A/HRC/EMRTD/7/CRP.2

9 March 2023

English only

Human Rights Council
Expert Mechanism on the Right to Development
Seventh session
3–5 April 2023
Item 4 of the provisional agenda
Implementation of the mandate and programme of work

Right to development in international investment law

Study by the Expert Mechanism on the Right to Development

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I. Objectives of this Study

1. This study, "The Right to Development in International Investment Law" ("the Study"), aims to explore the current and future role of the right to development ("the RtD") in international investment law.

2. Specifically, the Study will:

(a) analyse ingredients of the RtD as they currently feature in existing international investment law, both in the new generation of international investment agreements and also in arbitral awards, and make recommendations and proposals for improvement (as it will be demonstrated, the absence of express inclusion of the RtD in IIAs is no bar to the analysis);

(b) examine and consider obligations of States to protect the human rights of their populations, including primarily the RtD, together with their right to regulate in international investment law;

(c) explore the evolving role of investors as duty holders in complying with human rights obligations as well as States' obligations of international cooperation and the advancement of sustainable development and the sustainable development goals ("SDGs") arising from international investment agreements, whether bilateral or multilateral ("IIAs");

(d) examine the impact of two important recent legal developments will also be taken into account: first, the express inclusion of the RtD in the preamble of the Paris Agreement 2016; and, secondly, the continuous tension between states' obligations on climate goals and their obligations towards foreign investors;

(e) consider the role of *amicus curiae* (i.e. arguments presented by interested persons who are not parties to the particular case) in investor-state dispute settlement ("ISDS") cases, both as a source of human rights expertise as well as a means of participation for groups of individuals or peoples whose human rights are affected by the events underlying the dispute, having regard to the fact that the resolution of disputes is an integral part of international investment law, which directly impacts on individuals' and peoples' RtD;

(f) address the related question of whether arbitrators should have a proven record of human rights expertise (including in sustainable development and SDGs) as a pre-requisite of their appointment to adjudicate investment disputes which raise issues of human rights or the SDGs or whether alternative means of achieving a suitably qualified tribunal may be more effective; and

(g) in line with the mandate of our Mechanism, highlight good State-practice and make recommendations.

II. Mandate and methodology

3. The Study is based on a review of the relevant literature. Furthermore, it draws on input received from various stakeholders, including member states, civil society, intergovernmental organisations and UN agencies, in response to an open call for submissions.

4. Helpful insights were gained from attending COP27, particularly on the issue of the climate goals and current IIA regime. Further useful inputs were also gained through interactions with academics and academic visits. Last, but not least, the report also builds on the work done in this area by the United Nations Conference on Trade and Development ("UNCTAD"), the United Nations Commission on International Trade Law ("UNCITRAL"), the Organisation for Economic Co-operation and Development ("OECD"), the South Centre and other research centres and civil society organizations.

5. The recommendations made in the report are also informed by examination of model bilateral investment treaties, selected progressive international investment agreements that incorporate human rights provisions in some form as well as arbitration awards and other court judgments, with the caveat that this is an ever-changing landscape.

III. The Right to Development in International Investment Law

6. The fundamental premise on which the RtD is examined, in the context of international investment law, is the symbiotic relationship between the RtD and sustainable development, considered together with the SDGs.[1]

7. For the purposes of the Study, it is important to emphasise the three aspects of sustainable development, namely: social development; economic development; and environmental protection.[2] The concept of "social development" necessarily includes the longer-established concept (which has been more extensively examined in the literature) of human rights, since it is impossible to have social development and, in turn, sustainable development, if human rights are undermined. The 17 SDGs and the 169 targets incorporated in the 2030 Agenda represent the current global consensus on the scope and content of sustainable development.[3]

8. In light of the above, the Study will examine the interaction, tensions and the potential co-existence between human rights and international investment law. Alongside the right of States to regulate, attention will be paid to the duty of international cooperation between States and individuals' and peoples' right of participation, which are both important ingredients of the RtD.

9. These issues will be explored through *inter alia* examination of the topics raised in our questionnaire and the answers received. We are grateful to the States, intergovernmental organisations, UN agencies, civil society members and academics who have contributed to the Study.

IV. Sustainable Development in International Investment Agreements: Overview

10. Many IIAs, especially more recent ones, include various refinements and clarifications aimed at protecting a State's right to regulate in the public interest. Importantly, some IIAs and model bilateral investment treaties (model "BITs") have expressly incorporated sustainable development, SDGs and human rights, both in their preambles and in their operative provisions.[4]

11. Since the adoption of the Sustainable Development Goals Agenda by the UN General Assembly in 2015, 224 IIAs have been concluded. 31% of those contain provisions directly addressing the SDGs.

12. IIAs address sustainable development and SDGs in different ways, whether by highlighting the right of States to regulate or by imposing duties on foreign investors. Duties imposed on foreign investors include duties to contribute to sustainable development, to observe specific standards, to comply with human rights generally and to comply with principles of corporate social responsibility.

13. Examples of the ways in which IIAs have addressed sustainable development and the SDGs include:

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1 This relationship has already been explored in our Mechanism's first thematic study of 6 July 2021: 'Operationalizing the right to development in achieving the Sustainable Development Goals', Thematic Study by the Expert Mechanism on the Right to Development, A/HRC/48/63.

2 See for example, 'Report of the World Commission on Environment and Development', A/42/427, pp.1-82.

3 *Op. cit.* n.2 *supra*., paras.19-23.

4 Of the IIAs collected by UNCTAD (and available on its website at https://investmentpolicy.unctad.org), some of which have been terminated and others of which have been signed but are not yet in force, over 200 contain the term "sustainable development". The oldest to contain the term appears to be the Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil (1992).

(a) references to sustainable development in their preambles (e.g. the Brazil-India BIT (2020) and the Islamic Republic of Iran-Slovakia BIT (2016));

(b) using a definition of "investment" that requires a contribution to the sustainable development of the host country in order to qualify (e.g. the Morocco-Nigeria BIT (2016));

(c) providing for public policy exceptions which allow the host State to take measures to protect public policy objectives such as protecting public health and the environment (e.g. the Canada-Mongolia BIT (2016) and the Georgia-Japan BIT (2021));

(d) imposing an obligation on States not to relax labour or environmental standards in order to attract foreign investment (e.g. the Colombia-United Arab Emirates BIT (2017) and the Japan-Morocco BIT (2020));

(e) obligations on investors relating to responsible business conduct (e.g the Brazil-Ethiopia BIT (2018));

(f) provisions precluding corrupt practices (e.g. the Georgia-Japan BIT (2021)); and/or

(g) provisions promoting compliance with sustainable development in foreign direct investment (e.g. the European Union-Singapore Free Trade Agreement (2019)).

14. Similarly, principles of cooperation and capacity building are sometimes expressly referred to in BITs e.g. in the Brazil-Malawi BIT (2015)[5] , which highlights the strengthening of local capacity building through close cooperation with the local community in order to contribute to the sustainable development of the host country.

15. Examples of progressive model BITs include the Dutch Model Treaty (2019)[6] and the Belgium-Luxembourg Economic Union Model BIT (2019)[7] (the "BLEU Model BIT").

