Open call for input for Working Group on Business and Human Rights' report on "Human Rights-compatible International Investment Agreements (IIAs)"

Paris, the 31st of March 2021

Dear members of the Working Group on Business and Human Rights,

We write to respond to the open call for input for the report on Human Rights-compatible International Investment Agreements (IIAs or investment treaties).

The subject of human rights in investment agreements and in Investor-State Dispute Settlement (ISDS) more generally is a subject that needs further discussions, and we thank you for the opportunity to submit our inputs.

As you know, international investment law is defined as the field of international law that governs relationships between States and foreign investors. Traditionally, human rights and investment protections are apprehended as disparate areas of law[1]. However, human rights are becoming increasingly relevant in international investment disputes[2]. Recent arbitral awards have moved towards establishing an interaction between human rights and investment protections, and acknowledging non-investment obligations as a part of an investment dispute settlement. In practice, human rights issues have emerged in disputes related to water access[3], public health[4], the environment[5] and racial discrimination[6].

Human rights violations can be invoked in ISDS by investors[7] or by the host State. Host States invoke human rights either to defend its policy space in order to fulfil its positive obligations to guarantee the protection of human rights standards on its territory (including by foreign investors), or to engage the investors' own responsibility through the specific mechanism of the counterclaim. Even if the likelihood of State's counterclaims related to an investor's failure to conduct its business according to international human rights is slim, as

[1] Pierre-Marie Dupuy, "*A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law",* European Journal of Legal Studies, 2007; International Law Commission, '*Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*', 58th Session, U.N. Doc. A/61/10, 2007.
[2] Fabio G. Santacroce, "*The Applicability of Human Rights Law in International Investment Disputes"*, ICSID Review, Foreign Investment Law Journal (Kinnear and McLachlan (eds), 2019, p. 136.
[3] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bikaia UR Partzuergoa v. The Argentine Republic* (ICSID Case No.ARB/07/26).
[4] See for example., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26), Award, of 8 December 2016; *Philip Morris Brands Sàrl, et al. v. Uruguay* (ICSID Case No. ARB/10/7) Award of 8 July 2016; *Methanex Corporation v. United States of America*, Award of 3 August 2005.
[5] See for example, *Bilcon of Delaware et al v. Government of Canada*, (PCA Case No. 2009-04), Award of 17 March 2015; *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2), Award of 4 April 2016; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6), Award of 11 March 2011.
[6] *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* (ICSID Case No. ARB(AF)/07/01), Award of 4 August 2010.
[7] For example see *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL.

counterclaims are admissible only under certain conditions, it is possible to reinforce the viability of counterclaims by acting on the wording of the BITs.

As pointed out by the Tribunal in *Urbaser*[8], under the current regime of international human rights law and in the absence of a specific provision in the investment treaty, investors do not have positive obligations to take measures to protect the human rights of the host State's population[9].

Are human rights provisions in existing IIAs effective in encouraging investors to respect all internationally recognised human rights? If not, how could old IIAs be reformed efficiently to make them compatible with States' international human rights obligations?

Those are two of the proposed list of questions that we would like to address in our submission.

I. Are human rights provisions in existing IIAs effective in encouraging investors to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

Until the 21st century, international investment agreements did not contain any references to human rights[10]. Today, there are approximately 3,000 IIAs either with a total disregard for human rights[11] or with general references in the preamble of the agreement[12].

A number of investment agreements have recently adopted progressive provisions intended to increase compliance with internationally recognized human rights. New generation investment agreements are identifying common human rights, such as health, labour or anti-corruption[13]. Other IIAs acknowledge more broad issues of human rights such as gender equality and indigenous rights[14].

However, in order for the ISDS system to evolve towards an effective recognition of human rights and a more balanced approach of the international rights and obligations of foreign investors, some considerations need to be weighed.

