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Right to development in international investment law

Study by the Expert Mechanism on the Right to Development

Summary

In the present study, the Expert Mechanism on the Right to Development explores the current and future role of the right to development in international investment law, analyses the right to development in existing international investment law, explores the evolving role of investors as duty holders, examines the impact of two important recent legal developments, considers the role of amicus curiae and addresses the question of whether arbitrators should have a proven record of human rights expertise as a prerequisite of their appointment to adjudicate investment disputes. The report concludes with a series of recommendations and proposals.

I. Objectives

1. In the present study, the Expert Mechanism on the Right to Development:

(a) Analyses elements of the right to development as they feature in existing international investment law, both in the new generation of international investment agreements and in arbitral awards, and makes recommendations and proposals for improvement (as demonstrated, the absence of the express inclusion of the right to development in international investment agreements is no bar to the present analysis);

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

(c) Explores the evolving role of investors as duty holders in complying with human rights obligations as well as the obligations of States of international cooperation, the advancement of sustainable development and the achievement of the Sustainable Development Goals identified in the 2030 Agenda for Sustainable Development, as provided for in international investment agreements, whether bilateral or multilateral;

(d) Examines the impact of two important recent legal developments, taking into account: (i) the explicit inclusion of the right to development in the preamble of the Paris Agreement of 2015; and (ii) the continuous tension between the obligations of States to achieve climate goals and their obligations towards foreign investors;

(e) Considers the role of amicus curiae (that is, arguments presented by interested persons who are not parties to a particular case) in investor-State dispute settlement cases, both as a source of human rights expertise and as a means of participation for groups of individuals or peoples whose human rights are affected by events underlying such disputes; the resolution of disputes is an integral part of international investment law that has a direct impact on the right to development, both of individuals and peoples;

(f) Addresses the related question of whether arbitrators should have a proven record of human rights expertise (including in the area of sustainable development and the Sustainable Development Goals) as a prerequisite of their appointment to adjudicate investment disputes that raise issues of human rights or the Sustainable Development Goals or whether alternative means of selecting a suitably qualified tribunal may be more effective;

(g) Highlights good State practice and makes recommendations, in line with the mandate of the Expert Mechanism.

II. Mandate and methodology

2. The study, which is based on a review of the relevant literature, also draws on information received in response to a questionnaire distributed to various stakeholders, including Member States, civil society organizations, intergovernmental organizations and United Nations agencies, and to an open call for submissions.

3. Helpful insights were gained from the outcome of the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, in particular on the climate goals in the context of the current international investment agreements regime. Further useful information was obtained through interactions with academics and academic visits and from work carried out in the area by the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for Economic Cooperation and Development (OECD), the South Centre and other research centres and civil society organizations.

4. The recommendations made in the study have also been informed through the examination of model bilateral investment treaties, selected progressive international investment agreements that incorporate human rights provisions in some form, arbitration awards and other court judgments. It is important to keep in mind that the subject matter concerns a constantly evolving area of interest.

III. Right to development in international investment law

5. In the study, the right to development is examined in the context of international investment law, based on the core principles set out in the Declaration on the Right to Development (1986), and the symbiotic relationship between the right to development and sustainable development, considered together with the Sustainable Development Goals and the 2030 Agenda.[1]

6. For the purposes of the study, it is important to emphasize the three aspects of sustainable development, namely: social development; economic development; and environmental protection.[2] The concept of social development includes the long-established concept of human rights; it is impossible to achieve social development and sustainable development if human rights are undermined. The 17 Sustainable Development Goals and the 169 targets incorporated in the 2030 Agenda represent the current global consensus on the scope and content of sustainable development.[3]

7. In the light of the above, the study examines interactions, tensions and potential coexistence in the field of human rights and international investment law. Along with the right of States to regulate in the public interest, attention is paid to the duty of international cooperation between States and the right of individuals and peoples to participation, both of which are important aspects of the right to development. From the perspective of the right to development, the study contextualizes investment as a means to an end, that is, the realization of development as described in the preamble to the Declaration on the Right to Development. In summary, the objective of investment, and hence international investment law, should be "the constant improvement of the well-being of the entire population and of all individuals".[4]

8. The issues outlined above are explored, inter alia, through an examination of the topics raised in the above-mentioned questionnaire distributed to various stakeholders and the answers received. The Expert Mechanism is grateful to the States, intergovernmental organizations, United Nations agencies, members of civil society organizations and academics who contributed to the study.

IV. Overview of sustainable development in international investment agreements

9. Numerous international investment agreements, especially more recent ones, include refinements and clarifications aimed at protecting the rights of States to regulate in the public interest. Importantly, sustainable development, the Sustainable Development Goals and human rights appear in a number international investment agreements and model bilateral investment treaties.[5]

10. Since the adoption of the 2030 Agenda by the General Assembly in 2015, 224 international investment agreements have been concluded, 31 per cent of which contain provisions that directly address the Sustainable Development Goals.

11. International investment agreements address sustainable development and the Sustainable Development Goals in different ways, either by highlighting the right of States to regulate in the public interest or by imposing duties on foreign investors, the latter of which include duties to contribute to sustainable development, observe specific standards and

[1] A/HRC/48/63, paras. 19–23.
[2] See A/42/427, annex.
[3] See General Assembly resolution 70/1.
[4] See General Assembly resolution 41/128, annex.
[5] Of the international investment agreements collected by UNCTAD (https://investmentpolicy.unctad.org/international-investment-agreements), some of which have been terminated and others signed but not yet in force, over 200 contain the term "sustainable development". The oldest containing the term is the Framework Agreement for Cooperation between the European Economic Community and Brazil (1992).

comply with human rights generally as well as with principles of corporate social responsibility.

12. Examples of the ways in which international investment agreements[6] have addressed sustainable development and the Sustainable Development Goals include:

(a) References to sustainable development in their preambles (for example, the bilateral investment treaty between Brazil and India (2020) and the bilateral investment treaty between the Islamic Republic of Iran and Slovakia (2016));

(b) Use of a definition of "investment" that requires a contribution to the sustainable development of the host country in order to qualify (for example, the bilateral investment treaty between Morocco and Nigeria (2016));

(c) Providing for public policy exceptions that allow the host State to take measures to protect public policy objectives, such as protecting public health and the environment (for example, the bilateral investment treaty between Canada and Mongolia (2016) and the bilateral investment treaty between Georgia and Japan (2021));

(d) Imposing an obligation on States not to relax labour or environmental standards in order to attract foreign investment (for example, the bilateral investment treaty between Colombia and the United Arab Emirates (2017) and the bilateral investment treaty between Japan and Morocco (2020));

(e) Imposing obligations on investors relating to responsible business conduct (for example, the bilateral investment treaty between Brazil and Ethiopia (2018)).