16. The BLEU Model BIT expressly includes manifold aspects of the RtD. It does so through the lens of sustainable development, by emphasizing the importance of international cooperation on achieving sustainable development and by recognising its economic, social and environmental aspects as "interdependent" and "mutually re-enforcing".[8] Significantly, as well as encouraging dialogue between the Contracting Parties, it also encourages them to conduct a dialogue with the civil society organisations in their territories.

17. The Dutch Model BIT (2019) contains numerous references to sustainable development and human rights, including an express reference to the Universal Declaration of Human Rights.[9] The Dutch Model BIT may already have been used in negotiations, as the Netherlands has reportedly obtained permission from the European Commission to renegotiate its existing BITs with several countries including Argentina, Burkina Faso, Ecuador, Nigeria, Tanzania, Turkey, the United Arab Emirates, and Uganda, and to start negotiations for new BITs with Qatar and Iraq.[10]

V. The Importance of Recent Developments

18. Progress has been made in incorporating sustainable development, SDGs and human rights in IIAs since the adoption of the 2030 Agenda. There are, however, two important caveats.

19. First, looking at the universe of IIAs which are in force or have been signed but are not yet in force (c. 3,300 IIAs[11]), all but 245 were signed before the SDGs were agreed (on

[5] The importance of cooperation is also reflected in FTAs, see for example, art 22.20 of Australia-UK FTA (2021)

[6] Articles 2, 3, 6 and 7.

[7] Articles 14-18.

[8] Article 14(3).

[9] See in particular Article 6 (6) and the Preamble and Articles 2, 3, 5, 6. However, to this date, there no express reference in IIAs to the Universal Declaration on the Right to Development 1986.

[10] https://www.jonesday.com/en/insights/2019/07/renegotiation-of-existing-bits

[11] https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf

25 September 2015). It is therefore not surprising that the vast majority of IIAs do not contain provisions directly addressing sustainable development objectives, whether per se or in substance. Of the c. 70 IIAs which do contain such provisions, virtually all were signed after the SDGs were agreed. Those still, however, constitute only a minority of IIAs signed after the SDGs were agreed (c. 30%). That shows that incorporation of sustainable development and the SDGs in IIAs has yet to become the prevailing orthodoxy in treaty drafting and national investment policy. To change that would appear to require greater international consensus and greater leadership by major economies which tend to set the agenda for treaty negotiations.

20. Secondly, most new IIAs that do incorporate sustainable development in their substantive provisions appear to limit its role mainly to exceptions, recommendations and political commitments rather than in imposing binding obligations on States or investors to contribute to sustainable development.[12] Such practice is currently neither consistent nor widespread. For example, the Morocco-Nigeria BIT 2016 is signed by both countries but only ratified by Morocco. Whilst the inclusion of "sustainable development" has been retained in the subsequent Morocco Model BIT 2019 and Morocco has used it in other BITs, it has omitted it from its investment agreements with Brazil and Japan.[13] Other countries have taken an even more conservative view and, in drafting their model BITs have decided to avoid altogether the question of whether a foreign investment contributes to the development of the host state.[14]

21. Thirdly, the incorporation of "sustainable development" in the definition of "investment" in the IIAs is in some cases supported by provisions on how sustainable development could be achieved in the context of international investment law, namely by international cooperation, recognition of its economic, social and environmental aspects as interdependent and mutually re-enforcing as well as expressly encouraging dialogue between states and between states and civil society.[15]

22. In this context, the implementation of sustainable development in international investment law will depend on how its incorporation in the new generation of BITs is interpreted by international arbitral tribunals seized of investment disputes.

23. It will be largely for arbitral tribunals to test the practical and legal significance of "sustainable development" and to decide whether it is intended merely as an aspiration or as enforceable hard law[16]. This is likely to be particularly relevant where the concept of "sustainable development" is incorporated in the substantive sections of IIAs, such as in the description of "investment" (e.g. in the Morocco-Nigeria BIT (2016)[17], the Morocco Model BIT (2019)[18] and the Mauritius-Egypt BIT (2014)).[19] As these are new instruments, it remains to be seen whether, in the event of a dispute, host States will even choose to rely on "sustainable development" as part of their defence to a potential claim by an investor and, whether in that process, arbitral tribunals will interpret those references to "sustainable

[12] Ole Kristian Fauchald, "International Investment law in support of the right to development"? Leiden Journal of International Law (2021), 32, pp. 181-201, at p.189

[13] Arpan Banerjee and Simon Webber: "The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles? ICSID Review, Bol. 36, No.3(2021), pp. 536-362, at p.539, accessed online on 26 September 2022.

[14] See for example Colombian Model BIT where the drafters avoided the discussions on this issue. Arpan Banerjee and Simon Webber: "The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles? ICSID Review, Bol. 36, No.3(2021), pp. 536-362, at p.539, accessed online on 26 September 2022

[15] See BLEU Model BIT 2019

[16] Klentiana Mahmutaj: "Will the Morocco-Nigeria BIT transform sustainable development into hard law?" EJIL Talk! 27 January 2022 https://www.ejiltalk.org/will-the-morocco-nigeria-bilateral-investment-treaty-transform-sustainable-development-into-hard-law/

[17] Art. 1.3

[18] Art. 3.3.3

[19] Art. 1.1

development" as constituting an essential requirement of the protected investment or merely as being recommendatory in nature.[20]

24. Furthermore, the legal meaning of sustainable development in international investment law and how it can be achieved in practice are likely to be influenced by relevant parallel developments in the municipal laws of States, particularly where their impact extends beyond their own territories.

25. Current relevant domestic examples include a recent case of the German Federal Constitutional Court (*Bundesverfassungsgericht*) considered the justiciability of "sustainable development" in the context of environmental and climate law in Germany.[21] The Court, without referring to "sustainable development" by name, considered the concept of "intragenerational equity" (i.e. equity and fairness between current generations), not only within one State but also across borders, and "intergenerational equity" (i.e the commitment and responsibility towards future generations)[22] when exploring Germany's duties under the Paris Agreement (2015).[23] Whilst not directly concerning international investment law, this is a relevant parallel development which shines a useful sidelight on the growing role of sustainable development in international law[24] and its legal interpretation in future investment disputes. This is so especially because the environmental element of sustainable development, seen through the lens of climate change, in IIAs is essential to the fulfilment of RtD.

26. Overall, the current landscape indicates significant potential for further incorporation of sustainable development in IIAs. Whilst questions of its legal status and interpretation are for future arbitral tribunals, the inclusion of sustainable development in the definition of "investment" is a step in the right direction because, at the very least, it provides an RtD basis on which foreign investment should be made and on what host states and investors should expect of each other.

27. In the meantime, a coherent legal framework including consistency in the interpretation of "sustainable development" will be necessary to implement the RtD in international investment law.

VI. Human Rights, Corporate Social Responsibility and the Right to Development

28. Human rights are an integral part of sustainable development and the SDGs. They have also been a feature of ISDS for some time, even before the new generation of IIAs.

