, providing effective investor protection is necessary for maintaining FDI.

How can these competing interests be balanced between investors and host States so that both of them will benefit from it? How can non-investors, i.e. the common people, avoid paying the negative externalities of such an operation when a State fail to exercise its regulatory powers over water?

It is not the purpose of this article to provide a final solution to such a complex problem. Rather, this paper will discuss first the right to water as a human right (I) and its impact on corporations' activities (II); then reference will be made to the impact of ICSID arbitration on the right to water and to the possibilities of balancing different interests at stake (III).

<sup>1</sup> For a general discussion see Benedek, De Feyter, Marrella, *Economic Globalisation and Human Rights*, Cambridge, 2007.

## 1. The right to water as a human right

Notwithstanding the intuitive importance of water within the most vital human rights, it maybe surprising to see that very few express references may be found in fundamental international instruments. For any reasonable human being, every individual should hold a right to access adequate and drinking water while, under international law, national Governments should ensure that water is available, without discrimination to the population present in their territory. Is the right to water the product of some academics, a matter of logics or a rule of positive law?

The legal framework is particularly complex although the great majority of commentators speak easily of the right to water as a human right<sup>1</sup>. As a matter of facts, an express reference to it is quite rare in international Human Rights Law instruments.

At the global level, the Universal Declaration of Human Rights<sup>2</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights<sup>3</sup>, are very timid on the point. The latter, foresees, at art 11, a right to "an adequate standard of living ... including adequate food, clothing and housing, and to the

<sup>1</sup> See: F. Marrella, "Regolazione internazionale e responsabilità globale delle imprese transnazionali", in *Diritti Umani e Diritto Internazionale*, 2009, vol. 3, pp. 229-258; F. Marrella, F. Galgano, *Diritto e prassi del commercio internazionale*, Padova: Cedam, 2010; Benedek, De Feyter, Marrella, *Economic Globalisation and Human Rights*, Cambridge University Press: Cambridge, 2007; M. Fitzmaurice, "The Human Right to Water", in *Fordham Environmental Law Review*, 2007, pp. 538-586; J. Razzaque, "Trading Water: the Human Factor", in *Review of European Community and International Environmental Law*, 2004, pp. 15-26; A. Tanzi, *Controversial Developments in the Field of Public Participation in the International Environmental Law Process*, in Dupuy, Vierucci, *NGOs in International Law: Efficiency in Flexibility?*, Cheltenham, 2008, pp.135-152; A. Tanzi, C. Pitea, *Emerging Trends in the Role of Non-State Actors in International Water Disputes*, in *Resolution of international water disputes: papers emanating from the Sixth PCA International Law Seminar* (November 8, 2002), 2003, pp. 259-297; Stan Bernstein, "Freshwater and Human Population: A Global Perspective," in *Human Population and Freshwater*, ed. Karin M. Krchnak (Yale, 2002), 149-157, available at: <http://environment.yale.edu/documents/downloads/0-9/107Bernstein.pdf>; T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague, 2005; T. Treves, L. Pineschi, A. Tanzi, C. Pitea, C. Ragni, F. Romanin Jacur (eds.), *Non-Compliance Mechanisms and Procedures and the Effectiveness of International Environmental Agreements*, The Hague, 2009.

<sup>2</sup> See art 25 of the UDHR where it is envisaged in broad terms "a standard of living adequate for the health and wellbeing ... including food, clothing, housing".

<sup>3</sup> 993 UNTS 3.

continuous improvement of living conditions” to which it is added, at art 14(2)(c), a provision of “adequate nutrition and safe drinking water”.

A more concrete development, although contained in a *soft law* instrument may be found in General Comment n.15 of the UN Committee on International Covenant on Economic, Social and Cultural Rights of 26 November 2002 (E/C.12/2002/11) on the right to water. According to the General Comment, the right to water is derived from that of every individual to an adequate standard of living (art.11) and the right to health (art.12).

As a matter of facts, art.11, para 1, of the ICESCR specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing”. The use of the word “including” thus indicates that this catalogue of rights was not intended to be exhaustive. Moreover, the right to water is presupposed for securing an adequate standard of living since it is one of the most fundamental conditions for survival. In addition, the right to water is inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1).

All in all, the right to water may be considered as a pillar where the right to life and human dignity are to be constructed.

Even in other international instruments such as the 1966 International Convention on the Elimination of All Forms of Racial Discrimination<sup>1</sup>, the 1979 Convention on the Elimination of All Forms of Discrimination against Women<sup>2</sup>, the 1989 Convention on the Rights of the Child<sup>3</sup> and the 2006 Convention on the Rights of Persons with Disabilities, express references, where they exist, are very timid.

It should not therefore be surprising to note that more food for thoughts is found into declarations and international programmes with regard to access to safe drinking water and sanitation adopted by major United Nations conferences and summits, and by the General Assembly at its special sessions and during follow-up meetings, *inter alia*, the Mar del Plata Action Plan on Water Development and Administration, adopted at the United Nations Water Conference in March 1977, Agenda 21, adopted at the United Nations Conference on

<sup>1</sup> 660 UNTS 195.

<sup>2</sup> 1249 UNTS 13. See art 14(2)(h) where it is spoken of “adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.

<sup>3</sup> 1577 UNTS 3. See Art 24(2)(c) where the convention provides “to combat disease and malnutrition ... through the provision of adequate nutritious foods and clean drinking-water”.

Environment and Development in June 1992, and the Habitat Agenda, adopted at the second United Nations Conference on Human Settlements in 1996<sup>1</sup>.

All in all an important achievement at this level is the inclusion of this issue amongst the Millennium Development Goals, stressing, in that context, the resolve of Governments to halve, by 2015 the proportion of people unable to reach or afford safe drinking water, and to halve the proportion of people without access to basic sanitation, as agreed in the Johannesburg Plan of Action.

For the same reasons, the UN General Assembly, on 28<sup>th</sup> July 2010, formally recognized the right to water and sanitation with the Resolution n.64/292, acknowledging that they are essential for the full enjoyment of life and all human rights<sup>2</sup>. The Resolution also calls on states and international organization to provide financial and technological resources to enable other countries to provide universal access to safe and affordable water and sanitation.

Thus, on September 30<sup>th</sup>, 2010, the Human Rights Council adopted the General Assembly Resolution reaffirming that:

“The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity”<sup>3</sup>.

This means that at the UN level, the right to water and sanitation should be implicitly legally binding. However, these resolutions are not legally binding *per se*, and add a further puzzle piece to an already complex legal framework.

The situation looks slightly different on a regional scale. Reference here, may be made to the Protocol on Water and Health, adopted by the United Nations Economic Commission for Europe in 1999<sup>4</sup>, the European Charter on Water Resources, adopted by the Council of Europe in 2001, the Abuja Declaration, adopted at the first Africa-South America summit in 2006, the message from Beppu, adopted at the first Asian-Pacific Water Summit in 2007, the Delhi Declaration, adopted at the third South Asian Conference on Sanitation in 2008, and the Cairo Declaration, adopted at the fifteenth summit of Heads of State and Government of the Non-Aligned Movement in 2009.

<sup>1</sup> See the Resolution of the Human Rights Council adopted on 12 October 2009 on Human Rights and access to safe drinking water and sanitation, Doc. A/HRC/RES/12/8.

<sup>2</sup> See *The human right to water and sanitation*, GA Res. 64/292, UN GAOR, 64<sup>th</sup> Sess., 108<sup>th</sup> plen. mtg., Agenda Item 48, UN Doc. A/RES/64/292 (2010).

