

**Proposed Investment Treaty Provisions**  
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To ensure investment treaties are compatible with human rights, we propose states include nine standard clauses and to choose one of two alternative clauses addressing dispute settlement processes.

**Clause 1: Purpose of the Agreement**

The objective of this Agreement is to promote foreign investment that supports sustainable development aimed at the constant improvement of the wellbeing of the entire population and of all individuals present on a state's territory or under its jurisdiction.<sup>1</sup>

**Clause 2: Pre-investment obligations<sup>2</sup>**

When designing an investment, the host Contracting Party and the investor must ensure free and meaningful participation of those individuals and communities directly or indirectly affected by the investment. Care shall be taken in the planning of the investment to ensure costs or benefits extending or accruing to the community at large are distributed in a non-discriminatory basis.

**Clause 3: Post-establishment obligations<sup>3</sup>**

- 1) Investors and investments shall respect and uphold human rights in the host state.
- 2) Investors shall not manage or operate an investment in a manner that circumvents international environmental, labour or human rights obligations to which the host state and/or home state are Parties.
- 3) The investor and the investment shall, in keeping with good practice relating to the size and nature of the investment, develop and maintain a publicly disclosed environmental management system and a human rights management and mitigation plan. These systems and plans must include appropriate standards for due diligence, mitigation and management of risk, and provision of remedies and reparations to those harmed by the investment. In developing and carrying out the human rights management and mitigation plan, reference shall be made to the rights provided for in any international treaty or via customary international law that is binding on the home or host state. The development and maintenance of such plans are a necessary precondition for an investor to invoke the substantive and procedural protections found in this Agreement.
- 4) The Parties will adopt measures necessary to ensure this Clause is reflected in domestic law.

**Clause 4: Right to Regulate<sup>4</sup>**

- 1) The Host State has the right and the obligation to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, human rights, and other legitimate social and economic policies.
- 2) Non-discriminatory measures taken by a State Party to comply with international obligations under other treaties, including but not limited to treaties applicable to anti-corruption, human rights, humanitarian, criminal, environmental, and labour law, shall not constitute a breach of the substantive rights afforded to the investor under this Agreement, except for cases of direct expropriation.
- 3) In cases of direct expropriation, the purpose of the measure shall be taken into account as a mitigating factor in the assessment of damages. The assessment of fair and adequate compensation shall be based on an equitable balance between the public, affected third parties, and the investor, with consideration of all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, and the duration of the investment.<sup>5</sup>

<sup>1</sup> Inspired by the Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (2009), preamble.

<sup>2</sup> This provision is inspired by the United Nations Declaration on the Right to Development (1986) and draws on Yilmaz-Vastardis and Van Ho, 'Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection', in *Natural Resources Grabbing: An International Law Perspective* (Romanin et al., eds. (Brill Nijhoff 2015)).

<sup>3</sup> Inspired by the Reciprocal Investment Promotion Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016) ('Morocco-Nigeria BIT'), articles 13, 18.

<sup>4</sup> Inspired by the Morocco-Nigeria BIT, article 23.

<sup>5</sup> This sentence draws on the SADC Model Bilateral Investment Treaty Template (2012), article 6.2., option 1.

### **Clause 5, Option 1: Exhaustion of Domestic Remedies**

- 1) Disputes arising between an investor and a Contracting Party from this Agreement shall be in the first instance submitted to the domestic courts of the host state.
- 2) An investor may subsequently submit disputes to international arbitration only if the investor considers that there has been a denial of justice in the adjudication of the claim.
- 3) An investor need not exhaust domestic remedies if the domestic administrative or judicial institution has taken an unreasonably prolonged time to arrive at a final decision.<sup>6</sup>

### **Clause 5, Option 2: Loss of Right to Arbitration<sup>7</sup>**

- 1) No arbitration panel or body, international or domestic, shall have jurisdiction over claims arising under this Agreement by an investor if those claims implicate, explicitly or implicitly, directly or indirectly, the human rights of third parties.<sup>8</sup>
- 2) The following is an illustrative and non-exhaustive list of the types of disputes over which the arbitration panel or body may not exercise jurisdiction because of the implication for the human rights of third parties:
  - a. Disputes over the privatization of, provision of, or tariff limitations for water, health, or educational services;
  - b. Disputes over land tenure and title where the land is or has been vested, *de facto* or *de jure*, by an individual or community other than the state;
  - c. Disputes that implicate the rights of indigenous or tribal peoples;
  - d. Disputes arising from statements, responses, or protests by those impacted or affected by the investment.
- 4) In such instances, the domestic courts of the Host State shall have exclusive jurisdiction to hear the investor's claim(s). An investor may subsequently submit disputes to international arbitration only if the investor considers that there has been a denial of justice in the adjudication of the claim.
- 5) A tribunal may exercise jurisdiction over a claim for denial of justice without awaiting a final decision at the domestic administrative or judicial institution if the latter has taken an unreasonably prolonged time to arrive at a final decision.<sup>9</sup>

### **Clause 6: Third party access to home state courts for civil liability of investors<sup>10</sup>**

If, in breach of its obligations under Clauses 2 and 3 of this Agreement, an investor inflicts harm to third parties in the host state, the third parties shall have the right to pursue a civil action against the investor before the courts and tribunals of either Contracting Party to obtain remedies for the injuries suffered. The courts and tribunals of both Contracting Parties shall have jurisdiction over claims arising from this Clause.

