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Att: Working Group on Business and Human Rights

Please find below some comments in response to the Working Group's open call for input for its report on "Human Rights-Compatible International Investment Agreements (IIAs)".

I hope this is of assistance to the Working Group's discussions, and wish to thank you for providing the opportunity to input into this process.

Best wishes,

Esmé Shirlow

State duty to protect human rights

Q7 Is the current Investor-State Dispute Settlement (ISDS) regime “fit for the purpose” to address complaints related to human rights abuses linked to investment projects? If not, what are the alternatives for a legitimate, transparent and effective dispute resolution system to address such complaints?

In a recent article,¹ I explore the potential for mediation to provide a supplementary or alternative mechanism to investor-State arbitration, including to address complaints related to human and community rights vis-à-vis investment projects. The different procedures associated with mediation may offer distinct advantages as compared to arbitration for the resolution of these types of disputes. For example: mediation can offer a potentially more holistic dispute settlement process than arbitration. Whereas investor-State arbitrations usually focus exclusively on the *rights* or *obligations* of the *disputing parties*, mediation may permit consideration of the rights or interests of third parties. For investor state disputes, such third parties may include: the investor’s subsidiaries, parent companies, sub-contractors, or creditors; local and other sub-national government actors; indigenous groups with rights over land or contracts implicated in the dispute; local communities that might be impacted by or who might benefit from the investment; end users of the investor’s goods or service; and/or the investor’s competitors or those with rights or interests that conflict with the investor’s. The interests based nature of mediation also means that it may generate better— or at least different— solutions compared to investor state arbitration.

However, as I explore in that article and in a recent book chapter,² a major drawback of investor-State mediation as currently designed is its typically non-transparent nature. Investor-State mediation rules tend to set confidentiality, rather than transparency, as a default. Nonetheless, there is scope to ensure that such procedures are designed with transparency (and local communities) in mind. There is also scope for mediation to be used in tandem with arbitration to enhance transparency in the latter form of dispute settlement. Disputes about the transparency of arbitral proceedings could, for example, themselves be referred to a mediator or conciliator to facilitate – or otherwise evaluate – decisions about whether certain third parties should be permitted to intervene as *amicus curiae*, or certain aspects of the proceedings opened to public view or participation.

Investors’ responsibility to respect human rights

Q9 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?

Treaty practice indicates an increasing “legalisation” of CSR obligations in investment treaties.³ Nevertheless, most States that include CSR obligations in investment treaties frame them in permissive language that will at most encourage – but not require – investors to respect certain human rights or principles relevant to responsible corporate conduct. Many such clauses are also directed towards the States party to the treaty, rather than the investor itself. Article 16 of the Hong Kong-Australia bilateral investment treaty (2019), for example, states:

The Parties affirm the importance of each Party encouraging enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.⁴

¹ See: Esmé Shirlow, ‘The Promises and Pitfalls of Investor-State Mediation’ (2021) *Yearbook on International Investment Law & Policy* 2019, 461-513 (can be provided on request).

² See: Esmé Shirlow, ‘Back into the Shadows? Public Participation in the Peaceful Settlement of Investment Disputes through Non-Arbitral Means’ in Avidan Kent, Eric de Brabandere and Tarcisio Gazzini (eds), *Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (Brill, 2021) (can be provided on request).

³ Rafael Peels, Elizabeth Echeverria M., Jonas Aissi, Anselm Schneider, Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and Workers, ILO Research Paper No. 13 (2016), p. 1

⁴ <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/Documents/a-hkfta-investment-agreement.pdf>

Such language is too permissive to result in a legal obligation on investors to make or operate their investment consistently with such standards. These treaty provisions nevertheless indicate the scope for future reforms to more expressly require an investor to comply with particular obligations in the conduct of its investment activities. There are some treaties that stipulate to this effect that investors *shall* uphold certain human rights in the host State.⁵