<sup>3</sup> *Human rights and access to safe drinking water and sanitation*, HRC Res. 15/9, UN GAOR, Human Rights Council, 15<sup>th</sup> Sess., Agenda Item 3, UN Doc. A/HRC/RES/15/9 (2010), para. 3.

<sup>4</sup> See [http://www.unece.org/env/water/text/text\\_protocol.htm](http://www.unece.org/env/water/text/text_protocol.htm) (visited on 20 May 2010).

Finally, one should note that in recent years, specific constitutional norms have been introduced in at least ten countries, re-enforcing via domestic law the importance of the right to water as State practice and evidencing that international rules on the right to water as a human right should be placed high in the Governments' agenda.

Such constitutional solutions look quite different<sup>1</sup>. On one extreme of the scale, one may place the amendment to the Uruguay constitution of 2004 where private investment in water services is made unconstitutional *per se*, in order to protect the human right to water while Ecuador has made privatization of water services unconstitutional but providing at the same time a transition clause for the Bechtel subsidiary InterAgua to transfer operations back to the public sector. Bolivia and Colombia are elaborating provision on the human right to water, and India and Argentina have recognized this right through interpretations of other constitutional provisions — the right to life and the right to a healthy environment, respectively. In South Africa, the national constitution provides for a right to water and the High Court has confirmed the nature of human right of it<sup>2</sup>.

India has reached a similar result only via case law, ruling that private corporations violating the human right to water can be held liable<sup>3</sup>.

Confronted with the (poor) legal landscape that has been sketched above, the UN Human Rights Council adopted a decision (in Nov 2006) and a resolution (in Sept 2007) regarding human rights and equitable access to safe drinking water and sanitation. In March 2008, the Human Rights Council by its resolution 7/22, decided to appoint an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. Accordingly at its September 2008 session, the Human Rights Council appointed Ms. Catarina de Albuquerque (Portugal) as Independent Expert, for a period of three years. She took up her functions<sup>12</sup> on 1 November 2008 and her work is currently ongoing.

<sup>1</sup> See The Center for Economic and Social Rights, *The Right of Access to Water: Relevant Constitutional Provisions*. (Listing: Ethiopia, Gambia, Guatemala, Panama, Uganda, South Africa, Venezuela, and Zambia.). See in particular Uruguay Constitution (2004), art. 47, 188. See also Ecuador's Constitution (2008), art. 13, 41 and transitoria 4.

<sup>2</sup> See *Lindiwe Mazibuk, and Others v. Johannesburg Water and Others*, South African High Court, Witwatersrand Local Division, Case no: 06/13865 (July 7, 2007) and in particular P. Bond, J. Dugard, "The case of Johannesburg water: what really happened at the pre-paid 'Paris pump'", in *Law, Democracy and Development*, at <http://www.ukzn.ac.za/ccs/files/Bond%20Dugard%20LDD.pdf> (visited on 15 may 2010).

<sup>3</sup> Indian Supreme Court in *M C Mehta v. Union of India* 2004 (12) SCC118, about Coca cola operations in Kerala.

Her work, together with that of the Special Representative of the Secretary General on business and human rights – to which reference will be made hereinafter – will contribute to get the International Community moving towards the accomplishment of, *inter alia*, Millennium Development Goal 7. This Goal is intended to halve, by 2015, the proportion of people who are unable to reach, or to afford, safe drinking water; and to stop the unsustainable exploitation of water resources, by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.

Five normative criteria for the full realization of the right to water have been identified (*availability, accessibility, quality/safety, affordability, acceptability*) with five cross cutting ones (*non-discrimination, participation, accountability, impact, sustainability*).

*Availability* refers to sufficient quantities, reliability and the continuity of supply. In other words, water should be available and in a sufficient quantity for meeting personal and domestic requirements of drinking and personal hygiene as well as further personal and domestic uses such as cooking and food preparation, dish and laundry washing and cleaning. There must also exist sufficient number of sanitation facilities (with associated services) within, or in the immediate vicinity, of each household, health or educational institution, public institution and place, and the workplace.

Water, then, should be *accessible*. This means that sanitation and water facilities are physically accessible, at day and night, for everyone within, or in the immediate vicinity, of each household, health or educational institution, public institution and the workplace. Ideally within the home, including for people with special needs.

Thirdly, access to sanitation and water facilities and services must be *affordable*, i.e. accessible at a price all people can pay. Paying for services, including construction, cleaning, emptying and maintenance of facilities, as well as treatment and disposal of faecal matter, must not limit people's capacity to acquire other basic goods and services, including food, housing, health and education guaranteed by other human rights. This also means that the State is obliged to ensure the provision of services free of charge (e.g. through social tariffs or cross-subsidies) for those who are genuinely unable to pay for sanitation and water through their own means.

Fourthly, sanitation facilities must be hygienically safe to use. They must also take into account the safety needs of peoples with disabilities, as well as of children. Regular maintenance and cleaning are essential for ensuring the sustainability of sanitation facilities and continued access. Water must be of such a quality that it does not pose a threat to human health. Transmission of water-borne diseases via contaminated water must be avoided.

Finally, water and sanitation facilities and services must be culturally and socially *acceptable*. Acceptability means also privacy, as well as separate facilities for women and men in public places, and for girls and boys in schools. In regard to water, apart from safety, water should also be of an acceptable colour, odour and taste.

Five other parameters are to be considered cross-cutting ones. The first one is *non discrimination*.

As indicated by treaty law, discrimination on race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status or any other civil, political, social or other status must be avoided, both in law and in practice. Individuals and groups potentially vulnerable or marginalized include: women, children, inhabitants of (remote) rural and deprived urban areas as well as other people living in poverty, refugees and IDPs, minority groups, indigenous groups, nomadic and traveller communities, elderly people, persons living with disabilities, persons living with HIV/AIDS or affected by other health conditions, people living in water scarce-regions and sanitation workers amongst others.

Secondly, processes related to planning, design, construction, maintenance and monitoring of sanitation and water services should be *participatory*. This requires, *inter alia*, to include representatives of all concerned individuals, groups and communities in the decision making processes. To allow for participation in that sense, transparency and access to information is essential. Last but not least, *accountability* should be always guaranteed.

The realization of the human right to water requires responsive and accountable institutions, with a clear designation of responsibilities and coordination between different entities involved. In addition to participation and access to information mentioned above, communities should be able to participate in monitoring and evaluation as part of ensuring accountability.

In cases of violations – be it by States or non-State actors –, States have to provide accessible and effective judicial or other appropriate remedies at both national and international levels. Victims of violations should be entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition.

## 2. Transnational Corporations, the right to water and the evolving international agenda

Transnational corporations may encounter water issues in at least three different contexts: a) as enablers of access to water; b) as providers or distributors of water and c) as a user or consumer of water. Leaving aside this latter

aspect, one may note that Human Rights may be violated by a company if its facilities pollute the surroundings affecting *ipso facto* the rights to a home, to health of persons and the environment<sup>1</sup>.

Also, as a preliminary note, it should be observed that, in the framework of the European Convention on Human Rights, it is now settled that companies and their shareholders benefit from human rights protection against the host State in which they operate<sup>2</sup>.

Such aspects have grown in importance in the last decade, due to the fact that many States have conducted for various reasons (mostly under the push of the International Monetary Fund or the World Bank) large privatization policies. Have then they privatised the international obligations they had in terms of protecting, respecting and fulfilling human rights, including the right to water of the people? The answer is negative.