A. Historical development

29. Arbitral awards in ISDS have so far provided only a fragmented and incoherent analysis of the role of human rights in international investment law. Frequently, defences

[20] This question was raised in our questionnaire. One State has commented that the concept of sustainable development should be clearly defined in IIAs and that the exclusion of the SDGs from the provisions on investment may have the unwanted effect of investors engaging in activities which are not sustainable and yet claim protection rights under the IIA. Other states remained silent on this issue and one even took the view that the inclusion of such concept may make it more onerous and therefore less attractive for investors to invest.

[21] Jelena Baumler: "Sustainable Development made justiciable: the German Constitutional Court's climate ruling on intra- and inter-generation equity" https://www.ejiltalk.org/sustainable-development-made-justiciable-the-german-constitutional-courts-climate-ruling-on-intra-and-inter-generational-equity/

[22] Ibid.

[23] 'Sustainable development' features on several of the substantive provisions of the Paris Agreement 2015

[24] A recent example of how State's failing climate obligations adversely affect, amongst others, the survival and continued development of cultural identity see UN Human Rights Committee decision in *Daniel Billy et al v Australia* CCPR/C/135/D/3624/2019

advanced by States based on their right to regulate to protect the human rights of their citizens have failed, raising serious concerns about whether States have sufficient scope to protect the rights of their populations and the risks of a "regulatory chill". Even more frequently, tribunals have held that they lack jurisdiction even to consider human rights issues,[25] Such as in cases where States have mounted counterclaims based on alleged breaches of human rights by investors.[26]

30. There are, however, exceptions, e.g.:

(a) In *Urbaser v Argentina*,[27] Argentina's was permitted in principle to counterclaim that the concessionaire had failed to make a particular level of investment and thereby violated the Argentinian people's human right to water.

(b) In *Ecuador v Burlington*,[28] Ecuador was permitted to counterclaim for breaches of Ecuadorian environmental law and contractual obligations, ordering the investor to pay USD 41.7 million.[29]

(c) In *Copper Mesa v Ecuador*,[30] although Ecuador had violated several provisions of the Canada-Ecuador BIT, the Tribunal reduced the quantum of the award by 30% to reflect that the investor had, through its unlawful actions against anti-mining protestors,[31] contributed to its own losses.[32]

B. The new generation of IIAs

31. The new generation of IIAs may mark a watershed in the protection of human rights in ISDS. In a number of respects, they create greater scope for States to invoke their populations' human rights in such disputes, as described below.

1. Express references to the right to regulate

32. Some new IIAs expressly articulate, in preambles or substantive provisions, of the right of States to self-regulate. Those references are, however, merely declaratory, do not create new enforceable rights or obligations and are therefore, on their own, unlikely adequately to counterbalance the investment protection provisions in the IIAs.[33] A legally binding instrument on the RtD which makes specific provision for the right to regulate would arguably strengthen the position of those States that are parties to that instrument. However, that analysis is currently premature.[34] Nevertheless, it significantly furthers the RtD that some of the newer IIAs – albeit relatively few – expressly refer to the right to regulate, human

[25] Fabio G.Santacroce: 'The Applicability of Human Rights Law in International Investment Disputes" in Meg Jinnear and Campbell McLachlan (eds) ICSID Review- Foreign Investment Law Journal, OUP 2019, Vol 34 Issue 1) pp.136-155

[26] Some examples include, *Rusoro Mining ltd v Venezuela ICSID Case No. ARB(AF)/12/5, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Anglo American plc v Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1)

[27] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016. See also Edward Guntrip: "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?" EJIL Talk! 10 February 2017.

[28] The consent for counterclaim was provided under the contract and it did not have to be deduced from an IIA.

[29] https://www.iisd.org/itn/en/2018/10/18/burlington-v-ecuador/

[30] *Copper Mesa Mining Corporation v Ecuador* (PCA Case No. 2012-2).

[31] More than 50 heavily armed paramilitary security guards were hired by the Claimant to protect the investment. Peter Muchlinski "Can International Investment Law Punish Investor's Human Rights Violations? Copper Mesa, Contributory Fault and its Alternatives", ICSID Review (2022), pp.1-19. Unlawful conduct of the parties as a relevant factor in determining admissibility and merits of the claim is a well-established principle in international arbitration

[32] See Muchlinski, P., *op. cit.* n.34.

[33] Barnali Choudhury, International Investment Law and Non-economic Issues, 53 Vanderbilt Law Review 1 (2021)

[34] See Art 3 (h) and Art 11 (c) of the Revised Draft Convention on the Right to Development A/HRC/WG.2/23/2

rights obligations and human rights instruments[35] and also impose obligations on investors to observe corporate social responsibility standards.[36]

2. Investors' conduct may affect the quantum of compensation

33. Some new IIAs adopt the *Copper Mesa* approach to quantum.[37] For example, in the determination of quantum of compensation, the Moroccan Model BIT (2019) requires the tribunal to take into account investors' breaches of international human rights and environmental law in determining quantum[38] and the Dutch Model BIT (2019) requires the tribunal to take into account an investor's non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.[39]

3. Imposing duties on investors to comply with human rights under host state law

34. Some new IIAs[40] expressly place a duty on investors to comply with human rights obligations under the domestic law of the host State. This approach is of practical importance[41] for two main reasons. First, it is a reminder that human rights violations have real consequences[42] and, secondly, such express inclusion may minimise or eliminate jurisdictional objection to human rights counterclaims by States.

35. However, this change should not be overstated. States cannot initiate ISDS against investors, so this remains only the possibility of a counterclaim. Further, arguably a more robust approach is necessary, so that this category of breaches is a basis to deny investors treaty protection altogether.[43] Alternatively, arbitral tribunals could apply it as an admissibility criterion based on compliance with international public policy, including observance of fundamental human rights.[44]

4. Imposing duties on investors to comply with human rights under home state law

36. Some new IIAs specifically refer to investors' potential liability for breaches of human rights under the laws of the home State. These add little or nothing to investors' obligations, merely highlighting but not extending investors' existing obligations.[45] Further, the provision do not appear to add any obligations on home States.[46]

5. Corporate Social Responsibility

37. Some new IIAs refer to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, which are the principal sources for international consideration of corporate social responsibility ("CSR") and which are not legally binding. They therefore feature in IIAs in only a recommendatory vein. For example,

[35] See for example, Article 6 (6) the Dutch Model BIT (2019)

[36] See e.g. ECOWAS Article 14 (3), Draft Pan African Investment Code (2016), Article 24(a) and (b)

[37] For a critical analysis of whether human right-based claims should be treated as issues of contributory fault concerning the level of damages, see See Muchlinski, P., *op. cit.* n.34.

[38] Moroccan Model BIT (2019) Art 20.5 and India Model BIT 2016 Art 26.3

[39] Dutch Model BIT (2019) Art. 23

[40] Article 15.1 of 2012 Model BIT of the Southern African Development Community, Article 5.3 of the Netherlands Model BIT (March 2019 version), Article 13 of India Model BIT (2016) Article 14 of the Morocco- Nigeria BIT (2016), Draft Pan-African Investment Code, Article 13 of India Model BIT (2016)

[41] Eric De Brabandere, "Investment Claims: Human Rights Counterclaims in Investment Treaty Arbitration", 25 October 2018, https://oxia.oulaw.com/723.