The Working Group may therefore wish to consider the advantages/disadvantages for States of framing such provisions as permissive, best efforts, clauses or rather as obligatory standards with enforceable consequences. To the extent that the latter approach is preferred, it would also be worth addressing what exactly the consequences of a failure to comply with these provisions would be. The consequences may arise either on a bilateral State-State basis, or as between the investor and State under the treaty. Consequences for an investor of a failure to comply with stipulated CSR or human rights obligations could include: a lack of protection under the treaty, including the inadmissibility of any investor-State arbitration claim under the treaty; the prospects for a State to file a counterclaim against an investor as part of an investor-State dispute settlement procedure; or the reduction in an investor's capacity to claim remedies for any breach that is established under the treaty.

A further topic the Working Group may wish to address is whether such clauses should refer to “internationally recognised human rights”, or rather to domestic law implementing internationally, regionally or domestically recognised human rights. International human rights will typically bind States party to a relevant treaty, rather than investors as such. There may therefore be a need to translate such rights to ensure that they apply, and are adapted to apply, to non-State actors like investors. There are several instruments to this effect which could be referred to by States in investment treaties.⁶ Domestically, investor-specific obligations might be imposed by both host and home States. Host States might elect to rely upon general domestic law to bind investors to particular standards of conduct, or might alternatively impose investor-specific obligations as part of an admission process. Home States might also seek to regulate the conduct of their nationals overseas.⁷ Canada, for example, has created an “Office of the Extractive Sector Corporate Social Responsibility Counsellor”.⁸ This Office has a review mechanism to mediate disputes between investors and any individual or group adversely impacted by a Canadian extractive sector company operating in a country other than Canada. There are also other ways, beyond investor-State arbitration, in which investors might be encouraged (or required) to comply with human rights. Many regional development banks, for example, require some degree of compliance with CSR policies by investors undertaking projects through bank financing.⁹

Q12 How could IIAs encourage cohesive and human rights-compatible business practices (e.g., investors not lobbying States to lower human rights standards)?

The approach taken in the Framework Convention on Tobacco Control may be one model for addressing lobbying by investors, or by investors in particular sectors (see, especially, *Guidelines for implementation of Article 5.3*). States may also negotiate treaty provisions to discourage any lowering of human rights (and environmental) standards in order to attract foreign investment. The Canada-Peru FTA,¹⁰ for example, provides as follows:

Article 809: Health, Safety and Environmental Measures: The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental

⁵ See, for example: Morocco-Nigeria BIT; South African Development Community Model BIT.

⁶ See, for example: UN “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights for Business” (2003); UN “Guiding Principles on Business and Human Rights” (2011)

⁷ Nicholas Wall, ‘Investment Arbitration and Corporate Social Responsibility in the Trans-Pacific Partnership’ (2016) 16 *Asper Review of International Business and Trade Law* 315, 319.

⁸ David Collins, ‘Alternative Dispute Resolution for Stakeholders in International Investment Law’ 28.

⁹ See, for example: Asian Development Bank: Policy on Indigenous Peoples (April 1998) and Safeguard Policy Statement (June 2009). See, also, African Development Group Bank, Integrated Safeguards System – Policy Statement and Operational Safeguards (2013); Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development; European Development Bank, Environmental and Social Policy (2008).

¹⁰ Available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/08.aspx?lang=eng>

measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Several other States have since adopted similar provisions in their treaties; I would be happy to provide the Working Group with a list of these should it be of assistance.

Access to remedy

Q15 Have counter-claims brought by States against investors been effective in addressing human rights abuses linked to their investment? If yes, please provide details.

To the extent that a State considers an investor to have breached an obligation – either under international or domestic law – the most significant possible consequence of that breach from the perspective of an investor-State claim under an investment treaty is a State-filed counterclaim. Both the UNCITRAL and ICSID arbitration rules provide for counterclaims in investor-State arbitration, provided that: (i) the counterclaim falls within the tribunal’s jurisdiction, and (ii) the counterclaim is closely or directly connected to the investor’s claim.

