Response to the Working Group on Business and Human Rights' Call for Inputs: Extractive Sector, Just Transition, and Human Rights

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1 EXECUTIVE SUMMARY

This submission focuses on the compatibility of IIAs with a human right focused energy transition (i.e., a "just transition"). In doing so, we respond to questions 1, 5, 10, 15, 19 and 21.

An overarching issue with IIAs are their asymmetrical nature.[1] The rights and duties of each State party to the treaty are symmetrical; however, the outcome for each State party may be distorted by economic and political conditions within a particular State.[2] There is also an asymmetry in the substantive and procedural rights granted to investors vis-à-vis the State parties. Investors' rights include the right to treatment on a par with nationals (i.e., national treatment) and other foreign partners (i.e., MFN), FET, and freedom from expropriation without compensation. These investor rights are not, typically, accompanied by complementary investor obligations.

Investors further have the right to initiate the dispute settlement process against the host state, while the host state cannot bring an autonomous claim or counterclaim against the investor. Further, there is limited opportunities for public participation of affected communities who are non-disputing parties. The adverse effects of IIL and the ISDS system are particularly notable in the extractive sector[3] and certain geographical regions, such as Latin America.[4]

While being justified on the basis that FDI flows are inherently pro-development,[5] the "investors-rights" approach has limited the scope for States to regulate for a just transition.[6]

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[1] United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021)

[2] UNCTAD, *International Investment Agreements: Flexibility for Development* (Series Paper UNCTAD/ITE/IIT/18, 2000).

[3] Ella Merrill et al., *International Investment Law and the Extractive Industries* (Columbia Center on Sustainable Development Briefing 9, July 2022)

[4] Nazly Duarte Gomez and Daniel Rangel Jurado, 'New Directions in International Investment Law: Alternatives for Improvement' (Carola Policy Brief, Center for the Advancement of the Rule of Law in the Americas, Georgetown Law, 2021).

[5]United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021)

[6] United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021); UNCTAD, *International Investment Agreements: Flexibility for Development* (Series Paper UNCTAD/ITE/IIT/18, 2000); Suzanne A. Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements" (2010) 13(4) Journal of International Economic Law 1037; Andrew Newcombe, 'General Exceptions in International Investment Agreement' (Discussion Paper BIICL Eight Annual WTO Conference, London, May 2008)

Emerging empirical evidence has challenged the relationship between FDI and development outcomes.[7] These issues have catalysed a movement to reform IIL and ISDS. [8]

Our submission focuses on developments in preambular language, interpretive provisions, pre- and post-establishment screening, general exception clauses (substantive provisions), and participation and access to a remedy (dispute resolution provisions). These developments seek to rebalance the rights and obligations of foreign investors and the host states and empower states to regulate for a just transition.[9]

The response is intended to offer insights and information on the topic in question but is not intended to be a comprehensive or exhaustive discussion of all relevant points. While we have made every effort to provide a thorough response (within the limits of the Call for Inputs), there may be additional details or nuances to the subject that are not covered. Therefore, we welcome any request for clarification from the Working Group on Business and Human Rights.

[7] United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021). For a literature review see, Xueli Wan, "A Literature Review on the Relationship between Foreign Direct Investment and Economic Growth (2010) 3(1) *International Business Research* 52.

[8] For a first comprehensive overview of the criticism of the ISDS system, see Michael Waibel et al. (eds), *The Backlash against Investment Arbitration*, (Kluwer Law International 2010). Since its publication, several states, such as Venezuela, Bolivia, and South America, withdrew from the ICSID Convention. The ISDS system has been subject to criticism from the civil society organizations, the media, and the policy makers. See e.g., Claire Provost and Matt Kennard, 'The obscure legal system that lets corporations sue countries' *The Guardian* (London, 10 June 2015). Other examples happen in different regions: for example, in relation to the failure of the Energy Charter Treaty (ECT), the EU Commission announced the call for a coordinated withdrawal process after several member states announced their intention to withdraw from the ECT. In the US, there is equally growing concern, with most recently members of the Congress urging a ban of ISDS and in the interim requesting Secretary of State Antony Blinken and Trade Representative Katherine Tai to intervene in a dispute against Honduras. See details at David Lawder, '33 Democrats urge ban on investor-state dispute provisions in all US trade deal' Reuters (3 May 2023) <https://www.reuters.com/business/33-democrats-urge-ban-investor-state-dispute-provisions-all-us-trade-deals-2023-05-03/> accessed 13 May 2023.

[9] See, for example, UNCTAD *International Investment Agreements Reform Accelerator*, (UNCTAD/DIAE/PCB/INF/2020/8, 2020).