1. Human rights provisions in existing IIAs

Nowadays, there is a nascent tendency for states to make sure that IIAs will ensure the protection of their regulatory space and enforcement of internationally recognized human rights obligations. As a result, there are a number of investment agreements with numerous

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[8] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26).
[9] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. República Argentina* (ICSID Case No ARB/07/26), Award of 8 December 2016, para. 1209.
[10] Barnali Choudhoury, "*UCL working paper series: Human Rights Provisions in International Investment Treaties and Investor-State Contracts*", Social Science Research Network, 2020, p.8.
[11] Nour Nicolas, "*Recent clauses pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laydable Success or Disappointing Failure*", Kluwer Arbitration Blog, July 23, 2019.
[12] See for example Cape Verde-Hungary BIT (2019); Belarus - Hungary BIT (2019).
[13] See for example, Cambodia - Turkey BIT (2018); Pacific Agreement on Closer Economic Relations Plus (2017); Austria - Tajikistan BIT (2010); Japan-Oman BIT (2015); Colombia - Costa Rica FTA (2013).
[14] See for example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), preamble; CARIFORUM States - United Kingdom EPA (2019); Agreement between the United States of America, the United Mexican States, and Canada (2018).

express references to human rights, in a myriad of ways. These references are usually either in the preamble or the operative part of the investment treaty.

Throughout this section, we will firstly examine the impact of these references on the applicability of internationally recognised human rights either by Host States or by foreign investors, with a distinction between the practice of express references to human rights in the preamble as opposed to references in the operative part of the agreement. Secondly, we will discuss other elements that influence or can influence the effectiveness of international human rights in existing investment agreements.

a. References in the preamble

Express references to human rights in the preamble[15] of an IIA is considered to be the most common way of incorporating human rights in IIAs.

As an example, the Cape Verde-Hungary bilateral investment treaty preamble states the following:

> "*Seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised human rights, labour rights, and internationally recognized standards of corporate social responsibility*"[16].

Other treaties generally use more general language such as:

> "*States reaffirm their commitment to the UN Charter and the universal declaration of human rights"*[17].

According to article 31(1) of the Vienna Convention of the Law of treaties (VCLT), treaty provisions must be interpreted in light of their context as well as the treaty's object and purpose. The preamble is part of the context that is relevant to the interpretation of a treaty. Hence, if the preamble to an investment treaty refers to the parties' commitment to, or consideration for, the principles contained in a human rights instrument, a contextual interpretation requires that the terms of the investment treaty be construed in light of those human rights sources light of human rights regulations referred to in the preamble.

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[15] For instance, the preamble to the EU–Singapore free trade agreement (FTA) states that the parties have "*regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948*", Free Trade Agreement between the European Union and the Republic of Singapore (signed 19 October 2018, not yet entered into force) (EU–Singapore FTA). Similar wording can be found in the Free Trade Agreement between Canada and Republic of Colombia (signed 21 November 2008, entered into force 15 August 2011), in the Investment Agreement between the Swiss Confederation and Georgia (signed 3 June 2014, entered into force 17 April 2015) and in the Kingdom of Norway's Model BIT (2015).

[16] Hungary-Cabo Verde BIT (2019).

[17] See for example, EFTA States - Indonesia EPA (2018); Ecuador - EFTA FTA (2018); EU–Singapore free trade agreement; Free Trade Agreement between the European Union and the Republic of Singapore (2018); Similar wording can be found in the Free Trade Agreement between Canada and Republic of Colombia (signed 21 November 2008, entered into force 15 August 2011); and in the Kingdom of Norway's Model BIT (2015).

b. References of human rights in the operative part

There are also some investment treaties with references to human rights in the "operative part" of the investment treaty. References encountered in the core of the treaty can either be binding[18], in which case we talk about investors' human rights obligations, or non-binding.
They are binding when they impose express obligations on investors to respect internationally recognised human rights.

They are non-binding when they invite States to adopt legislations to regulate investors' behaviours[19] or simply encourage foreign investors to voluntarily incorporate international standards of corporate social responsibility that may include areas such as human rights, labor, environment, gender equality, indigenous and aboriginal peoples' rights, and corruption[20]. These latter are called "best effort clauses"[21]. The aim of those clauses is to make investors and investment activities respect human rights and comply with internationally recognized corporate social responsibility standards[22].

Nevertheless, non-binding obligations - to the same extent as preambles - are relevant for a contextual interpretation of the treaty provisions.

c. Are those wordings effective in encouraging investors to respect all internationally recognised human rights?

There are two elements to take into consideration when analysing the effectiveness of human rights provisions in existing IIAs.

i. *Binding language*

Depending on the wording, human rights provisions may be binding or not binding. As mentioned earlier, in some investment agreements human rights references do not purport to impose any binding obligations upon investors, and for this they are considered to be unsatisfying[23].