Privatization consists in hiring private enterprises to carry out public service functions. Its aim is, theoretically, to bring market efficiency and new sources of capital to under-funded and poorly managed public enterprises. Sometimes, this operation may replace a state-owned monopoly with a private one. Thus, if not carefully considered, the economic cure may only displace the problem of realising the right to water for all, from the realm of politics and public decision-making to the realm of markets and private profit seeking<sup>3</sup>.

In the last decade, we have also witnessed the phenomenon of a shift towards private sector for UN projects financing. The creation and the founding of the Global Compact has become a new paradigm in International Law and the main avenue of persuading transnational corporations to act responsibly.

<sup>1</sup> Art.8 of the ECHR seems to covers such a situation (EctHR, *Lopez Ostra v. Spain*, 9 dec. 1994). The Court sayed the State did not succeed in striking a fair balance betw. the interest of the town (having a waste-treatment plan) and the applicant's enjoyment of her right to respect for her home and her private and family life.

<sup>2</sup> On shareholder rights under ECHR law in general see: *Agrotexim Hellas SA and Others v Greece* A 330 (1995); (1996) 21 EHRR 250; *Association and H v Austria* (1984) 36 DR 187 at 191–2; *Matos e Silva Lda and Others v Portugal* 1996-IV 1092; (1997) 24 EHRR 573; *Société Colas Est et autres v France* 2002-III 421; *Autronic AG v Switzerland* A 178 (1990); (1990) 12 EHRR 485; *Demuth v Switzerland* 2002-IX 704; (2004) 38 EHRR 20; *Comingersoll SA v Portugal* 2000-IV 355; (2001) 31 EHRR 772. On shareholder rights under Protocol I(1) in particular: *Olczak v Poland*, Decision of November 7, 2002, EHRR 2002-X ¶ 61; *Company S-S I AB and BT v. Sweden*, Application 11189/84 (1986) 50 DR 121, 138; *Bramelid and Malmström v. Sweden*, Application 8588-89/79 (1982) 29 DR 64, 81; (1983) 5 EHRR 249. For an extensive analysis see Marius Emberland, *The human rights of companies: exploring the structure of ECHR protection* (OUP 2006) at 65 *et seq.*

<sup>3</sup> See for exemple J. Stiglitz, *Making Globalization Work*, Penguin Books, 2006.

The human rights and business framework, with the Global Compact as its zenith, has developed over a number of decades, beginning with the 1976 Organization for Economic Development and Cooperation (“OECD”) Guidelines for Multinational Enterprises<sup>1</sup>; the 1977 International Labour Organization (“ILO”) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>2</sup>; the United Nations Commission on Transnational Corporations’ code of conduct initiated in the 1970s and abandoned in 1994<sup>3</sup>; and the contentious United Nations “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”<sup>4</sup>, which was abandoned in 2004<sup>5</sup>.

The United Nations Global Compact, is the result of the call launched by the United Nations Secretary General Kofi Annan in 1999 at the World Economic Forum. Under this scheme, member corporations and organisations can sign up to the Global Compact and report on their compliance with its ten principles relating to labour, human rights, anti-corruption and the environment<sup>6</sup>. It is designed to promote ‘responsible corporate citizenship’ and has over 5,200 corporate members worldwide.

The UN envisage the Global Compact as a dialogue forum to promote mutual learning amongst corporations. The focus is essentially on helping corporations learn about ‘best practices’ and elaborating codes of conduct. These codes, however, in their general form, lack of strong law enforcement mechanisms. They are based more on peer-to-peer and market mechanisms: if member companies break the codes of conduct, the main sanction is a delisting from the Global Compact.

<sup>1</sup> Part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, updated June 2000.

<sup>2</sup> Adopted November 1977, 204th Session, amended November 2000, 279th Session (2001), <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>>.

<sup>3</sup> One may add in such a framework the 1977 Code of Conduct for Companies Operating in South Africa during apartheid which was adopted by the European Economic Communities, see U.N. Doc. A/32/267.

<sup>4</sup> See U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm. On Promotion and Protection of Human Rights, *The United Nations Norms on the Responsibilities of Transnational Corporations and Other business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

<sup>5</sup> *Responsibilities of Transnational Corporations and Other business Enterprises with Regard to Human Rights*, C.H.R. Res. 2004/116, U.N. ESCOR, Commission on Human Rights, 60th Session, U.N. Doc. E/CN.2/2004/L.73/Rev.1 (2004).

<sup>6</sup> <<http://www.unglobalcompact.org>>.

By the same instrument, companies pledge to report regularly on how they are implementing the Compact’s codes. To demonstrate progress, members use the Global Compact’s “Communication on Progress”, which is designed to highlight companies’ information in CSR reports.

The flipside of the coin is that by encouraging corporate ‘best practices’ mutual learning and voluntary respect for human rights, the UN and its Member States avoid tackling the hot issue of concrete action at the international hard law level against corporate human rights violations.

The result has been, nonetheless, in many cases positive but, here again, without a clear leadership and UN-driven regulatory framework, there is a risk to allow some companies to wrap themselves in the blue flag of the United Nations without increasing effectively human rights protection, particularly in the case of water<sup>1</sup>.

The issue of water is addressed by the Global Compact through the CEO Water Mandate, a voluntary initiative that is designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices<sup>2</sup>. Like the Global Compact, the CEO Water Mandate is based on a set of core elements that members claim to adhere to through a series of non-binding pledges (Direct Operations; Supply Chain and Watershed Management; Collective Action; Public Policy; Community Engagement; and Transparency)<sup>3</sup>. Members are all encouraged to learn from other ‘best practices’. Most of the Mandate’s endorsers are major corporations that are reliant on water as a primary input. Endorsers include Suez, Coca-Cola, PepsiCo, Nestlé, Groupe Danone, Unilever, Dow Chemical, Levi Strauss and Hindustan Construction Co.

<sup>1</sup> See the critical views expressed by R. Girard in <http://www.polarisinstitute.org/files/UNreport.pdf> (visited on 15 May 2010).

<sup>2</sup> The mission statement is as follows: “The CEO Water Mandate seeks to make a positive impact with respect to the emerging global water crisis by mobilizing a critical mass of business leaders to advance water sustainability solutions – in partnership with the United Nations, civil society organizations, governments, and other stakeholders. As a special initiative of the UN Secretary-General, The CEO Water Mandate offers a unique action platform to share best and emerging practices and to forge multistakeholder partnerships to address the problems of access to water and sanitation. The CEO Water Mandate covers six areas: Direct Operations; Supply Chain and Watershed Management; Collective Action; Public Policy; Community Engagement; and Transparency. Endorsers of The CEO Water Mandate recognize that through individual and collective action they can contribute to the vision of the UN Global Compact and the realization of the Millennium Development Goals”. See [http://www.unglobalcompact.org/issues/Environment/CEO\\_Water\\_Mandate](http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate)

<sup>3</sup> Id.

In 2005, besides the Global Compact and following the failed adoption by States of the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, the UN Secretary-General to appoint a Special Representative for Business and Human Rights<sup>1</sup>, Prof. John Ruggie (hereinafter SRSG) who had played a great role in the design of the Global Compact.

After extensive research, Prof. Ruggie elaborated in 2008 a framework based on three core principles: *protect, respect and remedy*<sup>2</sup>.

The first principle is the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication. The second principle is the corporate responsibility to respect human rights. In addition to compliance with applicable laws, companies are subject to what is sometimes called a social license to operate—or prevailing social expectations. The third principle is the need for more effective access to remedies for victims of human rights abuses involving companies. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims need redress.