(f) Provisions precluding corrupt practices (for example, the bilateral investment treaty between Georgia and Japan (2021));

(g) Provisions promoting compliance with sustainable development in foreign direct investment (for example, the European Union-Singapore free trade agreement (2019)).

13. Similarly, principles of cooperation and capacity-building are sometimes expressly referred to in bilateral investment treaties, for example, in the Brazil-Malawi bilateral investment treaty (2015),[7] which highlights the strengthening of local capacity-building through close cooperation with community-based structures in order to contribute to the sustainable development of the host country.

14. Examples of progressive model investment agreements include those of the Kingdom of the Netherlands (2019)[8] and the Belgium-Luxembourg Economic Union (2019).[9]

15. The Belgium-Luxembourg Economic Union model bilateral investment treaty, which includes manifold elements of the right to development, in particular sustainable development, emphasizes the importance of international cooperation in achieving sustainable development and recognizes the economic, social and environmental aspects of sustainable development as interdependent and mutually reinforcing.[10] Significantly, as well as encouraging dialogue between the contracting parties, the model also encourages States to conduct a dialogue with their civil society organizations.

16. The model bilateral investment treaty of the Kingdom of the Netherlands (2019) contains numerous references to sustainable development and human rights,[11] including an

[6] The international investments agreements listed herein are available from the UNCTAD International Investment Agreements Navigator (https://investmentpolicy.unctad.org/international-investment-agreements).

[7] The importance of cooperation is also reflected in free trade agreements (see art. 22.20 of the agreement between Australia and the United Kingdom of Great Britain and Northern Ireland (2021).

[8] Kingdom of the Netherlands, Agreement on reciprocal promotion and investments (March 2019), arts. 2, 3, 6 and 7.

[9] Belgium-Luxembourg Economic Union model bilateral investment treaty, arts. 14–18.

[10] Ibid., art. 14 (3).

[11] Kingdom of the Netherlands, Agreement on reciprocal promotion and investments (March 2019), preamble and arts. 2, 3, 5 and 6.

express reference to the Universal Declaration of Human Rights.[12] The model bilateral investment treaty may already have been used in negotiations as the Kingdom of Netherlands has reportedly obtained permission from the European Commission to renegotiate its existing bilateral investment treaties with several countries, including Argentina, Burkina Faso, Ecuador, Nigeria, Türkiye, Uganda, the United Arab Emirates and the United Republic of Tanzania and to initiate negotiations for new bilateral investment treaties with Iraq and Qatar.[13]

V. Significance of recent developments

17. Since the adoption of the 2030 Agenda, progress has been made in incorporating sustainable development, the Sustainable Development Goals and human rights in international investment agreements. There are, however, important caveats.

18. First, looking at the universe of international investment agreements that are in force or have been signed but are not yet in force (approximately 3,300 international investment agreements),[14] all but 245 were signed before the adoption of the Sustainable Development Goals in 2015. It is therefore not surprising that the vast majority of international investment agreements do not contain specific provisions addressing sustainable development objectives, whether per se or in substance. Of the approximately 70 international investment agreements that contain such provisions, virtually all were signed after the Sustainable Development Goals were adopted. Those agreements, however, constitute only a minority (roughly 30 per cent) of international investment agreements signed after 2015, showing that the incorporation of sustainable development and the Sustainable Development Goals in international investment agreements has yet to become the prevailing orthodoxy in treaty drafting and national investment policy. To effect a change will require greater international consensus and greater leadership by the major economies that tend to set the agenda for treaty negotiations.

19. Second, most new international investment agreements that incorporate sustainable development in their substantive provisions appear to limit its role mainly to exceptions, recommendations and political commitments rather than imposing binding obligations on States or investors to contribute to sustainable development.[15] Furthermore, the obligation to contribute to sustainable development is currently neither consistent nor widespread. For example, the Morocco-Nigeria bilateral investment treaty (2016) is signed by both countries but only ratified by Morocco. While the inclusion of sustainable development was retained in the subsequent Morocco model bilateral investment treaty (2019) and Morocco has included it in other bilateral investment treaties, it did not include it in its investment agreements with Brazil and Japan.[16] Other countries have taken an even more conservative view in drafting their model bilateral investment treaties and have decided to altogether avoid the question of whether foreign investment contributes to the development of the host State.[17]

20. Third, in some cases the incorporation of sustainable development in the definition of "investment" in international investment agreements is supported by provisions on how sustainable development could be achieved in the context of international investment law, namely through international cooperation and recognition of its economic, social and

[12] See art. 6 (6). However, to date, there have been no express references in international investment agreements to the Declaration on the Right to Development (1986).

[13] Jones Day, "Renegotiation of existing BITs by the Netherlands may directly affect current investments", July 2019.

[14] UNCTAD, "The international investment treaty regime and climate action", *International Investment Agreements Issues Note*, Issue No. 3 (2022).

[15] Ole Kristian Fauchald, "International investment law in support of the right to development?", *Leiden Journal of International Law*, vol. 34, No. 1 (2021), p. 189.

[16] Arpan Banerjee and Simon Weber, "The 2019 Morocco model BIT: moving forwards, backwards or roundabout in circles?", *ICSID Review: Foreign Investment Law Journal*, vol. 36, No. 3 (2021), p. 539.

[17] See, for example, Colombian model bilateral investment treaty (2017), where drafters avoided the discussions of the issue; and Banerjee and Weber, "The 2019 Morocco model BIT".

environmental aspects as interdependent and mutually reinforcing and by expressly encouraging dialogue between States and between States and civil society.[18]

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

22. It will largely be up to 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.[19] This is likely to be of particular relevance in cases where the concept of sustainable development is incorporated in substantive sections of international investment agreements, such as in the description of "investment" (for example, in article 1 (3) of the Morocco-Nigeria bilateral investment treaty (2016), article 3 (3) of the Morocco model bilateral investment treaty (2019) and article 1 (1) of the Egypt-Mauritius bilateral investment treaty (2014)). As such instruments are relatively new, it remains to be seen whether, in possible disputes, host States will choose to rely on sustainable development as part of their defence against potential claims by investors and whether arbitral tribunals will interpret references to sustainable development as constituting an essential requirement of protected investments or as being merely recommendatory in nature.[20]

23. 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 domestic law of States, particularly in the event that their impact extends beyond their own territories.