On the contrary, there are investment treaties with binding human rights obligations making internationally recognized human rights norms directly applicable to the investor.

As an example, the Morocco-Nigeria BIT specifies that:

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[18] For instance, under Article 14(b) of the 2017 Intra-MERCOSUR Investment Facilitation Protocol, investors and investments have a best-effort obligation to uphold the human rights of all those concerned by their business activity in a way that is consistent with the host State's human rights obligations under international treaties.
[19] CARIFORUM - EU Agreement.
[20] See for example, Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (2018); Belarus - India BIT (2018); Nigeria - Singapore BIT (2016).
[21] Nour Nicolas, "*Recent clauses pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laydable Success or Disappointing Failure*", Kluwer Arbitration Blog, July 23, 2019.
[22] Brazil-Malawi BIT (2015). See also Brazil-Mozambique BIT (2010).
[23] Nour Nicolas, "*Recent clauses pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laydable Success or Disappointing Failure*", Kluwer Arbitration Blog, July 23, 2019.

> "*investors shall uphold human rights in the host state, act in accordance with core labour standards, and not manage or operate investments in 'a manner that circumvents international environmental, labour and human rights obligations"*[24].

The Economic Community of Western African States supplementary Act on common investment rules for the community, stipulates that:

> "*investors shall uphold human rights in the workplace and in the community and shall manage and operate their investments without breaching or circumventing human rights*"[25].

The Southern African Development Community (SADC) Model BIT adopts a similar language since investors are expected to refrain from assisting or being complicit in the violation of human rights and further stipulates that investors have a "duty" to respect human rights[26].

Following the same approach, some treaties provide that States can hold investors' liable for any act relating to their investment in the host State[27]. Others enable arbitral tribunals to take into account investor failure to respect human rights when determining the compensation for an award or to off-set damage awards[28].

To sum up, human rights provisions may be binding or non-binding. However, even if human rights provisions are non-binding in IIAs, they can be used as elements of context for the interpretation of the treaty. If an IIA stipulates that the host State must respect and enforce its human rights legislation or international law, foreign investors will find it less easy to challenge such laws under the standards of protection available to them (such as the standard of fair and equitable treatment or the standards applicable in cases of indirect expropriation). In addition, binding human rights provisions imposed directly on foreign investors will be much more effective in substantiating host state counterclaims of human rights violations by foreign investors (see Section II).

ii. *Possibility to present counterclaims when the investor has violated internationally recognized human rights*

Human rights provisions in IIAs may not be actionable at trial, even though they are carefully worded to be binding[29]. In new generation IIAs, these provisions remain silent or ineffective

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[24] Morocco-Nigeria BIT (2016).

[25] Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS) (2008), Article 14(2).

[26] Southern African Development Community, SADC Model Bilateral Investment Treaty Template with Commentary (2012), Article 15: "*15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife. 15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher*".

[27] Morocco-Nigeria BIT (2016); ECOWAS; SADC Model BIT; Indian Model BIT (2016).

[28] Netherlands Model Investment Agreement (2018); SADC Model BIT; ECOWAS.

[29] « *Mais, si ontologiquement rien ne s'oppose à ce que les Etats reconnaissent au profit des investisseurs des droits internationaux mais aussi des obligations internationales, on doit néanmoins faire état d'une forte réticence à rendre ces*

without an enforcement procedural mechanism in the treaty, regardless of their position in the operative part of the treaty or in the preamble[30]. This mechanism usually takes the form of a counterclaim.

A counterclaim can be defined as a counter-attack by which a host-State asserts a separate cause of action[31]. It increases the possibility of raising human rights considerations in case of non compliance of human rights by an investor.

Hence, for a State's counterclaim to be successful, the counterclaim should be within the scope of parties consent and sufficiently connected with the investor's initial claim.

First, investors' **consent for counterclaims must be established**. This aspect entails a detailed scrutiny of the wording of the dispute resolution clause in IIAs to better seize the likelihood of the Tribunal's jurisdiction over the claim.