These (non binding) findings have been widely accepted both from Governments and from the business side.

However, it should not be forgotten that it is the task of the state to protect people within its frontiers against human rights infringements by non-state players. Privatization of essential goods and services does not amount to privatizing international responsibility. Human rights covenants are international legal conventions, agreements between countries making contracting states responsible for implementation of human rights. Countries which have mutually undertaken to protect, respect, fulfill and enforce human rights described in international human rights conventions have to implement these rules through national legislation.

In this regard, those States which are not in a position to implement and enforce human rights effectively should be helped more by the International Community in order to build up the appropriate judicial and administrative structures<sup>3</sup>.

<sup>1</sup> Human Rights Resolution 2005/69, <<http://www.business-humanrights.org>>.

<sup>2</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 8th Session, Agenda Item 3, U.N. Doc. A/HRC/8/5 (2008).

<sup>3</sup> In his 2008 report, John Ruggie singled out the OECD guidelines for multinationals as the most widely applicable standard confirmed by governments. In his view, these guidelines should be reviewed, because they are too unspecific on human rights and fall short of many voluntary business standards. However, it should be noted that OECD national contact points fulfill an important function amongst non-judicial remedies, as recognized by Prof. Ruggie in his latest reports.

A particular regulatory challenge, therefore, remains for business activity of companies in so-called weak governance zones. Weak governance zones are characterised by violence, corruption, deficient administrations and arbitrary political decisions, all factors which are condemned by the same international business community since they hinder business activity, complicate planning and make investments extremely risky.

Those (few) multinational companies that have invested in a weak governance zone face a dilemma: they may help to improve the situation locally thanks to their investments, such as through measures against child labour, discrimination, inadequate pay, despite an unstable situation. Or, on the contrary, they may face the accusation that their business involvement can sometimes give indirect support to an illegitimate or a dictatorial regime with the result of contributing to the perpetuation of unacceptable conditions. In such a context, training of key company officers in Human Rights and the ability to implement codes of conduct becomes a strategic asset both for the company and for its external stakeholders.

All in all, infringement of human rights and the absence of rule of law are massively detrimental to business activities and hence also impede companies with multinational operations.

Also in this perspective, the duty to respect becomes crucial. It is the duty of companies to respect human rights and to put in place the necessary management structures to this end.

Companies have an important role to play in supporting and spreading human rights. The Universal Declaration of Human Rights calls on every individual as well as all sections of society, i.e. also including business players, to help realize human rights.

At the same time, companies themselves have a responsibility to respect human rights, which exists independently of states. Corporate Social Responsibility begins with legal compliance and goes beyond compliance with host State law when the law is enforced poorly or not at all.

For these reasons, and also for a company to be able to demonstrate that it respects rights beyond legal requirements, a human rights due diligence process is nowadays indispensable.

“Naming and shaming” is a response by external stakeholders to the failure of companies to respect human rights. “Knowing and showing” is the new paradigm, meaning internalization of that respect by companies themselves through human rights due diligence analysis<sup>1</sup>.

<sup>1</sup> Respect for human rights is not only a responsibility of multinational companies but is also incumbent in equal measure on domestic companies.

According to the SRSR, the duty to respect entails the following:

“Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances”<sup>1</sup>.

Thus, companies need to undertake the following four steps: 1) adopt a human rights policy<sup>2</sup>; 2) consider the human rights implications of activities through conducting impact assessments<sup>3</sup>; 3) integrate the human rights policy into the company’s activities, and throughout the company<sup>4</sup>; 4) audit performance against policies and assessments on an ongoing basis and report on this performance<sup>5</sup>.

A critical aspect of Ruggie’s pillar of the corporate obligation to “respect” human rights is the human rights impact assessment (“HRIA”) which bears similarities to the environmental impact assessment. The SRSR developed a report on HRIsAs concerning methodological questions and making reference to various current initiatives. The International Finance Corporation (“IFC”) has developed *Guide to Human Rights Impact Assessment* in collaboration with the Global Compact and the International Business Leaders Forum<sup>6</sup>.

Companies may find it difficult to meet the first requirement which is collecting accurate and relevant information on the target regions of their investments. In addition, companies also need support on specific detailed questions relating to, for instance, implementation of particular social standards in certain regions. Here, the UN and its specialized agencies, such as the ILO, may become the hub for training and even implementation assessments.

<sup>1</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 8th Session, Agenda Item 3, U.N. Doc. A/HRC/8/5 (2008), paras 57-58.

<sup>2</sup> Id. Para 58: “For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies”.

<sup>3</sup> Id. para 61.

<sup>4</sup> Id. para 62.

<sup>5</sup> Id. para 63.

<sup>6</sup> *Human Rights Impact Assessments – Resolving Key Methodological Questions, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 4th Session, Agenda Item 2, U.N. Doc. A/HRC/4/74 (2007).

How can equality of opportunity in Muslim countries or freedom of association in authoritarian regimes best be realised? A leading example is offered by the ILO which, thanks to its specific know how, set up a helpdesk in spring 2009 to which companies and social partners can turn with questions relating to implementation of ILO standards<sup>1</sup>.

In one of his latest reports, the SRSR proposes that respect of human rights by companies should also be strengthened through reporting obligations<sup>2</sup>. The demand for transparency and credibility in business behavior vis-à-vis human rights should be addressed via binding reporting obligations on these matters.

Finally, the SRSR is currently working to develop appropriate remedies. It is recognized that the key is to develop and strengthen judicial and non-judicial complaint mechanisms in order to improve remedies for human rights infringements committed by companies. Here, amongst non-judicial remedies, the national contact points put in place in the framework of the OECD guidelines for multinationals can be useful complaint mechanisms. But once again, it should be noted that the duty to implement and enforce human rights is primarily a duty of states which must strengthen judicial complaint mechanisms and facilitate access to them. This is important for civil society and business since slow, poor and unreliable legal systems lead to legal uncertainty, to the detriment of civil society and the economic activity.

In this framework, companies should put in place their own complaint mechanisms in order to prevent and remedy to their own mistakes. Companies therefore should use various avenues to come into contact with employees, consumers, local communities and all other stakeholders in order to give them the opportunity to present their complaints and respond to them.

### Is Human rights protection provided by BITs?

The almost absent concern in international investment agreements for human and environmental rights, which are clearly involved in foreign investments, has attracted much debate and attention toward such instruments<sup>3</sup>.

<sup>1</sup> This is particularly the case in relation to small and medium-sized enterprises for which the services made available by policymakers and international organisations are still too limited. It is important not to underestimate the international business operations of SMEs: middle-ranking companies have long been very active at international level.

<sup>2</sup> See Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, Doc. A/HRC/14/27, issued on 9 April 2010.

<sup>3</sup> See for instance Reiner, C., Schreuer, C., 2009. Human Rights and International Investment Arbitration. In: Dupuy, P. M., Francioni, F., Petersmann, E., 2009. *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press.

As a matter of fact, human rights are rarely, if at all, mentioned in BITs, while the degree of protection of the interests of foreign investors has steadily strengthened since the first bilateral treaty signed in 1959.

Theoretically, BITs could address human rights concerns either by referring to the state duty to protect and promote human rights or by directly imposing obligations on the investors, setting requirements for their adherence to human rights standards; another possibility would be to provide clauses that ensure primacy of human rights treaties over BITs. However, up to now, very few examples of such technical solutions may be found in BITs.