24. In this regard, a recent case in which the German Federal Constitutional Court considered the justiciability of sustainable development in the context of environmental and climate law in Germany provides an example.[21] The Court, without referring explicitly to sustainable development, considered the concept of "intragenerational equity" (that is, equity and fairness between current generations), not only within one State but also across borders, and "intergenerational equity" (the commitment and responsibility towards future generations)[22] in considering Germany's duties under the Paris Agreement (2015).[23] While the case does not directly concern international investment law, it is a relevant parallel development that shines a useful light on the growing role of sustainable development in international law[24] and on its legal interpretation in future investment disputes, especially because the environmental element of sustainable development in international investment agreements, as seen through the lens of climate change, is essential to the fulfilment of the right to development.

25. Overall, the current landscape indicates significant potential for the further incorporation of sustainable development in international investment agreements. While questions of its legal status and interpretation will be determined by future arbitral tribunals, the inclusion of sustainable development in the definition of investment is a step in the right

[18] See Belgium-Luxembourg Economic Union model bilateral investment treaty.

[19] Klentiana Mahmutaj, "Will the Morocco-Nigeria bilateral investment treaty transform sustainable development into hard law?", *European Journal of International Law*, EJIL: Talk!, January 2022.

[20] Question raised in the questionnaire: one State commented that the concept of sustainable development should be clearly defined in international investment agreements and that the exclusion of the Sustainable Development Goals 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 international investment agreement. Other States remained silent on this issue, and one took the view that the inclusion of such concept may make it more onerous and therefore less attractive for investors to invest.

[21] Jelena Bäumler, "Sustainable development made justiciable: the German Constitutional Court's climate ruling on intra- and inter-generational equity", *European Journal of International Law*, EJIL: Talk!, June 2021.

[22] Ibid.

[23] Sustainable development features in several of the substantive provisions of the Paris Agreement.

[24] For a recent example of how a State's failing climate obligations adversely affect the survival and continued development of cultural identity, see Human Rights Committee, communication No. 3624/2019, *Daniel Billy et al. v. Australia*, Views adopted on 22 September 2022.

direction since, at a minimum, it provides a right-to-development basis for decisions on foreign investment and on what host States and investors should expect of each other.

26. Moreover, a coherent legal framework, including consistency in the interpretation of sustainable development, is required in order to implement the right to development in international investment law.

VI. Human rights, corporate social responsibility and the right to development

27. Human rights are an integral part of sustainable development and the Sustainable Development Goals. They have also been an element in the field of investor-State dispute settlement for some time, even before the introduction of the new generation of international investment agreements.

A. Historical development

28. Thus far, arbitral awards in investor-State dispute settlements have provided only a fragmented and incoherent analysis of the role of human rights in international investment law. Frequently, arguments 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 risk of a "regulatory chill". More often, tribunals have rules 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]

29. There are, however, exceptions, including:

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

(b) In *Burlington Resources Inc. v. Republic of Ecuador*, Ecuador was permitted to counterclaim for breaches of Ecuadorian environmental law and contractual obligations, and the investor was ordered to pay $41.7 million;[28]

(c) In *Copper Mesa Mining Corporation v. Republic of Ecuador*,[29] although Ecuador had violated several provisions of the Canada-Ecuador bilateral investment treaty, the Tribunal reduced the amount of the award by 30 per cent to reflect that the investor had, through its unlawful actions against anti-mining protestors, contributed to its own losses.[30]

[25] Fabio Giuseppe Santacroce, "The applicability of human rights law in international investment disputes", *ICSID Review – Foreign Investment Law Journal*, vol. 34, No. 1 (2019), pp. 136–155.

[26] Examples include *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, International Centre for Settlement of Investment Disputes case No. ARB(AF)/12/5; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, International Centre for Settlement of Investment Disputes case No. ARB/13/1; and *Anglo American PLC v. Bolivarian Republic of Venezuela*, International Centre for Settlement of Investment Disputes case No. ARB(AF)/14/1.

[27] International Centre for Settlement of Investment Disputes case No. ARB/07/26. See also Edward Guntrip, "*Urbaser v. Argentina*: the origins of a host State human rights counterclaim in ICSID arbitration?", *European Journal of International Law*, EJIL: Talk! 10 February 2017.

[28] International Centre for Settlement of Investment Disputes case No. ARB/08/5: consent for counterclaim was provided under the contract and did not have to be deduced from an international investment agreement.

[29] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA [Permanent Court of Arbitration] Case No. 2012–2.

[30] Peter Muchlinski, "Can international investment law punish investor's human rights violations? Copper Mesa, contributory fault and its alternatives", *ICSID Review: Foreign Investment Law Journal*, vol. 37, No. 1–2 (2022), pp. 359–377: over 50 armed paramilitary security guards were hired by the claimant to protect the investment. Unlawful conduct of the parties as a relevant factor in

B. New generation of international investment agreements

30. The new generation of international investment agreements may mark a watershed in the protection of human rights in investor-State dispute settlements, which, in a number of respects, may create greater scope for States to invoke human rights in such disputes, as described below.

1. Express references to the right to regulate

31. Some new international investment agreements expressly articulate the right of States to self-regulate. Such references are, however, merely declaratory; they do not create new enforceable rights or obligations and are therefore, on their own, unlikely to adequately counterbalance the protection provisions in international investment agreements.[31] A legally binding instrument on the right to development that makes specific provision for the right to regulate would arguably strengthen the position of States parties in international investment agreements. However, such a scenario is premature.[32] Nevertheless, the fact that some new international investment agreements, albeit relatively few, expressly refer to the right to regulate, human rights obligations and human rights instruments[33] and impose obligations on investors to observe corporate social responsibility standards[34] significantly furthers the right to development.

2. Investors' conduct may affect the quantum of compensation

32. Some new international investment agreements adopt the approach used in the *Copper Mesa* case to quantum of compensation.[35] For example, in article 20 (5), the Morocco model bilateral investment treaty (2019) requires that international human rights and environmental law by investors be taken into account in determining quantum compensation[36] and the Kingdom of the Netherlands model bilateral investment treaty (2019) requires that an investor's non-compliance with the Guiding Principles on Business and Human Rights and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises be considered by a tribunal.[37]

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

33. Some new international investment agreements[38] 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[39] for two main reasons. First, it is a reminder that human rights violations have real consequences.[40] Secondly, such express inclusion may minimize or eliminate jurisdictional objections to human rights counterclaims by States.

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determining admissibility and merits of the claim is a well-established principle in international arbitration.

31 Barnali Choudhury, "International investment law and non-economic issues", *Vanderbilt Journal of Transnational Law*, vol. 53, No. 1 (2020).

32 See A/HRC/WG.2/23/2, annex, arts. 3 (h) and 11 (c).

33 See Kingdom of the Netherlands model bilateral investment treaty, art. 6 (6).

34 See Economic Community of West African States, Common Investment Code, article 34 (2); and African Union Commission, draft Pan-African Investment Code (2016), art. 24 (a) and (b).