It is important to note that in most old generation IIAs, the scope of the dispute resolution clause is quite limited. If States express their consent to the jurisdiction of the tribunal when it signs the IIA, the arbitration agreement will only be formed once the investor accepts the offer by initiating an arbitration claim. In other words, States are always reliant on investors to initiate claims. Therefore, the wording of the arbitration clause usually only covers States' obligations regardless of investors' obligations contained in the IIA[32].

Under some new generation IIAs, the wording of jurisdiction clauses is wide enough to allow the tribunal to resolve "any dispute between the parties"[33]. Consequently, it's possible for a State to start a counterclaim.

Among new generation IIAs, the Morocco-Nigeria BIT for example grants jurisdiction to the arbitration tribunal to hear States counterclaims on the investor's breaches of its human rights binding obligations[34].

If the claim is brought under the International Convention on the International Center for the Settlement Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL) Rules, States' counterclaims are possible[35] and the tribunal will most likely establish its jurisdiction over the dispute.

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obligations justiciables au moins dans l'ordre international. Il est, en effet, loin d'être anodin de constater que les traités brésiliens (tout comme le modèle indien de 2015 finalement abandonné) ne prévoient pas de recourir à une procédure arbitrale concernant le respect des obligations sociétales des investisseurs mais préfèrent instituer des techniques propres à la RSE, comme celle de la médiation. Ainsi, les accords brésiliens instituent un mécanisme de suivi assuré par des comités joints qui sont des organes de médiation censés permettre de faire dialoguer les investisseurs avec les autorités de l'Etat d'accueil », Laurence Dubin, « *Rse et droit des investissements les prémisses d'une rencontre* », RGDIP, 2018, p. 880.

[30] Nour Nicolas, "*Recent clauses pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laydable Success or Disappointing Failure*", Kluwer Arbitration Blog, July 23, 2019.

[31] *« La demande reconventionnelle recouvre les demandes incidentes par lesquelles une partie à une instance prétend obtenir, au delà du rejet de la demande introduite contre elle, la satisfaction par la partie adverse d'une prétention entretenant un lien de connexité avec l'objet de la demande de cette partie »*, Jean Salmon, *Dictionnaire de droit international public,* Bruylant, 2001.

[32] For example, in the *Spyridon Roussalis v. Romania* case, the arbitration clause states the tribunal had jurisdiction over "*Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement*".

[33] Morocco-Nigeria BIT, SADC Model BIT.

[34] For instance the obligation to protect its workers rights or abstain from causing environmental damage contained in the investment agreement.

[35] ICSID Convention, Article 46; UNCITRAL, Article 19(3).

Furthermore, a **sufficient connection between the counterclaim and the Investors' initial claim** shall be established. Under ICSID rules, the requirement is the following:

> "*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or* ***counterclaims arising directly out of the subject-matter of the dispute*** *provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*"[36].

In other words, even if the jurisdiction clause permits counterclaims, a sufficient connection between the legal obligation breached and the investor's own claim shall be established[37].

In addition to potential jurisdictional problems due to the prerequisites mentioned above, **a breach of investors' human rights obligations is needed for the tribunal to establish a basis for the claim**.

It goes without saying, that considering the structure of current IIAs, establishing a successful counterclaim is rarely straight-forward.

In practice, this was the case in the investment dispute between *Urbaser and Argentina*, brought under the ICSID Rules[38]. Argentina filed a counterclaim alleging the violation by Urbaser of their obligations in relation to the human rights of water. Since the arbitration clause was open[39], the Tribunal accepted the jurisdiction over the counterclaim. However, the claim was dismissed on its merits. According to the Tribunal, the concession contract did not incur a transfer of human rights obligations to the investor[40]: the State's obligations to fulfil human rights, including the right to water was not applicable to the investor. But, as the Tribunal precised, if the right to water cannot be opposable to the investor :

> "*the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case"*[41].

This suggests that an obligation to refrain from violating human rights could be imposed on foreign investors through the application of international human rights law to investment treaties disputes.

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[36] ICSID convention, Article 46.

[37] Naomi Briercliefe, Olga Owczarek, "*Human rights based claims by States and new generation international investment agreements*", Kluwer Arbitration Blog, 2018; see also "*in relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response*", *Saluka v. Czech Republic,* UNCITRAL, 1976.

[38] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao iskaia UR Partzuergoa v. The Argentine Republic,* ICSID case No. ARB/07/26.