2 ABBREVIATIONS

Agreement on Trade-Related Investment Measures	TRIMs
Arbitration Institute of the Stockholm Chamber of Commerce	SCC
Arbitration Rules of the SCC Arbitration Institute 2023	SCC Rules
Bilateral Investment Treaty	BIT
Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention
Energy Charter Treaty	ECT
European Union	EU
Fair and Equitable Treatment	FET
Foreign Direct Investment	FDI
ICC Rules of Arbitration 2022	ICC Rules
ICSID Arbitration Rules 2021	ICSID Rules
International Centre for Settlement of Investment Disputes	ICSID
International Chamber of Commerce	ICC
International Investment Agreement	IIA
International Investment Law	IIL
Investor-State Dispute Settlement (ISDS)	ISDS
Most Favoured Nation Status	MFN
OECD Guidelines for Multinational Enterprises	OECD Guidelines

Performance Requirements	PR
UN Conference on Trade and Development	UNCTAD
UN Guiding Principles on Business and Human Rights	UN Guiding Principles or UNGP
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules
UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration 2014	UNCITRAL Transparency Rules
United Nations	UN
United Nations Commission on International Trade Law	UNCITRAL

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Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi, ICSID Case No. ARB/01/2	*Goetz v Burundi*
Bear Creek Mining Corporation v Republic of Peru, ICSID Case No. ARB/14/21	*Bear Creek v Peru*
Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15	*Pezold v Zimbabve* or *Pezold*
Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22	*Biwater v Tanzania* or *Biwater*
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Republic of Argentina, ICSID Case No. ARB/97/3	*Vivendi v Argentina* or *Vivendi*
Eco Oro Minerals Corp. v Republic of Colombia, ICSID Case No. ARB/16/41	*Eco Oro v Colombia* or *Eco Oro*
Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24	*Hamester v Ghana*

Methanex Corp. v United States of America	*Methanex v USA* or *Methanex*
Odyssey Marine Exploration, Inc. v United Mexican States, ICSID Case No. UNCT/20/1	*Odyssey v Mexico* or *Odyssey*
Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No. ARB/09/12	*Pac Rim v Salvador* or *Pac Rim*
Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6	*Perenco v Ecuador* or *Perenco*
Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26	*Urabaser v Argentina* or *Urabaser*

3 RESPONSE

3.1 Preambular Language

While non-binding the preamble expresses the general intentions and objectives of the parties, and will be used to interpret the substantive provisions of the treaty.[10] The majority of IIAs express their objective as to create favourable conditions for investors.[11] Where such preambular language is used, exceptions are likely to be narrowly interpreted, leaving states with a narrow margin of appreciation when regulating economic activities in the public interest. However, preambular language may be used to enshrine other objectives within the treaty, including a commitment to human rights, responsible business conduct, and sustainable development. An express reference to a just transition in the preamble may open up policy space for human rights-compatible energy transition laws and policies that ensure responsible business conduct.

However, due to inconsistent interpretation methods in ISDS, there is no guarantee that tribunals will follow the systemic interpretation that links the goals expressed in the preamble with the broader framework for international human rights, sustainable development, and just transition. The preambular language should be accompanied by complementary substantiative provisions, and an applicable law clause to ensure consistent interpretation with the treaty parties' intentions.

3.2 Interpretive provisions

Contracting Parties can indicate their intent to promote a just transition by incorporating objectives article into their IIAs. In the absence of such clauses, it is likely that the de facto starting position of an arbitral tribunal will be to adopt the investor-rights context.[12]

Definitions and scope of coverage provisions which delineate the types of investments that fall under the agreement's protection can further set the interpretive context. Most IIAs opt for a broad, inclusive definition of "investment" which is then subject to limitations or exclusions.[13] However, the definitions clause could exclude investments in the extractive sector or set pre-establishment requirements necessary for an investment to qualify for protection. Given

[10] Vienna Convention on the Law of Treaties (1969) United Nations Treaty Series 1155, 331.

[11] Commonwealth Secretariat, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (August 2012), <https://www.iisd.org/system/files/meterial/6th_annual_forum_commonwealth_guide.pdf> accessed 9 May 2023.

[12] Mann et al, *The IISD Model International Agreement on Sustainable Development: Negotiators' Handbook* (2nd edn, International Institute for Development. 2006).

[13] UNCTAD, *International Investment Agreements: Flexibility for Development* (Series Paper UNCTAD/ITE/IIT/18, 2000).

emerging evidence that *initial conditions*,[14] *type* and *entry mode*[15] of FDI are determinative of the impact of the investment on development outcomes, these provisions may be crucial for countries seeking to align IIAs with a just transition.

3.3 Pre- and post-establishment treatment

Broadly understood, pre-establishment screening methods are scrutiny and approval processes that foreign investors need to complete prior to entry.[16] Pre-establishment screening could be an important regulatory tool for managing investments in the extractive sector.