35 For a critical analysis of whether human right-based claims should be treated as issues of contributory fault concerning the level of damages, see Muchlinski, "Can international investment law punish investor's human rights violations?".

36 See also India model bilateral investment treaty (2015), art. 26 (3).

37 OECD Guidelines for Multinational Enterprises, art. 23.

38 Southern African Development Community model bilateral investment treaty (2012), art. 15 (1); the Kingdom of the Netherlands model bilateral investment treaty, art. 7 (1); India model bilateral investment treaty (2016), art. 12; Morocco-Nigeria bilateral investment treaty, art. 14; and draft Pan-African Investment Code, art. 22.

39 Eric De Brabandere, "Human rights counterclaims in investment treaty arbitration", *Investment Claims*, 25 October 2018.

40 For an interesting take on investors' breaches and compensation, see article 2 of the Bangladesh-Denmark bilateral investment treaty (2009), which refers to damage to public health, life or

34. This approach should not, however, be overstated. Since States cannot initiate dispute settlements against investors, this approach represents only a possibility of a counterclaim. Arguably, a more robust approach is needed so that breaches of human rights could be used as a basis for denying investors treaty protection.[41] Alternatively, arbitral tribunals could apply compliance with human rights as an admissibility criterion based on international public policy.[42]

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

35. Some new international investment agreements specifically refer to investors' potential liability for breaches of human rights under the laws of home States, which add little or nothing to investors' obligations, merely highlighting but not extending their existing obligations.[43] Further, the provisions do not appear to add any obligations on home States.[44]

5. Corporate social responsibility

36. Some new international investment agreements refer to the OECD Guidelines for Multinational Enterprises and the Guiding Principles on Business and Human Rights, the principal sources for international consideration of corporate social responsibility. Since neither are legally binding, they feature in international investment agreements only in a recommendatory vein. For example, article 16 of the Burkina Faso-Canada bilateral investment treaty (2015) encourages investors to incorporate internationally recognized standards both in their policy and practice and article 12 of the India-Belarus bilateral investment treaty (2018) recommends that investors do the same voluntarily.[45] Nevertheless, at least one international investment agreement, the China-Switzerland free trade agreement (2013), expressly recognizes the importance of corporate social responsibility for sustainable development. Although such provisions are "soft law", they nevertheless demonstrate an increased awareness of the importance of human rights in international investment law.

6. Conclusion

37. It is too early to determine whether recent developments in the laws of historically capital-exporting States represent an important cultural shift that may bear on the proper role of international investment agreements in the protection of human rights in host States. The lack of similar developments in the domestic legislation of major economies from the Global South indicates a significant asymmetry. All that can be said at present is that the endorsement of human rights in international investment agreements is still in its infancy and that a broader incorporation of human rights will be necessary before a consistent and coherent approach can be achieved.

environment that would make investors liable for compensation to the host State, either under domestic or international law.

[41] This seems to be the case only under the Colombian model bilateral investment treaty (2017) (chapter on denial of benefits).

[42] For problems related to this approach, see Muchlinski, "Can international investment law punish investor's human rights violations?", p. 373.

[43] See article 7 (4) of the Kingdom of the Netherlands model bilateral investment treaty (2019); and article 20 of the Morocco-Nigeria bilateral investment treaty (2016).

[44] Eric De Brabandere, "The 2019 Dutch model bilateral investment treaty: navigating the turbulent ocean of investment treaty reform", *ICSID Review – Foreign Investment Law Journal*, vol. 36, No. 2 (2021), p. 328.

[45] See also Argentina-Japan bilateral investment treaty (2018), art. 17, and Australia-Hong Kong free trade agreement (2019), art. 16.

VII. Impact of climate change on the right to development through international investment law

38. The relationship between climate change and the right to development is well-established.[46] Climate change poses an existential threat to people's enjoyment of the right to development,[47] as highlighted in the Paris Agreement.

39. Progress in relation to climate change and the right to development was made in 2022 at the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, at which agreement was reached on a loss-and-damage fund for vulnerable countries.[48] However, further multidisciplinary action is required to achieve the climate goals[49] and to address the all-encompassing nature of the climate change threat, in particular the reduction of carbon emissions and increased use of renewable energy,[50] both of which are closely intertwined with the global investment system. It is clear that continuous transformation and flexibility in many interconnected fields are essential to this process, including changes in the field of international investment law, an area that can either stifle or advance progress.

40. Presently, there are few specific "climate change" provisions in existing or new international investment agreements. Such provisions have chiefly been incorporated in recent international investment agreements (or model bilateral investment treaties),[51] and more often in free trade agreements, including sections dealing with climate change.[52] As things stand, those provisions do not distinguish between high- and low-emission investments or refine protection standards,[53] but rather emphasize the importance of international cooperation among States in achieving the climate goals.[54] Accordingly, amendments to both old and new international investment agreements are necessary. Such amendments should include provisions promoting foreign direct investment that protects the

[46] See A/76/154.

[47] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Understanding human rights and climate change" (2015); A/76/154; and Nandita Banerji, "Heatwaves in India could soon break human survivability limit, says World Bank analysis", *Down to Earth*, 7 December 2022.

[48] United Nations Climate Change News, "COP27 reaches breakthrough agreement on new 'loss and damage' fund for vulnerable countries", 20 November 2022.

[49] Georgina Rannard, "COP27: climate costs deal struck, but no fossil fuel progress", BBC News, 20 November 2022.

[50] 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" (A/77/226, para. 90 (d)). See also OHCHR, "Renewable energy and the right to development: realizing human rights for sustainable development" (2022).

[51] See, for example, Canada model bilateral investment treaty (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.

[52] See free trade agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (2022), art. 14.18 (2); and Australia–United Kingdom free trade agreement (2021), arts. 13.18 and 22.5.

[53] UNCTAD and International Institute for Environment and Development, "Policy brief on international investment agreements and climate action" (March 2022); and OECD, *Investment Treaties and Climate Change: OECD Public Consultation (January–March 2022) – Compilation of Submissions*, 13 April 2022. Some scholars are sceptical at the potential of realigning the investment regime with climate objectives; see Kyla Tienhaara and Lorenzo Cotula, "Raising the cost of climate action?: investor-State dispute settlement and compensation for stranded fossil fuel assets", Investment, Land and Rights series (London, International Institute for Environment and Development, 2020); and Kyla Tienhaara and others, "Investor-State disputes threaten the global green energy transition", *Science*, vol. 376, No. 6594 (2022). See also Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change* (2022), p. 74.