[42] For an interesting take on investors' breaches and compensation see Article 2 of the Bangladesh-Denmark BIT (2009), which refers to state's damage to public health, life or environment which would make the investor liable to pay compensation to the state, either under domestic or international law.

[43] This seems to be expressly the case only with the Colombian Model BIT (2017) under the chapter of "Denial of Benefits"

[44] For problems related this approach, see See Muchlinski, P., *op. cit.* n.34, at p.15.

[45] See e.g. Article 7(4) of the Dutch Model Treaty (2019), Article 20 Morocco-Nigeria BIT (2016)

[46] Eric De Brabandere "The 2019 Dutch Model Bilateral Investment Treaty: Navigating Turbulent Ocean of Investment Treaty Reform", ICSID Review, Vol.36, No. 2(2021), pp. 319-338 at p. 328.

the Canada-Burkina Faso BIT (2015)[47] encourages investors to incorporate internationally recognised standards both in their policy and practice and the India-Belarus BIT (2018) recommends that investors do the same voluntarily.[48] Nevertheless, at least one IIA - the Switzerland-China FTA (2013) – expressly recognises, in its preamble, the importance of CSR for sustainable development. Although really ‘soft law’, these provisions nevertheless demonstrate an increased awareness of the importance of human rights in international investment law.

6. Conclusion

38. It is too early to determine whether recent developments in the laws of historically capital-exporting States collectively represent an important cultural shift which may bear on the proper role of IIAs in the protection of human rights in host States. Notably, the lack of similar developments in the domestic legislation of major economies from the Global South indicates a meaningful asymmetry. All that can be said at present is that the endorsement of human rights in IIAs is still in its infancy and wider incorporation of them would be necessary before a consistent and coherent approach can be achieved.

VII. The impact of climate change on the Right to Development through international investment law

39. The relationship between climate change and the right to development is well-established.[49] Climate change poses an existential threat to people’s enjoyment of their right to development[50] and its importance was highlighted by being expressly included in the Preamble to the Paris Agreement.

40. A degree of progress has recently been made at COP27 in relation to climate change and the right to development,[51] where agreement was reached on a loss and damage fund for vulnerable countries.[52] However, further multi-disciplinary action is required to achieve the climate goals[53] and to address the all-encompassing nature of the climate change threat. One of those actions is to reduce carbon emissions and increase the use of renewable energy,[54] which is closely intertwined with the global investment system. It is therefore self-evident that continuous transformation and flexibility in many interconnected fields is essential to this process and necessarily includes changes within the universe of international investment law. This is one of the areas the areas that is capable of both stifling or advancing progress.

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[47] Article 16.

[48] Article 12. See Also Argentina-Japan BIT (2018) article 17; Australia-Hong Kong FTA (2019), Article 16.

[49] See also Report of the Special Rapporteur on the right to development, Saad Alfarargi (A/76/154).

[50] See e.g. OHCHR, ‘Understanding Human Rights and Climate Change’ (2015) and Alfarargi, S., *op. cit.* n.65. “Heatwaves in India could soon break human survivability limit, says World Bank analysis”: https://www.downtoearth.org.in/news/climate-change/heatwaves-in-india-could-soon-break-human-survivability-limit-says-world-bank-analysis-86431

[51] The Special Rapporteur on RtD commented on 15 July 2021 that (*op. cit.* n. 65): “However, little progress has been achieved at the international level to meet the actual need of the most impacted countries. The inadequacy of international cooperation aimed at addressing loss and damage pose a systemic threat to the realization of a broad range of human rights for those communities and indigenous peoples most exposed to adverse climate impacts – in particular to their right to development”.

[52] https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries

[53] https://www.bbc.co.uk/news/science-environment-63677466

[54] The Special Rapporteur on the promotion and protection of human rights in the context of climate change recommends ‘to hold accountable Governments, business and financial institutions for their ongoing investments in fossil fuels and carbon intensive industries and the related human rights effects that such investments invoke’. United Nations General Assembly, ‘Promotion and Protection of Human Rights in the context of Climate Change’ (26 July 2022) A/77/226, para 90 (d). See also: Renewable Energy and the Right to Development: Realising human rights for sustainable development https://www.ohchr.org/sites/default/files/2022-05/KMEnergy-EN.pdf

41. Presently, there are few specific "climate change" provisions in existing or new generation IIAs. Such provisions are mainly incorporated in recently signed IIAs (or model BITs)[55] and more often in free trade agreements ("FTAs") including sections dealing with climate change. [56] As things stand, those provisions do not distinguish between high- and low-emission investments or refine protection standards,[57] but understandably emphasise the importance of international cooperation amongst States in achieving the climate goals.[58] Accordingly, amendments to both old and new generation IIAs are necessary. Amongst other things, those amendments should include provisions that promote climate-protecting foreign direct investments,[59] a trend that should be followed by new IIAs. In order to be supportive of climate change goals, foreign direct investment should facilitate the transition from high-emission investment to low-emission investment, as stipulated under Article 2(1)(c) of the Paris Agreement.

42. But reforming IIAs is, by itself, insufficient,[60] predominantly because investors' rights are already extensively protected under existing IIAs, which give rise to a tension between the States' regulatory space to pursue climate goals, through introducing domestic legislation, regulations or policies, on the one hand and those States' obligations to foreign investors, on the other.[61] Currently, fossil fuel investors enjoy many of the protections that IIAs afford them vis-à-vis host States and the abovementioned tension is likely to continue to develop.[62]

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[55] See e.g. Canada Model BIT (2021), art 3.
'*The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity*.'

[56] See e.g. Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (signed 28 February 2022) (UK-New Zealand FTA) art 14.18 (2); Australia – United Kingdom Free Trade Agreement (signed 17 December 2021) (Australia-UK FTA) art 13.18 and art.22.5.

[57] UNCTAD and IIED, "International Investment Agreements and Climate Action," Policy Brief, March 2022; OECD, "Investment Treaties and Climate Change: OECD Public Consultation (January - March 2022)," Compilation of Submissions, April 7, 2022; some scholars are rather sceptical at the potential of realigning the investment regime with climate objectives, see e.g. Kyla Tienhaara and Lorenzo Cotula, "Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets," *IIED Report*, 2020, 59; Kyla Tienhaara et al., "Investor-State Disputes Threaten the Global Green Energy Transition," *Science*, May 5, 2022; see also (IPCC), "Climate Change 2022," 74.

[58] See for example, Australia – United Kingdom Free Trade Agreement (signed 17 December 2021) (Australia-UK FTA) art 13.18, see also art 22.5 ('1. Each Party affirms its commitment to address climate change (…) 3. The Parties recognise the important role that cooperation can play in addressing climate change. Consistent with Article 22.20 (Cooperation Frameworks)…)

[59] Stephenson, M. and Zhan, J. have commented in 'What is Climate FDI? How can we help grow it?' (accessed on 13 November 2022) that:
'Including climate FDI provisions in international investment agreements (IIAs) can help to protect, promote, facilitate, or otherwise support FDI that helps lower carbon, is carbon- neutral, or is carbon negative. This provides a very clear mechanism to encourage such investment, as it is part of the legal framework, thereby providing both greater clarity and certainty to investors, as well as stipulating consequences and recourse should the provision not be followed.'