### A) Explicit references to human rights in BITs

It was not until 1990s that references to social issues, though very timid, appeared in BITs: this, according to one author, means that it can be taken for granted that almost one-third of the total of BITs will not have any mention of human nor environmental rights<sup>1</sup>. Moreover, no explicit reference to human rights can be found in the BIT models of the countries which are contracting parties to the largest number of such treaties and which have historically set the trends governing their draft. For instance, no express mention is present on the BIT model of Germany (2008), France (2006), China (2003), United Kingdom (2005) and United States (2004).

The only explicit use of the words “human rights” in BITs is normally found in preambular paragraphs, which certainly has an impact on the interpretation of the treaty, but lacks to create a strong hard law obligation on the parties.

An attempt has been recently made by Norway, which in the BIT model of 2007 reaffirms in the statement of purpose of the treaty the parties’ “commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights”<sup>2</sup>. However, despite the efforts to achieve a better balance between investor and public-policy protection, the government decided to abandon the new draft following public criticism, coming especially from NGOs<sup>3</sup>. Another example can be found in the preamble of the European Free

<sup>1</sup> Mann, H., 2008. *International Investment Agreements. Business and Human Rights: Key Issues and Opportunities*. Winnipeg: IISD, pp. 9-10.

<sup>2</sup> *Norway BIT Model*, 2007. Draft version, 19 December 2007. Available at: <<http://ita.law.uvic.ca/documents/NorwayModel2007.doc>> [Accessed: 21 December 2010], p. 1.

<sup>3</sup> Vis-Dunbar, D., 2009. *Norway shelves its draft model bilateral investment treaty*. Investment Treaty News, June 8. Available at: <<http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>> [Accessed: 21 December 2010].

Trade Association-Singapore agreement signed in 2002, which however does not focus on investment, in which the parties reaffirm their “commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights”<sup>1</sup>.

### B) Indirect references to human rights in BITs

A larger number of BITs contains provision on social issues indirectly related to human rights, such as sustainable development, labor rights or environmental protection, but also basic health and safety promotion. The 2004 United States BIT model is probably the most notable example in this context, in which references to these issues are not limited to the preamble. In the statement of purposes, the parties would agree to “promote a greater economic cooperation [...] in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights”. The model continues by acknowledging that “it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic” environmental and labor laws, at Art. 12 and 13 respectively. A very similar provision can be found in the Canadian BIT model of 2004, and at Art. 1114 of NAFTA, in the section dealing with investments. The latter provides that:

“Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures”<sup>2</sup>.

According to the UNCTAD World Investment Report of 2010, the latest revisions and reformulations of BITs suggest a trend toward an increased attention paid to the right of states to regulate in the public interest. For instance, Canada-Jordan BIT of 2009 and Peru-Singapore Free Trade Agreement of 2008 introduced general exceptions that give states more space to implement measures for the protection of health and human, animal or plant life. Another example can be found in the Common Market for Eastern and Southern Africa (COMESA) Agreement, which drew a clearer line separating the compensable

<sup>1</sup> *Free Trade Agreement Between the EFTA States and Singapore*, 2002. Available at: <<http://www.efta.int/~media/Documents/legal-texts/free-trade-relations/singapore/SG-FTA.asbx>> [Accessed: 21 December 2010].

<sup>2</sup> North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993), Art. 1114(1) and (2).

indirect expropriation and the non-compensable one result of *bona fide* regulation in the public interest.

It is clear, however, that the promotion and protection of human rights in BITs, except for some rare instances, is mostly absent.

Moreover, the tendency of arbitral tribunals dealing with such clauses is often that of giving them little weight, in favor of preserving the original purposes of BITs, namely the protection of foreign investors<sup>1</sup>.

### Soft law responsibilities of investors

There seems to be two imbalances in current BITs: firstly, there is a much greater emphasis on the economic dimension in comparison to the social and environmental dimension of investments; secondly, there are many more obligations pending on the host states with respect to foreign investors, than obligations for the foreign investors vis-à-vis the host state and the international community.

These asymmetries may lead to a greater protection of the economic interests and rights of investors, neglecting- if not contracting out from - the public interests and the rights of other stakeholders when they may be affected by foreign investments.

These concerns become particularly problematic in relation to the activities of TNCs in developing countries. These countries have often not encouraged the protection and enforcement of human rights, because they are seen as conflicting with a regulatory regime that attracts foreign investments. As a result, TNCs are often in the position of operating in developing regions where human rights standards are less stringent than those characterizing the developed world<sup>2</sup>.

However, since the 1970s, with the ever increasing internationally recognized economic and political power of TNCs, there has been a growing pressure by IGOs, NGOs and international law scholars to bring the human rights responsibility, accountability and liability of such TNCs at the center of the debate, which has further strengthened following the promotion of large priva-

<sup>1</sup> See for instance: F. Marrella, *On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration*, in INTERNATIONAL COMMUNITY LAW REVIEW, vol. 12, pp. 335-359; Jacob, M., 2010: International Investment Agreements and Human Rights. INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010. Duisburg: Institute for Development and Peace, University of Duisburg-Essen.

<sup>2</sup> See Zerk, A., 2006. *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*. Cambridge: Cambridge University Press.

tization policies, especially by the International Monetary Fund and the World Bank<sup>1</sup>. Such policies implied that many tasks that were traditionally performed by states, such as the provision of water and sanitation services, were handed over to the private sector, often causing a replacement of a state-owned monopoly with a private one.

Today, most of the TNCs subscribing the Global Compact initiative are those using water as an input for production (such as Coca Cola, Nestlé or Danone), while only two providers of water-related services are listed among the endorsers, namely the French Suez and Veolia<sup>2</sup>.

### The impacts of BITs on the realization and enforcement of the human right to water

#### How BITs can impair human rights realization

Foreign investments generally are long-term activities, and this is particularly true for the privatization of public utilities as water and sanitation. Therefore, investors are more exposed to governmental policy shifts which may adversely affect the value of their investment. It is quite easy for investors to say that any regulatory measure implemented by the government adds costs or causes disincentives to their economic activities, so that they can seek compensation through international investment arbitration.

As far as the right to water is concerned, if it is true that, on the one hand, investment protection can attract the capital and know how necessary to develop infrastructures and a better governance, on the other hand it may have a negative impact, as it could limit the host states' ability to regulate with a view to achieving progressively the full realization of the right to clean water and sanitation. In fact, changes in regulation or implementation of new measures could be perceived by foreign investors as contrary to the non-discrimination or FET principles, as indirect expropriation or as violation of stabilization or economic equilibrium clauses, and be brought before an arbitration tribunal.

This section deals with the ways in which BITs may discourage states to implement policies aimed at having human rights realized or to remedy to hu-

<sup>1</sup> See Davarnejha, L., 2008. Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises. In: OECD, *7th Global Forum on International Investment*. Paris, France, 27-28 March 2008. Paris: OECD, p.10.

<sup>2</sup> UNGC, 2010. *The CEO Water Mandate – Endorsing CEOs*. [online] Available at: <[http://www.unglobalcompact.org/issues/Environment/CEO\\_Water\\_Mandate/endorsingCEOs.html](http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate/endorsingCEOs.html)> [Accessed 21 December 2010].

man rights abuses within their territory, focusing on the negative impacts that each single BIT clause introduced in the previous paragraph may have.