### **Clause 7: Rights of Third Party Interveners during Dispute Settlement<sup>11</sup>**

- 1) On written notice to the disputing parties, a third party whose interests are affected explicitly or implicitly, directly or indirectly, by a dispute may apply to the court or tribunal for leave to intervene for the purpose of asserting rights or interests affecting the jurisdiction of the tribunal or for the purpose of raising factual or legal assertions relevant to the court's or tribunal's interpretations, decisions, and judgments. Leave shall be granted unless there is a showing that the intervention is frivolous or abusive.
- 2) The Contracting Parties agree to provide a standing fund for the payment of legal assistance and/or representation for intervening third parties who lack sufficient means to pay for such assistance.<sup>12</sup> The States' respective Ministries of Justice shall administer the funds.

<sup>6</sup> Inspired by the Agreement between the Government of Sweden and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments (1978 ('Sweden-Egypt BIT'), article 8.

<sup>7</sup> This draws on Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process?', *International Human Rights Law Review*, vol 50, pp 60-85 (2016).

<sup>8</sup> This clause is inspired by and builds upon the 'Clean Hands Doctrine'. See, PCIJ, *Diversion of Water from the Meuse Case* (Netherlands v. Belgium) (1937).

<sup>9</sup> Inspired by Sweden-Egypt BIT, article. 8

<sup>10</sup> Inspired by: Morocco-Nigeria BIT, article 20; Yilmaz-Vastardis and Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?', 67 *International and Comparative Law Quarterly* (2018), 418-421; Van Ho, "'Band-Aids Don't Fix Bullet Holes": In Defence of a Traditional State-Centric Approach,' in *The Future of Business and Human Rights: Theoretical and Practical Challenges for a UN Treaty* (Letnar Cernic and Carillo-Santarelli, eds.) (Intersentia 2018).

<sup>11</sup> Inspired by North American Free Trade Agreement (1992) ('NAFTA'), article 1128.

<sup>12</sup> Inspired by General Assembly of the Organization of American States, Resolution AG/RES. 2426 (XXXVIII-O/08); Rome Statute of the International Criminal Court (1998), article 55.2.c.

- 3) Intervening third parties may seek financial support from either State Party. Where the State Parties do not respond positively to such requests, the intervening parties may request the relevant court or tribunal to order such funds as are necessary from either State Party.
- 4) The provision of financial assistance may be made dependent upon a sufficient showing that the third party has a real interest affected by the dispute.

**Clause 8: Transparency in regards to Disputes between an Investor and a State Party**

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) shall be applicable in all disputes arising under this Agreement. If these rules are subsequently amended, the tribunal, parties and intervening third parties shall apply the standard that guarantees the greatest level of transparency.

**Clause 9: Elaboration and Correction of the Protections in this Agreement<sup>13</sup>**

The Contracting Parties may, at any time, establish a common declaration, understanding, or interpretation of the provisions, rights, and guarantees within this Agreement without the need to amend the Agreement itself. Before doing so, they shall consult affected stakeholders, including, but not limited to, civil society, investors, industry and business organizations, academics, and respected jurists. To be valid and enforceable the common declaration, understanding, or interpretation need only be made public through publication on the websites of the ministries or departments responsible for international trade, investment, and justice in both Contracting Parties.

**Clause 10: Applicable Law and Supremacy Clause**

- 1) This Agreement is the applicable law to disputes between a Contracting Party and a protected investor arising from this Agreement. Where relevant, the competent court or tribunal shall also apply the law of the host state, and international obligations to which the state is a party, including in the areas of international human rights, humanitarian, criminal, environmental, or labour law.
- 2) In situations where a conflict arises, explicitly or implicitly, directly or indirectly, between a state's international obligations under this Agreement and its treaty or customary obligations in the areas of international human rights, humanitarian, criminal, environmental, or labour law, this Agreement shall be subordinated to the conflicting obligations.<sup>14</sup>

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<sup>13</sup> Inspired by NAFTA, article 2001.

<sup>14</sup> See, Essex Business and Human Rights Project, Submission to the OEIWG on transnational corporations and other business enterprises: 'Conflicts between a Treaty on Business and Human Rights and Investment and Trade Agreements,' <https://www1.essex.ac.uk/ebhr/documents/Submission%20of%20the%20Essex%20Business%20and%20Human%20Rights%20Project.pdf>.