[39] The arbitration clause stated that the tribunal had jurisdiction over "*Disputes arising between a Party and an investor of the other Party in connection with investments*". The tribunal considered that this provision was "*completely neutral as to the identity of the claimant or respondent in an investment dispute*", so that nothing could prevent the State from becoming the claimant by filing a counterclaim.

[40] Jarrod Hepburn, "*In a first, BIT tribunal finds that it has jurisdiction to hear a host State's counterclaim related to investor's alleged violation of international human rights obligations*", Investment Arbitration Reporter, 12 January 2017.

[41] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao iskaia UR Partzuergoa v. The Argentine Republic,* ICSID case No. ARB/07/26.

2. What should be done to strengthen the efficacy of human rights provisions in existing IIAs?

The efficacy of human rights provisions in existing IIAs can be strengthened by paying attention to the wording of standards of protection included in the IIA, but also through the application of international law to investment treaty disputes.

a. The wording of treatment standards: An instrument to strengthen the efficacy of human rights provisions.

When it comes to standards of protection implications on ensuring the efficacy of human rights provisions, the practice of relying on stabilization clauses is a matter for debate. These clauses aim at opening the possibility for investors to mitigate the risks related to the development of their project in the host State.

The UN Special Rapporteur on the situation of Human Rights Defenders argued that stabilization clauses language should be specific to circumvent the situation in which a State will not be able to handle its human rights obligations. Therefore, the clause should not hinder the State capacity to implement laws related to human rights[42].

In this regard, an investment treaty can include a "right to regulate clause", providing the right for States to adopt national measures in order to comply with their human rights obligations. For instance, the CETA provides:

> "*the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*"[43].

Overall, including stabilization clauses that do not hinder the State's regulatory powers combined with a right to regulate clause, seems like an appropriate tool to strengthen the efficacy of human rights provisions.

b. International Law as applicable law

Today, there is a consensus that international law governs the merits of investment treaty disputes[44]. Many international investment agreements (whether bilateral or multilateral) contain applicable law provisions indicating that the resolution of disputes between the host State and investors should be governed by international law, whether on an exclusive basis or in conjunction with other laws[45].

Additionally, the ICSID Convention clearly indicates that:

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[42] Barnali Choudhoury, "*UCL working paper series: Human Rights Provisions in International Investment Treaties and Investor-State Contracts*", Social Science Research Network (SSRN), 2020, p. 8.
[43] Comprehensive Economic and Trade Agreement (CETA).
[44] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Republica Argentina,* ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, para. 96.
[45] See for example North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA); Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) (ECT); US Model Bilateral Investment Treaty (2012).

> "*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*[46]."

According to some scholars, "*even when the treaty makes no reference to international law, the weight of case law and scholarly opinions suggests that international law nevertheless governs the merits of the dispute*[47]."

Therefore, as part of the broader corpus of international law, international human rights law should in principle, be applicable in investment treaty disputes.

Moreover, and following what has been discussed earlier, the requirements set out article in 31(3)(c) VCLT[48] as giving recourse to interpretative sources external to the treaty would also be applicable in this case. Therefore, in principle, it can be considered that any relevant international human rights norm must be directly binding upon the State parties to the investment treaty. However, in this context, human rights norms will only apply to the extent that they fall within the scope of international law.

Additionally, it should be noted that arbitral tribunals have also discretion "to evaluate, with the assistance of submissions of the parties on the matter, the precise scope of the phrase "applicable rules of international law" in the circumstances of the case of which it is seised"[49]. Therefore, internationally recognized human rights **can be** applicable as part of the law governing the merits of the investment treaty dispute through the applicability of international law, but will depend on a case by case.

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[46] ICSID Convention, Article 42(1).

[47] Fabio G. Santacroce, "*The Applicability of Human Rights Law in International Investment Disputes"*, ICSID Review, Foreign Investment Law Journal (Kinnear and McLachlan (eds); Jan 2019), p. 141; which also cites Yas Banifatemi, "*The Law Applicable in Investment Treaty Arbitration*" in Katia Yannaca-Small (ed), Arbitration Under International Investment Agreements: A Guide to the Key Issues (OUP 2010) and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004), para. 204.

[48] VCLT, Article 31: "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c)* ***any relevant rules of international law applicable in the relations between the parties****. 4. A special meaning shall be given to a term if it is established that the parties so intended*" (emphasis added).