[60] During COP27 we noted that some businesses were worried about losing competitiveness if engaged in decarbonisation, although some saw it as starting to create additional economic viability.

[61] Investors in the fossil fuel sector have been frequent ISDS claimants, initiating at least 192 ISDS cases against different types of State conduct. The last decade has also seen the emergence and proliferation of ISDS cases brought by investors in the renewable energy sector, with 80 known cases". UNCTAD, 'Treaty-Based Investor-Dispute Settlement Cases and Climate Action' (September 2022) IIA Issues Note No4. All bar one of this cases is brought under IIAs which predate the 2030 Agenda. https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf accessed on 12 November 2022

[62] Recent illustrations of such tension include investor-state disputes in *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 December 2021) as a "*struggle between competing societal objectives which pull in*

43. In practice, that means that existing IIAs may, at best, be merely neutral on climate-related aspects of the RtD and, at their worst, penalize States for adhering to those climate-related obligations. This is best illustrated by several arbitral awards where the tension was recognized but the arbitral tribunal found in favour of the investor.[63] Such claims can result in large awards of compensation to investors[64] which may discourage States from pursuing climate-friendly policies,[65] or may at least make them more expensive and thereby undermine public trust and confidence in tackling climate change[66] and fulfilling the climate objectives.[67] Furthermore, the risk of high compensation awards for investors and orders for payment of legal costs[68] risks making States' ambitious climate actions rather expensive or could even 'chill' such actions.[69] According to a recent study on the issue, climate adaptation ISDS claims may run as high as USD 340 billion.[70]

44. A recent example concerns a group of investors which brought arbitrations under the Energy Charter Treaty (1994), through which they sought a total of EUR 4 billion in damages over fossil fuel projects from four EU Member States.[71] A wide range of competing factors, including amongst others, the "European Green Deal", some EU Member States relying heavily on fossil fuels and the present lack of reform of the Energy Charter Treaty, highlight

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opposite directions: on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment" (Phillippe Sands, Partial Dissenting Opinion) paras 1, 28-30) and *Westmoreland Mining Holdings LLC v Canada (II)*, ICSID Case No UNCT/20/3, Final Award (31 January 2022)

[63] See n.81 *supra*. For another case see *Rockhopper v Italy* (ICSID Case No. ARB/17/14)

[64] "Investors in the fossil fuel sector have been frequent ISDS claimants, initiating at least 192 ISDS cases against different types of State conduct. The last decade has also seen the emergence and proliferation of ISDS cases brought by investors in the renewable energy sector, with 80 known cases". UNCTAD, 'Treaty-Based Investor-Dispute Settlement Cases and Climate Action' (September 2022) IIA Issues Note No4, https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf, accessed 14 November 2022

[65] "Blocking Climate Change Laws with ISDS Threats, Vermilion v France" https://10isdsstories.org/cases/case5/ accessed on 29 December 2022

[66] Sharma, M., 'Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players', Journal of World Investment & Trade 23 (2002) 746-777, at p. 752.

[67] As noted in the 2022 IPCC report, some claims brought by foreign investors against host States do challenge measures aimed at fulfilling climate and environmental objectives. Intergovernmental Panel on Climate Change (IPCC), 'Working Group III Contribution to the Sixth Assessment Report, Climate Change 2022: Mitigation of Climate Change," April 2022, Chapter 14 "International Cooperation,' p 71–72: '*While international investment agreements hold potential to increase low-carbon investment in host countries, these agreements have tended to protect investor rights, constraining the latitude of host countries in adopting environmental policies*', referring to Miles, Kates, ed., *Research Handbook on Environment and Investment Law* (Edward Elgar, 2019); UNCTAD, "Treaty-Based Investor-State Dispute Settlement Cases and Climate Action," *IIA Issues Note*, no. 4 (September 2022): 22; see also Lea Di Salvatore, "Investor–State Disputes in the Fossil Fuel Industry" (International Institute for Sustainable Development (IISD), December 2021), 41, finding that the fossil fuel industry is the most litigious industry in the ISA system with about 20% of all known cases.

[68] In addition, losing Respondent States ordinarily face costs orders which can run into several millions of dollars and which can be particularly onerous for developing and least developed countries.

[69] See e.g. *Westmoreland Mining Holdings LLC v. Canada (II)*, ICSID Case No. UNCT/20/3 (dispute regarding the phasing out of coal-fired power plants); see also Tarald Laudal Berge and Axel Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity," *Journal of International Dispute Settlement* 12, no. 1 (March 1, 2021): 1–41.

[70] Global Development Policy Centre: "With a Potential $340 Billion Price Tag, Investor-State Disputes Threaten the Global Green Energy Transition" https://www.bu.edu/gdp/2022/05/05/with-a-potential-340-billion-price-tag-investor-state-disputes-threaten-the-global-green-energy-transition/

[71] Financial Times, 21 February 2022 https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab

the interplay and potential tensions between sustainable development, climate change and investors' rights in international investment law.[72]

45. In those circumstances, it is essential that ISDS strikes a fine balance between the necessity for States to change and adapt their legislation as a response to the climate crisis and related ecological transformations and the stability and predictability of the host State's regulatory framework, which is guaranteed to investors under certain IIAs.[73]

46. Flexibility is essential to striking the necessary balance. Environmental law, climate change regulations and policies are all highly dynamic, requiring adaptation in a nonlinear and unpredictable way in order to respond to the current climate risks and the constant emergence of data showing the nature and extent of environmental degradation.[74] States wish both to protect the environment and combat climate change, and to pursue economic development strategies, involving, inter alia, mining activities, as a means to boost economic prosperity[75] and secure economic wellbeing.[76]

47. The need for IIAs reform and international cooperation in this regard[77] and the practical difficulties in doing so, are illustrated by current efforts to modernize the Energy Charter Treaty ("ECT") having regard to the impact of ISDS on climate change through the large number of renewable energy disputes. The possibility of a fossil fuel carve-out is a step in the right direction. However, far from reflecting the climate emergency, the current drafting of the carve-out (to take precedence over existing IIAs), even if the multilateral consensus was achievable, would still offer an additional ten years of protection to fossil fuel investments.

48. Despite those difficulties, reform of the IIAs is essential to mitigate this tension.'[78] A potentially swifter and more effective resolution of this tension may be to persuade arbitrators to recalibrate how they approach the climate-goal/investor-rights tension in ISDS when exercising their interpretative discretion.[79] This, however, can only be achieved within the parameters and the jurisdiction of a given dispute, with the technical and procedural challenges that it entails.[80] Nevertheless, arbitrators should be encouraged to take proper account in their decision-making, of the provisions of the Paris Agreement and the express

[72] In this context, it may be a cause for concern that '*the majority of known fossil fuel* [investor-state dispute] c*ases are decided in favour of investors*', *Ibid.* In the end, these cases settled.

[73] Jack Biggs, 'The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases,' *ICSID Review - Foreign Investment Law Journal* 36, no. 1 (December 1, 2021): 99–128.