Some treaties expressly exclude the filing of specified counterclaims by States responding to investor-State arbitration proceedings.¹¹ Where a treaty does not expressly exclude a particular counterclaim, a tribunal will typically analyse its jurisdiction to hear that counterclaim by reference to the treaty’s dispute settlement clause. To leave scope for counterclaims, the offer of arbitration in the investment treaty must be worded such that it can be interpreted as contemplating the possibility of the *State* filing *claims* against the investor. A dispute settlement clause consenting to arbitration in relation to “all disputes arising out of an investment”, for example, might provide a stronger basis for a tribunal’s jurisdiction over a counterclaim¹² than one providing for arbitration of “claims by the investor that a measure taken or not taken by the host State is in breach of the treaty”.¹³ Host States must nevertheless be wary because broadly worded dispute settlement clauses also open avenues for expanded investor claims against the State. Moreover, even a broadly worded jurisdictional clause (e.g. “disputes related to an investment”) might not encompass all conceivable counterclaims. For example in *Biloune v Ghana*, a tribunal held it could not consider alleged human rights breaches against the investor because its jurisdiction was limited to *investment* disputes.¹⁴

Even if a tribunal has jurisdiction in principle over counterclaims, a second question arises as to whether it can determine the *specific* counterclaim filed by the State. This, again, depends upon the terms of the investment treaty. A tribunal with jurisdiction only over disputes “arising under the treaty”, for example, is likely to determine that its jurisdiction extends only to counterclaims based upon the terms of the treaty itself. This would preclude a host State from founding its counterclaim on alleged breaches of domestic law, except to the extent that such obligations are reflected in the treaty’s provisions. Where a treaty imposes obligations directly upon an investor, a State is unlikely to have much difficulty establishing the content of its counterclaim. As noted above, however, most investment treaties do not as yet impose direct obligations upon investors. As such, States are typically required to source investor obligations in other sources. In the *Urbaser* proceedings, for example, Argentina filed a counterclaim against an investor alleging that the investor had breached the human right to water by failing to invest

¹¹ North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (1992/1994) Article 1136.

¹² *Metal-Tech v. Uzbekistan* (2013), para. 410

¹³ *Rusoro v. Venezuela* (2016), para. 627

¹⁴ *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989.

sufficiently in water service provision.¹⁵ The tribunal noted that the investment treaty, like other investment treaties, was asymmetrical: it imposed obligations on the States and not the investor.¹⁶ The applicable law clause in the treaty, however, provided that investor-State disputes should be decided by the tribunal on the basis of the treaty and by reference to “general principles of international law”.¹⁷ The tribunal accepted that corporations might be subject to obligations under general international law, given recent developments in CSR practices under international law.¹⁸ It considered, however, that the human right to water had yet to develop to bind corporations, such that it entailed only State – not corporate – obligations.¹⁹ The counterclaim was rejected on this basis. A key difficulty for States wishing to file counterclaims therefore arises as a result of the asymmetrical nature of investment treaties.

To determine its jurisdiction over a counterclaim, the tribunal must also be satisfied that the obligation is owed by the investor itself. In *Sergei Paushok*, for example, a counterclaim based on the investor’s alleged non-compliance with domestic law was rejected by the tribunal on the basis that the applicable obligation was owed by the claimant’s subsidiary, not the claimant.²⁰ This may raise particular issues vis-à-vis human rights counterclaims and links to the above comments concerning the source of investor obligations. For example, to the extent that a relevant obligation is imposed through a domestic admission process on the foreign investor itself, these issues of privity are less likely to arise.

¹⁵ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016.

¹⁶ *ibid* 1182.

¹⁷ *ibid* 1188.

¹⁸ *ibid* 1194–1195.

¹⁹ *ibid* 1208.

²⁰ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 684