### *Non-discrimination*

The extent of the potential impact of the non-discrimination standard, especially that of national treatment, on the protection and promotion of human rights often depends on the way in which it is interpreted and applied by arbitral tribunals. As shown above, interpretations vary widely across jurisprudence, for instance with respect to the meaning of “likeness” and “less favorable treatment”.

An interpretation of national treatment that focuses exclusively on the adverse effects of regulatory measures or that asks for a strict causal relationship between the means adopted and the public policy ends, will seriously constrain a country’s ability to regulate in favor of the protection and promotion of human rights.

An interpretation of “likeness” like that adopted by the *Occidental* tribunal could be used by foreign investors to challenge the imposition of human rights obligations by states merely if domestic corporations, even operating in other economic sectors, are not subject to the same requirements. Or, conversely, this broad approach could be used to challenge a state regulation that was aimed at furthering a particular sector or group of society in particular need of support.

A very important consequence of the inclusion of NT in investment treaties is that even if some form of discrimination toward foreign investors is grounded on solid and valid economic or social reasons, it cannot be justified. A meaningful example is provided in a report of the HCHR dealing with the National Water Act adopted by the Republic of South Africa in 1998<sup>1</sup>. This act provides for a favorable treatment to disadvantaged racial minorities in the issuance of water licenses, in the effort of redressing the apartheid discriminations suffered in the previous decades. Clearly, this may result in a different treatment of national with respect to foreign investors, and thus be perceived as discriminatory even though it aims at promoting equality and diminishing racial discrimination. Unless specific exceptions are provided in South African BITs, any foreign investor operating in the water sector could claim a breach of the obligations under the investment treaty, especially if the interpretation of “likeness” is very broad.

<sup>1</sup> V. *Human rights, trade and investment. Report of the High Commissioner for Human Rights*, UN ECOSOC, Commission on Human Rights, 55<sup>th</sup> Sess., Item 4 of the Provisional Agenda, UN Doc. E/CN.4/Sub.2/2003/9, para. 31(b).

### *Fair and equitable treatment and full protection and security standards*

Despite the limited number of arbitral cases in which an argument based on human rights has been made, there are two situations that seem to be more frequent. In the first situation, two obligations of the state are in conflict: this happens when a host state argues that its behavior, alleged to be in breach of the FET standard, was required to respect an international human rights obligation. In the second scenario, the investor contributes directly to the violation of the standard and the state has to breach the FET in order to stop an investor conduct that violates human rights norms<sup>1</sup>.

The rights granted to the foreign investor by the FET clause are among those that are most commonly in contrast with the state’s right to regulate. As a matter of fact, the clause’s aim of creating a stable environment for investments and its formulation in extremely vague and flexible terms provide investors with a very appealing instrument through which they can bring a state regulatory measure, not amounting to the level of indirect expropriation, in front of an arbitral tribunal. On the other hand, from the state’s perspective, the presence of a FET clause on BITs may constitute a deterrent for the implementation of measures to promote and protect human rights if they are likely to be challenged by foreign investors that may have the economic value of their investment reduced by such measures.

Moreover, the inconsistent jurisprudence on the FET violations creates a high degree of uncertainty for states. While some tribunals seem to demand that an investor needs to be in the position of knowing in advance all the rules that will govern his investment, others seem to take into account the state’s right to regulate. These wide-ranging scenarios may make it difficult for states to predict whether a regulatory measure in furtherance of human rights will be considered in breach of a BIT requiring them to pay compensation to the investor. Therefore a FET clause could represent for a state a strong disincentive to regulation, especially for developing countries where multiple needs for precious financial resources may represent a crucial decisional factor.

In order to make further steps toward the realization of the right to water, tribunals should not adopt inflexible interpretations of the FET standard, otherwise the investors’ legitimate expectations may be violated for any state involvement in the regulation of tariffs or adjustment of subsidies. Particular

<sup>1</sup> V. *supra* See Knoll-Tudor, I., 2009. The Fair and Equitable Treatment Standard and Human Rights Norms. In Dupuy, P. M., Francioni, F., Petersmann, E., 2009. *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press, p. 339.

attention should be paid to the fact that certain industries, such as the water and sanitation ones, in which concession contracts may last 30 years or more, are more subject to regulatory tightenings and changes, and that this could be reasonably expected by foreign investors.

Similarly, analogous deterring effects may take place with the FPS standard whenever tribunals interpret this provision as in the *Azurix* case mentioned above, namely when FPS is understood as an extension of the FET, meaning that it requires governments to provide “the stability afforded by a secure investment environment”<sup>1</sup>.

### *Expropriation*

The protection of foreign investment against expropriatory measures by the host state, especially against indirect expropriation, is one of the most important fields of confrontation between the state’s right to regulate pursuing public policy objectives and the foreign investor’s rights. From the point of view of the investor, when drafting an expropriation clause, there is of course a strong incentive in defining concepts such as “investment”, “measure” and “expropriation” as broadly as possible, so that greater protection is provided. Then, it will be easy for investors to argue that any measure realized by the government becomes an indirect expropriation requiring compensation. In fact, all in all, any government activity affects the economy to some extent and, consequently, alters the relative value of foreign investments.

Moreover, as with the FET and FPS standards, the inconsistency of interpretations, even those giving some room for police powers, does not allow to predict clearly which regulatory measures can be considered permissible and non-compensable. The possibility of being judged by a tribunal that considers the state’s public purpose irrelevant, concentrating solely on the effect of the impugned measure, may dissuade states from accomplishing human rights targets, because of the potential threat of paying huge amounts in compensation. The financial aspect, in fact, plays an important role. While developed countries, if willing to pay compensation, can regulate without particular concerns even if expropriation norms are interpreted in broad terms, developing countries’ regulatory activity could be strongly discouraged by the inability to pay potential compensations that may arise from an arbitral award.

All these concerns have been perfectly summarized by the HCHR, expressing his concern about:

<sup>1</sup> *V. Azurix Corp. v. Argentine Republic* (hereinafter, *Azurix*), ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408.

“Investors’ use of expropriation provisions to protect investments against new measures to [...] promote human rights. [Although] expropriation provisions do not prohibit government regulatory action, [...] they do require [fair market value] compensation to the investor where the regulation directly or indirectly expropriates an investment or is tantamount to expropriation. [...] The extent of what constitutes direct expropriation, indirect expropriation or a measure tantamount to expropriation of an investment is unclear”<sup>1</sup>.

After discussing some broad interpretation of expropriation provisions, he underlined that such interpretations “could affect states’ willingness or capacity to introduce new measures to promote and protect human rights”<sup>2</sup> and that:

“[It is] important to avoid a situation where the threat of litigation on the bases of broadly interpreted expropriation provisions has a *chilling effect* on government regulatory capacity, conditioning state action to promote human rights”<sup>3</sup>.

Finally, it is emphasized that “while human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment, neither should they be made subject solely to economic calculus”<sup>4</sup>.

In line with this reasoning, General Comment 15 on the ICESCR requires states to adopt effective measures to fulfill the right to water and that water should be treated as a social and cultural, not economic, good. If expropriation is understood as an “interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or the reasonably-to-be-expected economic benefit of property”<sup>5</sup>, many measures that would be required for the realization of the right to water may be considered expropriatory. For instance, the creation of tariff standards altering the investor’s expected economic benefit may be considered as amounting to expropriation, even though the measure is taken with the purpose of granting access also to the poorest groups of the population.