[74] Richard J. Lazarus, *The Making of Environmental Law* (Chicago, IL: University of Chicago Press, 2006), 22.

[75] On the importance of investor/investment protection as a relevant factor in attracting foreign investment, see for example 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS, in which respondents said the availability of treaty-based protections for investors, the availability of ISDS and the host state's history of involvement in investor-state disputes all "strongly influence" their investment decisions" (p.8).

[76] See e.g. *Eco Oro v Colombia,* cited at n.81 *supra*.

[77] Whether the duty to cooperate entails a duty to negotiate in good faith, see: "A duty to negotiate in good faith as part of the duty to cooperate to establish "an international legal order in which human rights can be fully realised'- the New Frontier of the Right to Development by Olivier De Schutter, CRIDHO Working Paper 2018/5, November 2018

[78] "*reform of existing IIAs is essential to ensure that IIAs do not hinder States from implementing climate change measures and from achieving a just transition to low-carbon economies. The reform should minimize the States' risk of facing ISDS claims related to climate change policies and those related to high-carbon investments*" UNCTAD, "The International Investment Treaty Regime and Climate Action," *IIA Issues Note*, no. 3 (September 2022): 2.

[79] For detailed proposals on how arbitrators can recast their decision-making roles in reconciling public interest in climate mitigation and investment rights, see Mala Sharma "Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players". Journal of World Investment & Trade 23 (2002) 746-777 and Laura Letourneau Tremblay: "In the Need of a Paradigm Shift: Reimagining *Eco Oro v Colombia* in Light of New Treaty Language", Journal of World Investment & Trade 23 (2022) 915-946. See also suggestions here: https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award.

[80] See para 33 above.

reference in it to the RtD, the recent UN Resolution on the human right to a clean, healthy and sustainable environment[81] and, by taking into account *inter alia* Social Licences to Operate,[82] the value of community participation and consultation.

49. In practice this holistic approach can be achieved through a more inclusive approach to the contributions of *amici curiae*[83] and by requiring arbitrators' professional qualifications to include expertise in human rights[84] and climate law, which would enable them to give the climate-related issue their just place in international investment law.

VIII. The Right of Participation in Development through Consultation with Relevant Stakeholders and Social Licenses to Operate

50. The right of individuals and peoples to actively participate in political, social, cultural and economic development and enjoy the benefits of such participation, in a manner in which their human rights are realised, lies at the heart of the RtD.[85] A significant innovation which can facilitate such participation is the Social Licence to Operate ("SLO"). An SLO is an agreement between the investor and local stakeholders by which the affected local community is directly involved in deciding on the propriety and suitability of the proposed investment. SLOs are granted not, as legal investment licences are, by the host State, but rather by the affected local communities or by civil society at large.[86] The manifestation of a lack of an SLO is, amongst others, the deterioration of the project and social unrest.[87]

51. Many newer IIAs require social and environmental impact statements, which include consultation with local communities. They do not, however, specifically require that foreign investors consult with local communities and obtain an SLO prior to commencing investment, let alone to maintain one throughout the life of the investment.[88] SLOs have, however, already featured in investor-state disputes but with varying degrees of interest and accuracy and with varying interpretations by arbitrators,[89] partly because of their undefined nature in international investment law.

52. The first apparent reference to an SLO in an investor-state dispute is to be found in the Award of the arbitral tribunal in *Bear Creek Mining v Republic of Peru*.[90] The prevailing view was that the investor's duty to take mandatory measures required by the government of the host State discharged their obligation to obtain an SLO from the affected communities, which in that case were indigenous communities. By contrast, one member of the tribunal, in a partial dissenting opinion, decided that the investor had a (broader) legal duty to consult and share the benefits of the project directly from the start, which stemmed from the Convention Concerning Indigenous and tribal Peoples in Independent Countries (ILO

[81] A/76/L.75

[82] See section VIII below

[83] See section IX below

[84] See section X below

[85] Art 1- Universal Declaration on the Right to Development 1986.The right of consultation, particularly of the indigenous communities, is enshrined in the International Labour Organization's (ILO) Indigenous and Tribal People's Convention No169 (1989), the UN Declaration on the Right of Indigenous Peoples 2007, UNGA Res 61/295 (13 September 2007)

[86] Barnes, Mihaela-Maria: "The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals", in Thomas Schultz (ed), Journal of International Dispute Settlement, OUP 2019, Volume 10, Issue 2, pp. 328-360

[87] Ibid.

[88] In our questionnaire, we asked whether IIAs should expressly require States to consult stakeholders in their own civil society prior to permitting a foreign investor to make an investment in their territory and whether this should be limited to particular types of investment and stakeholders. Some States have expressed reservations in this regard, including concerns that the process may discourage foreign investment or that it may adversely affect the State's ability objectively and consistently to assess the merits of investments.

[89] See particularly, Philippe Sands dissenting opinions in *Bear Creek* and *Eco-Oro*.

[90] *Bear Creek Mining Corporation v Republic of Perú* (ICSID Case No. ARB/14/21), Award, 30 November 2017.

Convention No 169).[91] He went on to decide that the damages awarded against Peru should have been halved because of the lack of an SLO and because the investor's obligations were equal to those of the Peruvian government.[92]

53. In *Copper Mesa*, the Ecuadorian government eventually withdrew a concession from a Canadian investor, probably because of social unrest (the investor's senior personnel were found guilty of orchestrating violent acts committed on its behalf, contrary to domestic criminal law) which the investor's presence and subsequent actions had caused in the local Junin community. Nevertheless, this made it impossible for the investor to complete their consultations with the local community. The misbehaviour of the investor in this case was marked by a 30% reduction in the award of their otherwise successful claim.

54. So far, therefore, it appears that investors' failures to obtain an SLO have only reduced the value of the compensation awarded rather than denied the investor or its investment protection (or negated liability on the part of the host State).

55. This may be partly due to SLOs' vague legal status, having been described as a composite concept which features in judicial reasoning with some form of normative status.[93] And yet, despite their current unsettled status in international investment law, their absence has arguably manifested strongly through, amongst others, protests, blockades and an unstable socio-political environment.

56. Their legal status aside, in our consultations foreign investors, especially those in the extraction industry, viewed SLOs as a positive development which they felt would contribute to the success of their investment in the long run by creating greater certainty and reducing reputational and financial risk.

57. The importance to communities of foreign investors consulting them directly[94] to obtain and maintain an SLO speaks for itself: it is an effective way to protect the population's human rights and fulfil their RtD. For host States, they can assist in avoiding social unrest, promoting foreign investment through making investments less risky and by reducing the risk of investor-state disputes in turn reduce the risk of having to pay compensation and legal costs.

58. In those circumstances, arbitrators should consider in each case SLOs as an essential feature of international public policy. Only through that process, the future practice may be reformed so that consent obtained by investors is not simply a box ticking exercise, but that their investment is founded on continuous commitment to community participation and its development.[95]

IX. Third-party participation in ISDS

59. Another means by which civil society and affected communities may participate in shaping international investment law and the outcomes of particular cases is through the use of *amici curiae* (literally, "friends of the court").[96] The involvement of *amici curiae* in any

[91] *Bear Creek Mining Corporation v Republic of Perú* (ICSID Case No. ARB/14/21), Partial dissenting Opinion of Philippe Sands, 30 November 2017, para. 13.