[54] See Australia–United Kingdom free trade agreement (2021), art. 13.18. See also art. 22.5.

climate,[55] which should be included in new investment agreements. In order to support climate change goals, foreign direct investment should facilitate the transition from high- to low-emission investment, as stipulated under article 2 (1) (c) of the Paris Agreement and in conformity with the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.[56]

41. Reforming international investment agreements is, however, insufficient:[57] investors' rights are already extensively protected under existing international investment agreements, which give rise to tensions between the regulatory space of States to pursue climate goals through the introduction of domestic legislation, regulations or policies on the one hand and their obligations to foreign investors on the other.[58] Currently, investors in fossil fuels enjoy many of the protections that international investment agreements afford them vis-à-vis host States and the above-mentioned tensions are likely to continue.[59]

42. In practice, existing international investment agreements may, at best, be merely neutral on climate-related aspects of the right to development and, at worst, penalize States for adhering to climate-related obligations. This is best illustrated by several arbitral awards, including awards mentioned above, in which, while such tensions were recognized, arbitral tribunals found in favour of investors.[60] Such claims can result in large compensation awards to investors[61] that may discourage States from pursuing climate-friendly policies,[62] or may,

[55] Matthew Stephenson and James Zhan have commented in "What is climate FDI? How can we help grow it?" (Think20 Indonesia, 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.

[56] Paris Agreement, arts. 2 (2) and 4 (19).

[57] As noted at the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, some businesses were worried about losing competitiveness if engaged in decarbonization, although some saw it as creating additional economic viability.

[58] UNCTAD, "Treaty-based investor-State dispute settlement cases and climate action", *International Investment Agreements Issues Note* (Issue No. 4 (2022)): "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". All but one of these cases are brought under international investment agreements that predate the adoption of the 2030 Agenda.

[59] Recent illustrations of such tension include investor-State disputes in *Eco Oro Minerals Corp. v. Republic of Colombia*, International Centre for Settlement of Investment Disputes case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, as a "struggle between competing societal objectives which pull in 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" (Philippe Sands, Partial Dissenting Opinion, para. 1); and *Westmoreland Mining Holdings, LLC v. Canada (II)*, International Centre for Settlement of Investment Disputes case No. UNCT/20/3.

[60] For another case, see *Rockhopper v. Italy*, International Centre for Settlement of Investment Disputes case No. ARB/17/14.

[61] UNCTAD, "Treaty-based investor-State dispute settlement cases and climate action".

[62] Lora Verheecke and others, "Blocking climate change laws with ISDS threats: Vermilion vs. France", in *Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice* (Brussels and Amsterdam, Friends of the Earth Europe and International, Transnational Institute and Corporate Europe Observatory, 2019).

at least, make them more expensive, thereby undermining public trust and confidence in tackling climate change[63] and fulfilling the climate goals.[64]

43. Furthermore, the prospect of high compensation awards for investors and orders for payment of legal costs[65] risks making the ambitious climate actions of States rather expensive or could even "chill" such actions.[66] According to a recent study on the issue, climate adaptation investor-State dispute settlement claims may run as high as $340 billion.[67]

44. A recent example concerns a group of investors that brought action under the Energy Charter Treaty (1994), through which they sought a total of €4 billion in damages over fossil fuel projects from four member States of the European Union.[68] A wide range of competing factors, including the "European Green Deal", the heavy reliance of some member States on fossil fuels and the lack of reform of the Energy Charter Treaty, highlight the interplay and potential tensions between sustainable development, climate change and investors' rights in international investment law.[69]

45. It is essential that investor-State dispute settlement strike a balance between States' need to change and adapt their legislation in response to the climate crisis and related ecological transformations and the stability and predictability of the regulatory framework of host States, which is guaranteed to investors under certain international investment agreements.[70]

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.[71] States wish to protect the environment and to combat climate change, as well as to pursue economic

[63] 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*, vol. 23, No. 5-6 (2022), pp. 746–777.

[64] As noted in the 2022 report by the Intergovernmental Panel on Climate Change, some claims brought by foreign investors against host States challenge measures aimed at fulfilling climate and environmental objectives (*Climate Change 2022: Mitigation of Climate Change*, p. 1499): "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 *Research Handbook on Environment and Investment Law*, Kate Miles, ed. (Edward Elgar, 2019). See also UNCTAD, "Treaty-based investor-State dispute settlement cases and climate action"; and Lea Di Salvatore, "Investor–State disputes in the fossil fuel industry" (International Institute for Sustainable Development, 2021), p. 41, finding that the fossil fuel industry is the most litigious industry in the investor-State arbitration system with about 20 per cent of all known cases.

[65] Respondent States that lose such cases may face costs running into millions of dollars that can be particularly onerous for developing and least developed countries.

[66] See *Westmoreland Mining Holdings, LLC v. Canada (II)*, International Centre for Settlement of Investment Disputes case No. UNCT/20/3 (dispute regarding the phasing out of coal-fired power plants); and 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*, vol. 12, No. 1 (2021), pp. 1–41.

[67] Rachel Thrasher, "With a potential $340 billion price tag, investor-State disputes threaten the global green energy transition", Boston University Global Development Policy Center, 5 May 2022.

[68] Camilla Hodgson, "European energy groups seek €4bn damages over fossil fuel projects", *Financial Times*, 21 February 2022.

[69] It may be a cause for concern that "the majority of known fossil fuel [investor-State dispute] cases are decided in favour of investors" (Di Salvatore, "Investor-State disputes in the fossil fuel industry"). In the end, these cases were settled.

[70] Jack Biggs, "The scope of investors' legitimate expectations under the FET standard in the European renewable energy cases", *ICSID Review: Foreign Investment Law Journal*, vol. 36, No. 1 (2021), pp. 99–128.

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

development strategies, involving, inter alia, mining activities, as a means to boost economic prosperity[72] and secure economic well-being.[73]

47. The need for reform in the area of international investment agreements and international cooperation,[74] and the practical difficulties in doing so, are reflected in current efforts to modernize the Energy Charter Treaty with regard to the impact of investor-State dispute settlements on climate change, including through a significant number of renewable energy disputes. The possibility of the elimination of fossil fuel investment protections (the so-called fossil fuel carve-out) is a step in the right direction. However, far from reflecting the climate emergency, the current draft of the carve-out, even if multilateral consensus on it could be achieved, would still offer an additional 10 years of protection for fossil fuel investments.