[49] *Eli Lilly and Company v. Government of Canada* (Case No. UNCT/14/2), Award 16 March 2017, para. 106.

II. How could old IIAs be reformed efficiently to make them compatible with States' international human rights obligations?

As a general comment, it should be noted that future reforms should be channelled on making human rights clauses in investment treaties more than hortatory.

A meaningful reform of investment treaties consists of not only encouraging investors to comply with human rights and to impose mandatory obligations but also of adding a set of consequences for investors in case of failure to meet their obligations. Below you will find a list of elements to be considered when reforming IIAs.

a. Promote the effective applicability of human rights through treaty language

The language contained in the treaty determines the applicability of human rights obligations. However, a mere reference to "applicable rules of international law" is not sufficient to ensure that arbitration tribunals will take into consideration human rights obligation embedded in international convention or case-law: each tribunal may have to precise the scope of the applicable international law[50].

Hence, references to human rights obligations must be carefully drafted to ensure their effectiveness. Under the 1969 VCLT, a treaty is interpreted following the ordinary meaning to be given to the terms of the treaty in the context and light of its object and purpose. However, it is possible to take into account: any agreement relating to the treaty, which was made between all the parties, any instrument in connection with the conclusion of the treaty, or any subsequent agreement relating to the treaty, or practice in the application of the treaty[51]. The most efficient way to ensure human rights obligations fall in the scope of the treaty is to make a direct reference to them.

To ensure the applicability of human rights obligations in investment treaty already in force, Parties may issue a joint or unilateral declaration clarifying their intentions[52].

For future treaties, it is possible to implement treaty institutions charged with the task of their interpretation[53]. For instance, the United States-Uruguay BIT (2005) states:

> "*A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision*"[54].

[50] Daniel J. Gervais, "*Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada*", *UC Irvince Law Review*, Vol. 8, 2018 pp. 495-397.
[51] Vienna Convention on the Law of Treaty, United Nations, *Treaty Series*, vol. 1155, p. 331.
[52] OECD, "Investment Treaties over Time, - Treaty Practice and Interpretation in a Changing World", *OECD Working Papers on International Investment 2015/02*, p. 25.
[53] *Ibid*, p. 27.
[54] United States-Uruguay BIT, 2005, Article 30.

However, interpretative mechanisms only ensure a possibility for the Parties to interpret the treaty, without directing this interpretation into a specific direction. This calls for better mechanisms to ensure the enforcement of human rights obligations.

b. Encompass procedural mechanisms to ensure the enforcement of human rights obligations.

As we briefly discussed above, States need to have access to counterclaims in order for human rights obligations to become actionable and thus effective. Also, the lack of accuracy in the dispute settlement clause triggered a situation where counterclaims are most likely to be unsuccessful.

According to scholars[55] this situation can be overcome by imposing binding obligations on investors, as well as including a broad arbitration clause in such a manner that even investors' obligations are covered.

This will most likely result in the admission of counterclaims and more importantly an enhancement of investors compliance with human rights.

In this respect, new provisions found in new generation IIAs[56] are celebrated for creating the possibility for States to bring human rights related counterclaims against investors by providing human rights binding obligations, and a dispute settlement clause encompassing counterclaims (see Section I).

Aside from counterclaims, some treaties provide for other procedural mechanisms to enhance the efficacy of human rights provisions. For example, Morocco-Nigeria BIT cited earlier includes a denial of benefits provision[57] in case of human rights violation. Denial of benefits provisions allow a party to deny the benefits of the treaty to certain investors.

Even in the absence of a denial of benefits provisions in the treaty, some tribunals denied the access to arbitration for investors on the grounds of the unclean hands doctrine[58] or investors' violation of transnational public order and precisely the violation of anti-corruption standards[59]. These defences can be used as procedural mechanisms encouraging compliance with human rights since they usually close "the door of international arbitration for foreign investors".

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[55] « *Comme le note très justement Sophie Lemaire,* « *en pratique, le principal obstacle matériel aux demandes reconventionnelles étatiques résulte de l'absence d'obligation mise à la charge de l'investisseur dans le TBI et, en conséquence, del'absence de règle qui puisse être invoquée par l'Etat, à son profit* », Laurence Dubin, « *RSE et droit des investissements, les prémices d'une rencontre* », RGDIP, p.886.