[92] *Ibid.*, para.39.

[93] Barnes, Mihaela-Maria: "The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals", in Thomas Schultz (ed), Journal of International Dispute Settlement, OUP 2019, Volume 10, Issue 2, pp. 328-360 The lack of clarity surrounding such an important tool of participation becomes apparent when even experienced arbitrators in the field of human rights law, have arguably confounded the concept of Free, Prior and Informed Consent and SLOs (supra at 113)

[94] For an illustration of its importance see *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No.ARB/14/2

[95] This is subject to further analysis exploring the basis on which a tribunal would take notice of an SLO, including the minimum threshold of evidence for the existence of an SLO and the metrics that should be used to determine such evidential threshold.

[96] The first recorded ISDS case in which *amicus curiae* briefs were accepted by a tribunal is in *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Order of 15 January 2001.

particular case is at the discretion of the court or arbitral tribunal, permitted to present arguments and evidence relevant to the case which the court or tribunal may then, in its discretion, take into account, even though the *amicus curiae* is not a party to the dispute.[97] In this way, local communities and civil society organisations may present arguments or evidence to the tribunal which the tribunal might not otherwise receive because the investor or the host State might not present them (and in some instances may have a vested interest in not presenting them).

60. *Amicus curiae* have, however, received, and continue to receive, a chequered and inconsistent reception by arbitral tribunals.[98] In December 2021 an ICSID tribunal rejected the admissibility of *amicus curiae* on human rights and particularly the right to live in a healthy environment in the case of *Eco Oro Minerals Corp. v Republic of Colombia*.[99] It noted that the petitioners had not explained the nature of their *'perspective, knowledge and insight'* other than to assert that it would be different to that of the disputing parties.[100] Similarly, another arbitral tribunal recently refused the application for an *amicus curie* submission on human rights and international environmental law in a dispute under the NAFTA Agreement between a US investor and Mexico.[101] Apart from their finding that the parties had sufficient expertise,[102] the majority held that the amicus submissions would not assist the tribunal to resolve the dispute at hand, which did not concern the claimant's activities in the territory where one of the petitioners operated.[103]

61. Even where *amicus curiae* are heard, their involvement has historically been limited to the filing of briefs and their access to much of the evidence and documents filed by the parties to the proceedings is very limited. Some commentators have long suggested that this limits the positive impact they may have on decisions.[104]

62. Subject to a detailed empirical study of the case law, which appears not to have been carried out, it may at least be noted that arbitral tribunals have competing imperatives to balance, including keeping costs within reasonable bounds and receiving relevant evidence and arguments which may assist them in doing justice in a particular case. Tribunals, as a rule, will not wish to permit supposed *amici curiae* to become *inimici curiae* by taking up too much time and forcing the tribunal and parties to incur even greater costs where that is not justified by the contribution which they may make to the particular case.

63. The desirability of *amicus curae* briefs and ways to facilitate them have been considered by UNCITRAL Working Groups. In the 53rd session of the UNCITRAL Working Group II (4-8 October 2010), '[m]*any delegations expressed strong support for allowing submissions by third parties" but felt that "there should be certain restricting criteria in place for such submissions'*.[105] Subsequently, in the 37th session of the UNCITRAL Working Group III (1-5 April 2019), there were discussions as to whether the Mauritius

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97 Usually, there exists no mechanism for local communities or civil society organisations to become parties to investor-state cases because such cases are arbitrations in which the only parties contemplated by the IIA are the foreign investor and the host State, or perhaps such other parties as they together consent to add.

98 Examples of tribunals accepting *amicus* submissions are *Suez and Vivendi v Argentina*, ICSID Case No. ARB/03/19, Order in Response to Amicus Petition and *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 on Amicus Curiae. Examples of tribunals denying *amicus* submissions include *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition and *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (USA) v. Republic of Ecuador* II, PCA Case No. 2009-23, Procedural Order No. 8.

99 *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/1641 Procedural Order No.6 Decision on Non-Disputing Parties' Application.

100 ibid, para. 32.

101 *Odyssey Marine Exploration v Mexico,* ICSID Case No. UNCT/20/01 Procedural Order No.6

102 ibid, para. 23.

103 ibid, para. 22.

104 See e.g. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter, 36 Vanderbilt Transnational Law Review 37 (2003), pp.72-73.

105 UNGA, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)' A/CN.9/712, paras. 46-47.

Convention on Transparency and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were sufficient to ensure that *amicus* submission would be submitted to and duly considered by tribunals.[106]

64. Further, the increasing importance of *amicus curiae* is highlighted by investment treaties and arbitral rules now explicitly allowing for their submission.[107] Most recently, Rule 67 of the new ICSID Arbitration Rules (2022) removes the need for tribunals to consult the disputing parties before considering *amicus* submissions. In light of that development and the increasing need for IIAs to function in a way complementary to the Paris Agreement (see above), it is likely that attempts to present *amicus curae* briefs will continue and even increase.[108] It is difficult to say, however, whether that will lead to a greater positive impact on decision-making by *amicus curiae* and the more effective consultation of stakeholders such as local communities.

65. Some commentators appear to consider that because the *amicus curiae* mechanism is *'not designed to enable grant effective voice or protection for actors whose rights are directly at stake in a dispute'* that it will never practically function well in this regard.[109] Alternative proposals include (perhaps as an adjunct to the creation of a standing multilateral investment court or tribunal), by analogy to various domestic legal systems:[110]

(a) allowing persons who have no direct interest in the proceedings, such as civil society NGOs, to intervene in the proceedings (in some more extensive way than *amicus curiae*);

(b) permitting or requiring interested or affected third parties to be joined as parties to the proceedings in their own right;

(c) permitting or requiring the dismissal of cases where an affected third party cannot be joined and the impact on that third party's rights would be too great to allow the claim in all justice to continue; and/or

(d) permitting or requiring the tribunal to reframe the claim so as to minimse the effects on affected third parties.

66. Further alternatives to *amicus curiae* which some of our contributors have suggested is that there be established a new permanent institution exclusively dedicated to defending the collective interest – perhaps a kind of universal intervener or *amicus curiae* with enhanced rights – or that some such similar function could be served in some way by the creation of a "multilateral advisory centre", which is envisaged by UNCITRAL as a kind of advice bureau for States to assist them in defending claims in ISDS.

67. Nevertheless, the current systemic complexities should not hinder the ability of civil society and affected communities to participate effectively in the ISDS process.

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[106] UNGA, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)' A/CN.9/970, para. 32.

[107] See e.g., EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2017), art. 8.38; SIAC Investment Arbitration Rules (2017), r. 29.2; SCC Arbitration Rules (2017), App III, art. 3.

[108] Gian Maria Farnelli: "Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements", Journal of World Investment & Trade 23 (2022) 887–914

[109] 'Third Party Rights in Investor-State Dispute Settlement: Options for Reform', Submission to UNCITRAL Working Group III on ISDS Reform, contributed by Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED), and International Institute for Sustainable Development (IISD), 15 July 2019.