48. Despite such difficulties, the reform of international investment agreements is essential to mitigate the tensions outlined above.[75] A potentially quicker and more effective resolution might be to persuade arbitrators to recalibrate how they approach the tensions between climate goals and investor rights in investor-State dispute settlements when exercising their interpretative discretion.[76] This, however, can only be achieved within the parameters and the jurisdiction of a given dispute, including the technical and procedural challenges entailed. Nevertheless, arbitrators should be encouraged, in their decision-making, to take into account: (a) the provisions of the Paris Agreement and its express reference to the right to development; (b) General Assembly resolution 76/300 on the human right to a clean, healthy and sustainable environment; and (c) social licences to operate, including the value of community participation and consultation.

49. In practice, such a holistic approach can be achieved through a more inclusive approach to the contributions of amici curiae (see sect. IX below) and by requiring that the professional qualifications of arbitrators include expertise in human rights, sustainable development (see sect. X below) and in climate law, which would enable them to give climate-related issues just place in international investment law.

VIII. Right of participation in development through consultation with relevant stakeholders and social licenses to operate

50. Agreements on a social licence to operate represent an innovation that supports the right of individuals and peoples to actively participate in political, social, cultural and

[72] On the importance of investor/investment protection as a relevant factor in attracting foreign investment, see School of International Arbitration, Queen Mary University of London, and Corporate Counsel International Arbitration Group, "2020 QMUL-CCIAG survey: investors' perceptions of ISDS" (2020), in which respondents said the availability of treaty-based protections for investors, the availability of investor-State dispute settlement and the host State's history of involvement in such disputes strongly influence their investment decisions.

[73] See *Eco Oro Minerals Corp. v. Republic of Colombia,* International Centre for Settlement of Investment Disputes case No. ARB/16/41.

[74] On the question as to whether the duty to cooperate entails a duty to negotiate in good faith, see Olivier De Schutter, "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 realized': the new frontier of the right to development", Interdisciplinary Research Cell in Human Rights Working Paper 2018/5 (University of Louvain, 2018).

[75] UNCTAD, "The international investment treaty regime and climate action" *International Investment Agreements Issues Note*, Issue No. 3 (2022):

> 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.

[76] See Sharma, "Integrating, reconciling, and prioritising climate aspirations in investor-State arbitration"; and Laura Letourneau Tremblay, "In need of a paradigm shift: reimagining *Eco Oro v Colombia* in light of new treaty language", *Journal of World Investment & Trade*, vol. 23, No. 5-6 (2022), pp. 915–946. See also Toni Marzal, "Polluter doesn't pay: the *Rockhopper v. Italy* award", EJIL: Talk!, 19 January 2023.

economic development and to enjoy the benefits of such participation in a manner allowing them to realize their human rights, which lie at the heart of the right to development.[77] Through such agreements, which are made between investors and local stakeholders, affected communities are able to directly participate in deciding on the propriety and suitability of proposed investments. Social licenses to operate are not granted by the host State but by affected local communities or by civil society at large.[78] Manifestations of a lack of a social license to operate may include the deterioration of projects and/or social unrest.[79]

51. Many newer international investment agreements 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 a social license to operate prior to commencing investment, let alone to maintain one throughout the life of the investment.[80] Social licenses to operate have already featured in investor-State disputes, although with varying degrees of interest and accuracy and with varying interpretations by arbitrators,[81] owing, in part, to their undefined nature in international investment law.

52. The first apparent reference to a social license to operate in an investor-State dispute is to be found in the award of the arbitral tribunal in the case of *Bear Creek Mining Corporation v. Republic of Peru*.[82] The prevailing view of the tribunal was that the investor, in fulfilling its duty to take the mandatory measures required by the Government, had discharged its obligation to obtain an social license to operate from the affected communities, which were indigenous communities. One member of the tribunal, in a partial dissenting opinion, stated that, in the light of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), the investor had a broader legal duty to consult and share the benefits of the project from the start and that the damages awarded against Peru should have been halved both because of the lack of a social license to operate and because the investor's obligations were equal to those of the Government of Peru.[83]

53. In the *Copper Mesa* case, the Government of Ecuador withdrew a concession from a Canadian investor, probably because of social unrest caused by the investor's presence and subsequent actions in the local community (senior personnel were found guilty of orchestrating acts of criminal violence on behalf of the company). Nevertheless, this made it impossible for the investor to complete consultations with the local community. In the decision of the tribunal, the misbehaviour of the investor resulted in a 30 per cent reduction in the award of its otherwise successful claim.

54. Thus far, it appears that the failure of investors to obtain social licenses to operate has only reduced the value of compensation awarded to investors rather than denying them or their investments protection altogether (or negated the liability of host States).

55. This situation may be partly due to the vague legal status of social licenses to operate, which have been described in judicial reasoning as a composite concept with some form of

[77] Declaration on the Right to Development, art. 1. The right of consultation is enshrined in the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) and in the United Nations Declaration on the Rights of Indigenous Peoples.

[78] Mihaela-Maria Barnes, "The 'social license to operate': an emerging concept in the practice of international investment tribunals", *Journal of International Dispute Settlement*, vol. 10, No. 2, pp. 328–360.

[79] Ibid.

[80] The questionnaire asked whether international investment agreements should expressly require States to consult stakeholders in civil society prior to permitting a foreign investor to invest in their territory and whether this should be limited to particular types of investments and stakeholders. Some States expressed reservations, including concerns that the process may discourage foreign investment or that it may adversely affect States' ability objectively and consistently to assess the merits of investments.

[81] See partial dissenting opinions of Philippe Sands in *Eco Oro Minerals Corp. v. Republic of Colombia*, International Centre for Settlement of Investment Disputes case No. ARB/16/41; and *Bear Creek Mining Corporation v. Republic of Peru,* International Centre for Settlement of Investment Disputes case No. ARB/14/21.

[82] International Centre for Settlement of Investment Disputes case No. ARB/14/21, Award, 30 November 2017.

[83] Partial dissenting opinion of Philippe Sands, 30 November 2017, paras. 13 and 39.

normative status.[84] Despite their current unsettled status in international investment law, opposition to the lack of social licenses has been strongly manifested, including through protests, blockades and unstable sociopolitical environments.

56. Their legal status aside, in consultations foreign investors, especially with investors in the extraction industry, social licenses to operate were viewed as a positive development that would contribute to the success of investments in the long run by creating greater certainty and reducing reputational and financial risk.

57. The importance direct communication between foreign investors and communities in order to obtain and maintain social licenses to operate speaks for itself:[85] it is an effective way to protect the human rights of individuals and populations and to fulfil their right to development. In addition, social licences can assist host States by preventing social unrest, promoting foreign investment by making investments less risky, reducing the risk of disputes between investors and host States and reducing their risk of having to pay compensation and legal costs.