If a state decides to resort to private sector participation in the water services provision, the decision is probably also motivated by the lack of financial resources to expand and control the water utilities. Therefore, if found in breach of the expropriation clause, it is unlikely that the state will be in the condition of providing prompt, adequate and effective compensation and this certainly threatens the state willingness to realize and enforce the human right to water. If these considerations are introduced in the framework of the longev-

<sup>1</sup> para. 31(d).

<sup>2</sup> *Id.*, para. 35.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Metalclad Corporation v. United Mexican States* (hereinafter *Metalclad*), ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103.

ity of concession contracts in the water sector, the risk of preventing states from taking actions to effectively promote the equitable expansion of water services becomes unbearable.

However, the recent trend in applying the proportionality principle in the evaluation of expropriatory measures, as in *Methanex* and *Azurix*, which take into account public demands and purposes, is certainly more conducive to the realization of the human right to water. Nonetheless, it must be underlined that neither *Methanex* nor *Azurix* tribunals discussed states' human rights obligations when dealing with the alleged expropriatory measures<sup>1</sup>. Therefore, few answers are provided to governments relating what is permissible in terms of interference with the foreign investor's activity. For instance, apart from the difficulties in understanding the exact scope of police powers due to the different and often opposing arbitral rulings, it is also not clear to what extent human rights, and the human right to water, can form part of the police power doctrine. More in general, without the express discussion of human rights within arbitral tribunals, several doubts remain on which regulatory activities required by states to fulfill the right to water may be considered expropriatory and on whether or not, once expropriation has been determined, the public policy purposes will be taken into account in assessing the level of compensation.

#### *Umbrella clauses*

The effect of this clause in relation to the promotion of human rights consists in an international extension of states' potential liability in adopting new regulatory measures, not just under the expropriation, FET, FPS and other clauses, but also under their contractual obligations. Despite the considerable grey area left by jurisprudence in the interpretation of this provision, its potentially broad scope could certainly discourage state action<sup>2</sup>.

The fact that umbrella clauses allow for arbitration under the BIT means that they may be used by foreign investors to bring claims for any violation of the contract. If a concession contract for the provision of water and sanitation services is concerned, an umbrella clause may significantly deter states from altering the terms of such contract, even though it is done in furtherance of the

<sup>1</sup> For instance, in *Azurix*, the tribunal stated that "The matter [the issue of the compatibility of the BIT with human rights treaties] has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case".

<sup>2</sup> See Schreiber, W., 2008. Realizing the Right to Water in International Investment Law. An Interdisciplinary Approach to BIT Obligations. *Natural Resources Journal*, 48(2), 431-478, pp. 459-463.

realization of the human right to water. For instance, states that entered concession contracts with foreign investors in which tariff rate or monitoring standards have been specified in advance, may continue to comply with contracts that are not necessarily appropriate for the fulfillment of the right to water because of the potential risk of breach of their BIT under the umbrella clause.

#### *Other provisions*

Progressive realization of human rights objectives could be restrained by the prohibition on performance requirements, preventing states from implementing local development policies such as the obligation for foreign investors to form partnerships with local firms or to employ local managers for the promotion of intellectual capital. However, the BIT clauses listed under this category do not have relevant potential impacts on the realization of the human right to water.

#### *Stabilization clauses in investment contracts*

Breaches of stabilization clauses discussed in arbitral tribunals, although often connected with expropriation claims, have nearly always resulted in requiring the payment of compensation<sup>1</sup>. The amount of such compensation generally depends on the assessment of several factors, such as the costs incurred by the investor following the violation of the clauses, the legitimate expectations following the presence of the clauses and, in the case of an economic equilibrium provision, the financial resources necessary to restore the equilibrium of the investment project.

If compared to the expropriation clauses in BITs, stabilization clauses allow for a lower threshold beyond which states are required to compensate the investor. In fact, while the former generally requires a substantial deprivation of the investment to take place, for the latter to be breached even slightly intrusive forms of government actions, affecting in some way the equilibrium of the investment, are enough. In fact, although the required compensation for the breach of stabilization or economic equilibrium clauses is likely to be lower than that required for an expropriation, a payment may be imposed also for minor interferences.

<sup>1</sup> Cotula, L., 2008. Regulatory Takings, Stabilization Clauses and Sustainable Development. In: OECD, *7th Global Forum on International Investment*. Paris, France, 27-28 March 2008. Paris: OECD, p. 8.

Because of the commitment by states not to alter the regulatory framework governing an investment, public authorities may be discouraged from implementing laws and regulations protecting public interest. The negative impacts may take place both in terms of regulatory chill, with states withholding from regulating because of the potential arbitration proceeding, or as a selective regulation that excludes those measures which may impact foreign investments. Furthermore, stabilization clauses may also offer to investors an argument for the breach of IIAs, especially if they provide for an umbrella clause, but also through a FET clause or an indirect expropriation clause.

Be that as it may, the effects would be harmful for the realization of the right to water, lowering both social and environmental standards. The legal liability of states that seek to implement regulations with the aim of raising social and environmental standards, such as water quality requirements, renegotiation of tariffs in favor of poorer groups, or the improvement of sanitation services, may make the realization of human right to water harder. This is even more true for poorer countries, where a rapid regulatory framework development and implementation is needed, rather than barriers to the application of new laws.

#### *The regulatory chill phenomenon*

A characteristic that all the above-mentioned clauses have in common, which challenges the state's ability to protect and promote human rights, is their potential chilling effect. Even though it is questionable whether or not a regulatory action amounts to expropriation or is in breach of FET, FPS or other BIT clauses, investors may simply use the threat of arbitration as a way to "chill" state regulation from taking place. The effectiveness of such threat is clear in the light of the huge amounts of compensation that a state may be required to pay for the breach of the BIT, especially for developing countries which already face financial difficulties.

All the more so if disputes follow the privatization of water services, because of the large amount of money and stakes involved. For instance, in *Azurix case*, the U.S.-based corporation threatened to resort to arbitration during the discussions for renegotiating its agreement with Argentina, probably in order to gain leverage during the negotiation phase<sup>1</sup>.

<sup>1</sup> Costamagna, F., Sindico, F., 2007. The Linkage Between International Economic Law and Access to Water and Water Scarcity. In: International Environmental Law Resource Centre, *Legal Aspects of Water Sector Reforms Workshop*, Geneva, Switzerland, 20-21 April 2007, p. 9.

#### *Structural issues compounding the realization and enforcement of human rights*

To conclude the overview of this chapter on the ways in which the states' ability to fulfill the right to water may be impaired under IIAs obligations, some remarks have to be done on the structural issues that, coupled with the substantive difficulties highlighted above, may further compound an already problematic situation.

One first structural problem is that of the unilaterality of the foreign investment regime in two different respects. First of all, the already extensively discussed issue of the unbalance between investor and state's obligations. In fact, while BITs provide investors with many different rights enforceable through international arbitration, they do not impose them any obligation toward host states. Secondly, it is not difficult to see that BIT provisions will be of greater use to capital-exporting countries rather than to capital importing ones. In fact, though investment treaties contemplate a two-way flow between state parties, oftentimes it actually is a one-way flow in the context of great disparities of wealth and technology. Developing countries traditionally belong to the capital-importing category and, at the same time, are those facing the greater challenges in realizing the human right to water; nonetheless, they are often confronted with foreign investors from wealthy developed countries claiming breaches of their obligations under BITs.

The inequality and imbalance that often characterizes BITs parties is also related to their political, economic and legal expertise. When lacking, it has repercussions on the ability to foresee the exact significance of specific clauses and, if renegotiations or later corrections are not feasible, such initial misalignment may have unfavorable consequences especially for the weaker contracting party.