[110] *Ibid*. See also UNGA, 'Possible reform of investor-State dispute settlement (ISDS) Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters – Note by the Secretariat (8 December 2021)' A/CN.9/WG.III/WP.213.

X. Arbitrators' Qualifications in Human Rights and Sustainable Development

68. Decisions of arbitral tribunals in ISDS arbitrations have the obvious capacity to impact host States' finances through the imposition of massive compensatory awards and legal costs bills. But their prophylactic effects are potentially even more far-reaching, including for non-parties such as local communities. Such decisions can, by providing informal and non-binding precedents, influence how investors treat local communities and the environment through their investments in the first place. That may occur in some cases by actually changing how investors view their own legal or moral obligations or, at the very least, by prompting investors to take steps to reduce the risk of negative outcomes in potential ISDS arbitrations. Further, it is arguably overly narrow, at least on an ethical if not also on a strictly legal level, to treat tribunals as having a duty to do justice only to the parties before them rather than to the identifiable non-parties who stand to be affected by their decisions.

69. It is plainly important to achieving a just outcome in ISDS disputes which may raise human rights and environmental concerns (which is probably the majority of cases) that arbitrators are equipped with sufficient knowledge and expertise to identify and human rights law and environmental law factors and arguments (*a fortiori* given the impact which decisions in ISDS can have on non-parties and, perhaps, their ethical responsibility to non-parties).

70. The lack of familiarity with human rights law of some arbitrators in ISDS has been identified as a concern for States and civil society. In our questionnaire, we asked whether a requirement for formal qualifications may lead to fairer awards which fully take into account human rights concerns raised in particular disputes.

71. Some of our contributors are of the opinion that arbitrators ought to be required to demonstrate expertise in human rights law[111] before they are permitted to adjudicate investor-state disputes, while others take the view that the better approach would be to appoint an independent expert to the arbitral tribunal which would assist them with any human rights and related expertise[112] .

72. While not directly touching on the issue of human rights, delegates at the 35th session of UNCITRAL Working Group III observed that arbitrators sitting in investment cases had not been well positioned to owe a general duty towards an international system of justice.[113] It was suggested that stakeholders should take into account *"the impact of the design and culture of the dispute resolution framework on the manner in which cases would be handled"*.

[111] See also Article 20 (5) of Dutch Model BIT (2019) which states that the appointing authority shall make every effort to ensure that members of the tribunal either individually or together, possess the necessary expertise in public international law and that includes, amongst others, expertise in environmental and human rights law.

[112] That option presents the obvious danger inherent with tribunal-appointed experts in general, namely that they may become a kind of de facto arbitrator, in whose selection the parties may have had no involvement, which causes the tribunal to abdicate their own responsibilities to reach a view. Further, given the room for differences of opinion in these matters, fairness may require that the parties are each given the opportunity to challenge that expert's opinion through cross-examination and/or deployment of their own experts' evidence, which may significantly increase costs.

[113] Outside the realm of investor-State arbitration, a private group of international practicing lawyers and academics formed a Business and Human Rights Arbitration Working Group, operating from the Center for International Legal Cooperation (CILC) in The Hague. In 2017, they noted that '[p]*arties to business and human rights arbitration will need to have access to arbitrators who have expertise in business and human rights.*' Their efforts resulted in the launch of The Hague Rules on Business and Human Rights Arbitration Article 11(1)(c) of which specifically provides that:
"[t]he presiding or sole arbitrator shall have demonstrated expertise in international dispute resolution and in areas relevant to the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry'.

In the end, while the delegates were not able to reach a conclusion on the issue, they agreed that "qualifications of the decision makers were important".[114]

73. The interplay between human rights and international investment law is likely to increase. This is especially so in light of States' obligations under the Paris Agreement and the tension between those obligations and the duties as host States of investment subject to IIAs.[115] In those circumstances, it will be essential that arbitrators demonstrate expertise in human rights law, including sustainable development and climate-related litigation, in order to achieve fair and reasonable resolution of investor-state disputes.

XI. Conclusions and Recommendations

A. Conclusions

74. **The RtD has an increasing role in international investment law, through the incorporation of concepts such as "sustainable development" in the new IIAs, as well as the SDGs and the importance of international cooperation and community participation– all of which are inherent in the idea of the RtD. How the RtD is given effect in international investment law will (absent further multilateral treaty-making to operationalize the RtD, whether in the context of international investment law or more generally) largely be dependent on how individual arbitral tribunals interpret them in particular cases (albeit that individual arbitral awards do not bind subsequent tribunals hearing disputes between different parties). That includes particularly immediate concerns related to climate change, such as how to resolve the tension between States' obligations under the Paris Agreement and their obligations to foreign investors under IIAs. This is in itself an illustration of the ongoing tension between the States' right to regulate and their obligations to foreign investors.**

75. **According to UNCTAD,[116] out of the 68 ISDS disputes commenced in 2020, 65% were based on treaties signed in the 1990s or earlier and 97% were brought under the IIAS signed before 2011. Therefore, it is too early to say how the new generation IIAs would influence the development of international investment law and the protection of human right within it.**

76. **If the existing system of ISDS remains in place, and more far-reaching reforms are not preferred by States, then there are nevertheless ways in which the existing system can be made more effectively to operationalise the RtD of affected groups. These include reforms introduced via negotiation of new (and renegotiation of old) IIAs or through reforms to the most widely used arbitral rules, such as those promulgated by ICSID and the UNCITRAL Rules.**

B. Recommendations

77. **The Expert Mechanism recommends that States:**

(a) **in new IIAs, including through renegotiations of existing IIAs**

(i) **expressly employ the concept of "the right to development", so as to achieve greater recognition of the right;**

(ii) **expressly impose meaningful and enforceable obligations on foreign investors to respect their peoples' RtD, through making it a condition of there being a protected "investment" in the first place and/or a free-standing obligation actionable by the host State through a counterclaim;**

[114] UNGA, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)' A/CN.9/935, paras. 85-88.

[115] See section VII above.

[116] UNCTAD, World Investment Report 2021: Investing in Sustainable Recovery 129 (21)

(iii) **expressly define the concept of an SLO, identify the minimum evidential threshold for its existence, and require any arbitrators appointed to adjudicate a dispute with a foreign investor to take into account the existence (or lack thereof) of SLOs as a matter of international public policy;**

(iv) **expressly require that any arbitrator appointed to adjudicate a dispute with a foreign investor shall have a minimum standard of experience and expertise in the international law of [human rights law, sustainable development and, where relevant to the dispute, the environment];**

(v) **expressly provide that interested or affected persons are permitted an effective means to participate in disputes referred to arbitration by a foreign investor, including where appropriate through the use of *amicus curiae* procedures and/or intervention or joinder as parties in their own right; and**

(b) **expressly require foreign investors, under national law, alternatively in the relevant IIAs, to obtain SLOs from affected local people as well as social and environmental assessments, as a threshold to permitting protection of the investment and/or a free-standing obligation actionable by the host State through a counterclaim.**