58. In the light of the above, in each case, arbitrators should consider that social licenses operate as an essential feature of international public policy. Only through such a process will future practice be reformed so that the consent obtained for investments is founded on the continuous commitment of investors to community participation and its development, not simply as part of a box-ticking exercise.[86]

IX. Third-party participation in investor-State dispute settlements

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 third parties, amici curiae (literally, "friends of the court") in investor-State dispute settlements.[87] At the discretion of the court or arbitral tribunal, third parties not party to disputes are permitted to present arguments and evidence relevant to cases which the court or tribunal may, at its discretion, take into account.[88] Through the testimony of amici curiae, local communities and civil society organizations may present arguments or evidence that might not otherwise be heard because investors or host States might not present them (and in some instances may have a vested interest in not presenting them).

60. Amicus curiae briefs have, however, received, and continue to receive, an inconsistent reception by arbitral tribunals.[89] In February 2019, in the case of *Eco Oro Minerals Corp. v.*

[84] Barnes, "The 'social license to operate'". Even experienced arbitrators in human rights law have confounded the concept of free, prior and informed consent and social licenses to operate. See also footnote 115 below.

[85] *Bear Creek Mining Corporation v. Republic of Peru*, International Centre for Settlement of Investment Disputes case No. ARB/14/2.

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

[87] The first recorded investor-State dispute settlement case in which amicus curiae briefs were accepted by a tribunal was in *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Decision, 15 January 2001.

[88] Usually, no mechanism exists for local communities or civil society organizations to become parties to investor-State cases because such cases are arbitrations in which the only parties contemplated by the international investment agreement are the foreign investor and the host State.

[89] Examples of tribunals accepting amicus curiae submissions are *Suez and Vivendi v. Argentina*, International Centre for Settlement of Investment Disputes case No. ARB/03/19, Order in Response to Amicus Petition; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, International Centre for Settlement of Investment Disputes case No. ARB/05/22, Procedural Order No. 5, 12 February 2007. Examples of tribunals denying amicus curiae submissions include *Aguas del Tunari, S.A. v. Republic of Bolivia*, International Centre for Settlement of Investment Disputes case No. ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003; and *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA [Permanent Court of Arbitration] Case No. 2009-23, Procedural Order No. 8, 18 April 2011.

Republic of Colombia,[90] an International Centre for Settlement of Investment Disputes tribunal rejected the admissibility of amicus curiae testimony on the right to live in a healthy environment, noting that the petitioners had not explained the nature of their "perspective, knowledge and insight" other than to assert that it would be different from that of the disputing parties.[91] In a similar instance, in 2021, another arbitral tribunal refused the application for an amicus curiae submission on human rights and international environmental law in a dispute under the North American Free Trade Agreement between an investment firm from the United States of America and the Government of Mexico. Apart from finding that the parties had sufficient expertise, the majority held that the amicus curiae submissions would not assist the tribunal in resolving the dispute at hand, which did not concern the claimant's activities in the territory where one of the petitioners operated.[92]

61. Even where amicus curiae submissions 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 suggested that this limits the positive impact they may have on decisions.[93]

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 parties to incur even greater costs that are not justified by the contribution they may make to a particular case.

63. The desirability of amicus curiae briefs and ways to facilitate them have been considered by UNCITRAL Working Groups. At the fifty-third session of UNCITRAL Working Group II (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".[94] Subsequently, at the thirty-seventh session of UNCITRAL Working Group III (2019), there were discussions as to whether the Mauritius Convention on Transparency and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were sufficient to ensure that amicus curiae submissions would be submitted to and duly considered by tribunals.[95]

64. Further, the increasing importance of amicus curiae is highlighted by investment treaties and arbitral rules now explicitly allowing for their submission.[96] Most recently, rule 67 of the new International Centre for Settlement of Investment Disputes Arbitration Rules (2022) removed the need for tribunals to consult the disputing parties before considering amicus curiae submissions. In the light of that development and the increasing need for international investment agreements to function in a way complementary to the Paris Agreement, it is likely that attempts to present amicus curiae briefs will continue and even increase.[97] It is difficult to say 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.

[90] Procedural Order No. 6: Decision on Non-Disputing Parties' Application, 18 February 2019.

[91] Ibid., para. 32.

[92] *Odyssey Marine Exploration, Inc. v. Mexico*, International Centre for Settlement of Investment Disputes case No. UNCT/20/1, Procedural Order No. 6, 20 December 2021; see paras. 22–23.

[93] See Charles H. Brower, II, "Structure, legitimacy, and NAFTA's investment chapter", *Vanderbilt Journal of Transnational Law*, vol. 36, No. 1 (2003), pp. 72–73.

[94] A/CN.9/712, paras. 46–47.

[95] A/CN.9/970, para. 32.

[96] See Canada-European Union Comprehensive Economic and Trade Agreement (2017), art. 8.38; Singapore International Arbitration Centre, Investment Arbitration Rules, 1st ed. (2017), rule 29.2; and Stockholm Chamber of Commerce, Arbitration Rules (2017), appendix III, art. 3.

[97] Gian Maria Farnelli, "Investors as environmental guardians? On climate change policy objectives and compliance with investment agreements", *Journal of World Investment & Trade*, vol. 23, No. 5–6 (2022), pp. 887–914.

65. Some commentators consider that because the amicus curiae mechanism is "not designed to grant effective voice or protection for actors whose rights are directly at stake in a dispute" it will never function well in this regard.[98] 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:[99]

(a) Allowing persons who have no direct interest in the proceedings, such as representatives of civil society organizations and non-governmental organizations, to intervene in proceedings (in a more extensive way than amicus curiae);

(b) Permitting or requiring interested or affected third parties to be joined as parties to 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 the third party's rights would be too great to allow the claim in all justice to continue;

(d) Permitting or requiring tribunals to reframe claims so as to minimize the effects on affected third parties.

66. Further alternatives to amicus curiae suggested by some contributors include the establishment of a new permanent institution exclusively dedicated to defending the collective interest, as a kind of universal intervener or amicus curiae with enhanced rights, or that a similar function could be served in some way by the creation of a "multilateral advisory centre", which is envisaged by UNCITRAL as an advice bureau to assist States in defending claims in investor-State dispute settlements.

67. Nevertheless, the current systemic complexities should not hinder the ability of civil society and affected communities to participate effectively in the investor-State dispute settlement process.