[56] Morocco-Nigeria BIT; SADC Model BIT.

[57] Morocco-Nigeria BIT.

[58] *Copper Mesa Mining Corporation v Republic of Ecuador (*PCA No. 2012-2), UNCITRAL Award of 15 March 2016, para. 6.62, in which the Tribunal held that "*a human rights breach by the investor may taint the admissibility of its claim*".

[59] *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso* (ICSID Case No.ARB/97/1).

c. Include exclusion clauses and carve-outs relating to human rights.

Another recent practice consists in specifying in the investment treaty that the latter cannot apply to legislations adopted by the host State relating to the protection of human rights or the environment. This approach makes it possible to protect the regulatory space of the host State by allowing it to impose to investors present on its territory its human rights legislation, without the risk of facing arbitrations.

As an example, the China-Australia fair trade agreement specified that human rights issues covered by this treaty will never become arbitrable[60]:

> "*Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section*"[61].

However, in this specific case the wording of such a clause is not appropriate since it will most likely lead to the exclusion of the human rights area from investment disputes.

In some other treaties, the practice is rather to carve out human rights regulation from specific standards of treatment found in the treaty. For instance, the ASEAN - India Investment Agreement states that:

> "*Financial assistance or measures taken by a Party ... in pursuit of legitimate public purpose including the protection of health, safety, the environment' will not be considered as a violation of national treatment obligations*[62]."

Similarly, the Austria- Kyrgyzstan BIT provides that:

> "*Non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation*[63.] "

Most modern Canadian investment treaties exempt the host State from some of its investment treaty obligations in order to protect human, animal, plant life, health, public security, public morals or to maintain public order[64].

Usually, these clauses provide a solid basis for a state defence to arbitral claims brought against human rights related regulations. However, some scholars suggested broadening the general exclusion clauses to include other policy goals which might be invoked when justifying a deviation from the agreement[65].

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[60] Australia - China FTA (2015).
[61] *ibid*.
[62] Association of Southeast Asian Nations (ASEAN) - India Investment Agreement.
[63] Austria- Kyrgyzstan BIT (2016).
[64] Canada-European Union: Comprehensive Economic and Trade Agreement (2017); Canada-China BIT (2012).
[65] Markus Krajewski, '*Ensuring the primacy of human rights in trade and investment policy*', Study commissioned by CIDSE, March 3, 2017, p. 20.

d. Incorporate a supremacy clause to assert human rights supremacy over investment agreements obligations.

Last but not least, some scholars have advocated for a human rights supremacy clause, as a tool to resolve the growing tension between human rights obligations and investment agreements obligations. This clause could also define the relationship between human rights treaties on the one hand and investment agreements on the other by establishing a supremacy of human rights obligations over investment agreements. Thus, providing a stable, non-confrontational legal environment[66].

III. Reform proposal to ensure the compatibility of IIAs with international human rights obligations

In light of the above, we consider that all the following points should be taken into consideration when addressing reforms of IIAs:

1. Include a general exclusion clause (carve-out) which provides that domestic legislations enacted by the host State to protect human rights do not purport to be a breach of the treaty. Thus, States' regulatory powers to enforce its international human rights commitments are protected; and

2. Include direct binding international human rights obligations upon investors, which would include : (i) a customary negative obligation outlawing human rights violations; (ii) a due diligence standard arising from "United Nations Guiding Principles on Business and Human Rights", (iii) and investors' human rights obligations arising from host State domestic regulations and international commitments, which could be as follow:

> "*1. Investors have an international obligation not to violate human rights in the course of their activities and must adhere to the standard of due diligence to prevent future human rights violations.*
>
> *2. Investors must respect human rights obligations resulting from host State domestic laws and international commitments.*"

3. The above reforms should be completed with a broad arbitration clause apprehending the tribunal's jurisdiction based on investment activities (and not only limited to host State obligations); and

4. Incorporate a supremacy clause to assert human rights supremacy over investment agreement obligations.

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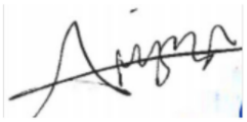
[66] *ibid*.

We would be delighted to expand on any of these issues and assist the Working Group if needed.

Respectfully,

Hélionor de Anzizu
Lawyer



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