Another concern, particularly relevant for the water and sanitation sectors, is that BITs, which provide the basic legal framework for large privatization programmes, are conventionally negotiated and concluded without any public participation. This lack of participation and transparency may reveal itself to be harmful when governments, with the aim of attracting foreign investments, are willing to subordinate the protection and promotion of human rights to economic development. This problem has been expressly acknowledged by the HCHR, underlining how the "the race to attract investment might lead to a *race-to-the-bottom*" by lowering environmental and human rights standards on the one hand, and by strengthening investment protection on the other hand. With this respect, BITs involve a prisoner's dilemma: all states would be better off by collectively keeping as much regulatory capacity as possible, but capital-importing countries are singularly tempted to negotiate

terms of the agreement that attract more foreign investment. During negotiation of BITs, potential host countries have the incentive to bid down the conditions for the treatment of foreign investments, in the attempt of attracting as much capital as possible<sup>1</sup>. Brought to an extreme this phenomenon may have really detrimental effects for the realization of the right to water.

Finally, many structural deficiencies characterize also the dispute settlement procedures. As already stated on several occasions, foreign investment disputes are normally settled before international arbitral tribunals, and the deficiencies characterizing this dispute settlement regime have both direct and indirect relevance in the progressive realization of human rights. The next chapter, entirely devoted to the international investment arbitration and the human right to water, will deal extensively with these concerns.

### 3. The impact of ICSID Arbitration on the Right to Water

During the 1990s a trend towards privatization of infrastructures emerged mostly in developing countries, some of these privatizations entailed services such as water and sewage, electricity supply or public transportation<sup>2</sup>. Thus, foreign private investors found themselves involved in activities with a clear impact on human rights obligations incumbent upon States. Conversely, States overlooked the fact that by privatizing certain essential services there would have been no transfer of international responsibility in terms of human rights obligations.

Here, basically, some States have faced a dilemma: in order to attract more foreign private investment, they have allowed companies to charge higher bills to citizens for water with the result of breaching human rights obligations. As soon as it was not tenable anymore, Governments have issued administrative measures (such as price-freezing) against foreign private parties with the result of breaching international investment obligations and therefore lead to ICSID arbitration.

<sup>1</sup> See Gutzman, A., 1998. Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law*, 38(1998), 639-688.

<sup>2</sup> U. KRIEBAUM, "Privatizing Human Rights", in *Transnational Dispute Management*, 2007, 3-5, 2006. See also S. Pannatier, O. Ducrey, *Water Concessions and Protection of Foreign Investments under International Law*, in E. Brown Weiss, L. Boisson de Chazournes, N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law*, OUP, 2005 as well as P. Thielborger, *The Human Right to Water versus Investors rights: Double Dilemma or Pseudo-conflict?*, in P.M. Dupuy, F. Francioni, E. Petersmann, *Human Rights in International Investment Law and Arbitration*, OUP, 2009, p. 487 ff.

It is not excessive to say that International Investment Law has encountered International Human Rights Law in such a context with trial and error policies from Governments and from water companies.

Investment arbitrators have so far<sup>1</sup> either escaped from developing a comprehensive balanced approach to such issues or, simply, as it has been observed, they have addressed such questions in a "sporadic manner"<sup>2</sup>.

Yet, investment arbitrations may raise, much more than international commercial arbitrations, fundamental issues of public interest. Despite what normally happens in international commercial arbitration, the resolution of large investment disputes cannot escape from deciding issues of public interest given the wider political and economic impact of the decision.

The right to water has come into discussion in a number of ICSID arbitrations and gives a good picture about the different interests at stake as well as the technical solutions which are progressively being developed by experts.

### Conclusion

In developing countries where structural adjustment loans have been contracted in the past and where global financial pressure has pushed the governments to deregulate water and privatise the sector, foreign private investments have flowered.

A greater role and a greater responsibility should be placed on international financial institutions including human rights clauses in their financing instruments.

<sup>1</sup> See: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case no. ARB/97/13); *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* (Case no. ARB/03/17); *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic* (Case no. ARB/03/18); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (Case no. ARB/03/19); *Azurix Corp. v. Argentine Republic* (ICSID Case no. ARB/01/12); *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case no. ARB/02/3); *Azurix Corp. v. Argentine Republic* (ICSID Case no. ARB/03/30); *SAUR International v. Argentine Republic* (ICSID Case no. ARB/04/4); *Anglian Water Group v. Argentine Republic*, UNCITRAL arbitration filed in 2003; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case no. ARB/05/22); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case no. ARB/07/17); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case no. ARB/07/26).

<sup>2</sup> M. Hirsch, "Investment and non investment obligations", in Muchlinskiy, Ortino and Schreuer, *Oxford Handbook of International Investment Law*, OUP, 2008, at 163.

Economic globalisation has shifted some of the regulation powers of Governments – with their complicity - to private economic actors. However, it should not amount to substituting the public interest of the citizens with the private interest of a few individuals, including some corrupted governmental officers.

The test of this decade for International Investment Law is when a decision needs to be made between ensuring increased profits of a private investor and protecting human or environmental rights. The answer is certainly difficult, since a balance has to be made by arbitrators outside the specific context of human rights courts or international bodies. The unity of International Law and not its fragmentation can provide the basis to reconcile conflicting rules.

Transparency and good governance are other two key values of our times. While confidential business information must be protected (and this is the case in International Commercial Arbitration), when vital goods are at stake, like water, there should be information to the public about the terms of the privatization and its impact on the society. This would lead to more responsible contracting by companies and Governments, and contribute to more consistent rulings by arbitrators, thereby reinforcing predictability and legitimacy of International Law.

Last but not least, each Government should consider the human rights impacts in a range of broader policy areas, including when they sign trade agreements and investment treaties.

What is needed, therefore, are government policies that induce greater corporate responsibility and corporate strategies that reflect the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of the society in which they operate.

## **ВЛИЯНИЕ МЕЖДУНАРОДНОГО ВАЛЮТНОГО ПРАВА НА ВНУТРИГОСУДАРСТВЕННОЕ ВАЛЮТНОЕ ПРАВО**

**Л.И. Волова**

доктор юридических наук, профессор,  
заведующая кафедрой международного права  
Южного федерального университета

В условиях мирового финансового кризиса возрастает значение международного валютного права, регулирующего международное сотрудничество государств в валютной сфере, содержащего международно-правовые принципы и нормы, регламентирующие деятельность государств по координации их действий в области валютных отношений.

Имевшие место в прошлом кризисы и ныне существующий мировой финансовый кризис обострили потребность в более эффективном правовом регулировании мировой экономики и обслуживающих ее международных валютно-финансовых отношений, как на государственном, так и на международном уровнях и доказали потребность в усилении многосторонних механизмов такого регулирования. В первую очередь требуется четкое правовое регулирование тех валютных отношений и операций, которые затрагивают интересы всех или большинства стран.

Международное финансовое (валютное) право должно сыграть положительную роль в своевременном выявлении надвигающихся кризисов, их предупреждении и преодолении возможных отрицательных последствий.

В условиях интеграции государств в мировую валютную систему усиливается роль международного валютного права, поэтому оно будет все больше утверждаться на региональном и универсальном уровнях, что связано, в том числе, со стремлением многих развивающихся стран и государств с переходной экономикой устранить трудности, связанные со своими платежными балансами и решить проблемы возврата по иностранным кредитам.

Для достижения этой цели необходимо эффективно использовать все международно-правовые средства, методы и механизмы междуна-