X. Qualifications of arbitrators in human rights and sustainable development

68. Th decisions of arbitral tribunals in investor-State dispute settlement arbitrations clearly have the capacity to impact the finances of host States through the imposition of massive compensatory awards and bills for legal costs. However, their prophylactic effects are potentially even more far-reaching, including for non-parties such as local communities. Such decisions, by providing informal and non-binding precedents, can influence how investors treat local communities and the environment in making their initial investments. In some cases, such decisions can change how investors view their legal or moral obligations or, at a minimum, prompt investors to take steps to reduce the risk of negative outcomes in potential investor-State dispute settlement arbitrations. Further, it is arguably overly narrow, at least on an ethical if not a strictly legal level, to treat tribunals as having a duty to do justice

[98] Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development, "Third party rights in investor-State dispute settlement: options for reform", submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019. On 3 April 2023, the UNCITRAL Working Group III completed the draft code of conduct for arbitrators in international investment dispute resolution. The text will be presented to UNCITRAL for adoption at its fifty-sixth session (3–21 July 2023) in Vienna (see https://unis.unvienna.org/unis/en/pressrels/2023/unisl343.html). Under article 3 (2) of the draft, the arbitrator must not, inter alia, "(a) be influenced by loyalty to any disputing party or any other person or entity" or "(b) take instruction from any organization, government or individual regarding any matter addressed in the international investment dispute proceeding" (A/CN.9/1148). Paragraphs 24 and 26 of the draft commentary, taken together, mean that while arbitrators are not to be influenced by non-disputing parties, they are not prevented from considering amicus curiae submissions.

[99] Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development, "Third party rights in investor-State dispute settlement"; see also A/CN.9/WG.III/WP.213.

only to the parties before them rather than to the identifiable non-parties who stand to be affected by their decisions.

69. In achieving a just outcome in investor-State dispute settlement disputes, which may raise human rights and environmental concerns, which is probable in most cases, it is important that arbitrators have sufficient knowledge and expertise in the areas of human rights law and environmental law (a fortiori, given the impact that decisions in investor-State dispute settlement can have on non-parties and their possible ethical responsibility to non-parties).

70. The lack of familiarity of some arbitrators in investor-State dispute settlements with human rights law has been identified as a concern both for States and civil society. In the questionnaire, contributors were asked whether a requirement that arbitrators have formal qualifications might lead to fairer awards that fully consider the human rights concerns raised in particular disputes.

71. Some contributors were of the opinion that arbitrators ought to be required to demonstrate expertise in human rights law[100] before being permitted to adjudicate investor-State disputes, while others took the view that a better approach would be to appoint an independent expert to arbitral tribunals to assist them with human rights and related expertise.[101]

72. While not directly touching on the issue of human rights, delegates at the thirty-fifth session of UNCITRAL Working Group III observed that arbitrators sitting in investment cases owed a general duty towards an international system of justice.[102] 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".[103] In the end, while delegates were not able to reach a conclusion on the issue, they agreed that "qualifications of the decision makers were important".[104]

73. The interplay between human rights and international investment law is likely to increase, especially given the obligations of States under the Paris Agreement and the tensions between those obligations and their duties as host States subject to international investment agreements (as discussed in sect. VII above). In the light of the above, 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.

[100] See article 20 (5) of the Kingdom of the Netherlands model bilateral investment treaty (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, including expertise in environmental and human rights law.

[101] The obvious danger is that tribunal-appointed experts might become de facto arbitrators, selected with no involvement, which could result in an abdication of decision-making responsibility on the part of other members of the tribunal. Further, given differing opinions, fairness may require that all parties be given the opportunity to challenge expert opinions through cross-examination and/or deployment of evidence of their own experts, which may significantly increase costs.

[102] Outside the realm of investor-State arbitration, in 2017, the Business and Human Rights Arbitration Working Group, noted that parties to business and human rights arbitration need to have access to arbitrators who have expertise in business and human rights. Article 11 (1) (c) of the Hague Rules on Business and Human Rights Arbitration, provides that:

> The 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.

[103] A/CN.9/935, para. 86.

[104] Ibid., para. 88.

XI. Conclusions and recommendations

A. Conclusions

74. **The right to development has an increasing role in international investment law through the incorporation of sustainable development and the Sustainable Development Goals in new international investment agreements, including the importance of international cooperation and community participation, all of which are inherent to the idea of the right to development. Absent further multilateral treaty-making to operationalize the right to development, whether in the context of international investment law or, more generally, how the right to development is effected in international investment law will 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). Such an interpretation relates, in particular, to immediate concerns related to climate change, including how to resolve the tensions between the obligations of States under the Paris Agreement and their obligations to foreign investors under international investment agreements. The process of interpreting, in itself, is an illustration of the ongoing tensions between the right of States to regulate and their obligations to foreign investors.**

75. **According to UNCTAD,** [105] **out of the 68 investor-State dispute settlement disputes commenced in 2020, 65 per cent were based on treaties signed in the 1990s or earlier and 97 per cent were brought under international investment agreements signed before 2011. It is therefore too early to say how new international investment agreements will influence the development of international investment law and the protection of human right within it.**

76. **If the existing system of investor-State dispute settlement remains in place, and more far-reaching reforms are not preferred by States, there are nevertheless ways in which the existing system can be made more effectively in operationalizing the right to development of affected groups. These include reforms introduced through the negotiation of new (and renegotiation of old) international investment agreements or through reforms to the most widely used arbitral rules, such as those promulgated by the International Centre for Settlement of Investment Disputes and in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.**

B. Recommendations

77. **The Expert Mechanism recommends that, in new international investment agreements, including in the renegotiation of existing international investment agreements, States expressly:**

(a) **Employ the concept of "the right to development" in order to achieve greater recognition of the right;**

(b) **Impose meaningful and enforceable obligations on foreign investors to respect peoples' right to development by making it a condition of "protected investment" in the first place and/or a free-standing obligation actionable by the host State through a counterclaim;**

(c) **Define the concept of a social license to operate, identify the minimum evidential threshold for its existence and require arbitrators appointed to adjudicate a dispute with a foreign investor to take into account the existence, or lack, of a social license to operate as a matter of international public policy;**

[105] UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (United Nations publication, 2021), pp. 129–130.

(d) **Require that arbitrators appointed to adjudicate a dispute with a foreign investor have a minimum standard of experience and expertise in international law, including human rights law, sustainable development and, where relevant to the dispute, the environment;**

(e) **Ensure that interested or affected persons are permitted an effective means of participation in disputes referred to arbitration by foreign investors, including, where appropriate, through the use of amicus curiae procedures and/or interventions or to be joined as parties in their own right;**

(f) **Require that foreign investors, as a threshold obligation, obtain under national law or, alternatively, through relevant international investment agreements: (i) social licenses to operate from affected local communities, and (ii) social and environmental assessments provided by host States, in order to benefit from the protection of their investments under international investment agreements; failure to obtain such social licences and social and environmental assessments would allow host States to seek redress against investor States through counterclaims.**