Typically, states reserve a right to exercise control over admission and establishment in accordance with the state's laws and regulations.

States may extend national treatment or MFN status to pre-establishment conditions. This would significantly limit the host country's discretion with regards to the entry of foreign investors.[17] Pre-establishment requirements should, at a minimum, comply with the principles for responsible investment contracting.[18]

The states should not be precluded from imposing pre-establishment requirements that have ex post effects, even where those effects impose greater obligations on foreign than domestic investors. There have also been calls for explicit inclusion of environmental screening requirements in IIAs.[19] States would be well advised to establish effective EIA processes. An EIA process may also require investors to include a management and remediation systems in

[14] Eduardo Borensztein et al., "How Does Foreign Direct Investment Affect Economic Growth?" (1998) 45(1) Journal of international Economics 115; Laura Alfaro et al, "FDI and Economic Growth: the Role of Local Financial Markets" (2004) 64(1) Journal of International Economics 89; Lisbeth Colen, Miet Maertens and Johan Swinnen, "Determinants of Foreign Direct Investment Flows in Developing Countries: The Role of International Investment Agreements" in Oliver De Schutter et al eds *Foreign Direct Investment and Human Development : The Law and Economics of International Investment Agreements* (Taylor & Francis Group, 2012); Omar M. Al Nasser, "How Does Foreign Direct Investment Affect Economic Growth? The Role of Local Conditions" (2010) 11(2) Latin American Business Review 111.

[15] Lisbeth Colen, Miet Maertens and Johan Swinnen, "Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence" in Oliver De Schutter et al (eds) *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Taylor & Francis Group, 2012); Andrew Sumner "Is Foreign Direct Investment Good for the Poor? A Review and Stocktake" (2005) 15(3) Development in Practice 269; Nuno Crespo and Maria Paula Fontoura, "Determinant Factors of FDI Spillovers – What Do We Really Know?" (2007) 35(3) World Development 410.

[16] Voon and Merriman, "Incoming: How International Investment Law Constrains Foreign Investment Screening" (2023) 24 *Journal of World Investment and Trade* 75, 76. Pre-establishment screening methods are increasingly used in the context of mergers and acquisitions and within sensitive or strategic sectors such as technology.

[17] UNCTAD, *International Investment Agreements: Flexibility for Development* (Series Paper UNCTAD/ITE/IIT/18, 2000) 100.

[18] UN Office of the High Commissioner for Human Rights, *Principles for Responsible Contracts: Integrating Management of Human Rights Risks into State-Investor Contract Negotiations* (United Nations Publication HR/PUB/15/1, 2015).

[19] Mann et al, *The IISD Model International Agreement on Sustainable Development: Negotiators' Handbook* (2nd edn, International Institute for Development. 2006).

their investment strategy, resulting in welcome post-establishment effects. The Morocco-Nigeria BIT (2016) is particularly innovative in this regard.

At the post establishment phase, it is possible, albeit uncommon, to include exceptions to the standard of national treatment or MFN.[20]

States could implement, in the treaty language, substantive obligations on the investor in line with UNGP 11-13. For example, the provisions could define the investors obligation as "not to engage in investment activities that will infringe on human rights" or incorporate a reference to international human rights as the substantive scope of the investors' obligation. This would provide an applicable law framework for the tribunal to apply, constraining the tribunal's discretion when deciding these issues.

Any damage arising from non-compliance with post-establishment requirements should be actionable in either the host or home state at the claimant's discretion. This can be achieved through an "investor liability clause".[21]

3.4 Performance Requirements

Pre- and post-establishment treatment may constitute actions short of PRs. PRs are "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country."[22] PRs may include requirements to: prioritise use of local workers, goods and services, ensure technology, knowledge and skills transfer, invest in research and development, or to achieve other environmental or social outcomes.[23]

States infrequently use PRs in IIAs; their absence may leave scope for PRs subject to existing agreements, FET, national treatment, and MFN. IIAs may incorporate TRIMs rules which prohibits performance related measures relating to local content and trade balancing requirements.[24] Where we see mention of PRs, it is typically a prohibition on PRs (TRIMs+ obligations). These prohibition clauses may include limited exceptions where the measure pursues a legitimate public policy objective that does not constitute arbitrary or unjustifiable discrimination.[25] They may also remove particular PRs that are of strategic importance from the purview of ISDS.[26]

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[20] Article 9 Morocco Model BIT (2019).

[21] Morocco-Nigeria BIT (2016).

[22] UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (UNCTAD/ITE/IIA/2003/7, 2003) 2.

[23] Suzy H Nikièma, *Performance Requirements in Investment Treaties* (International Institute for Sustainable Development Best Practice Series, December 2014).

[24] For example, see Article 140 New Zealand-China FTA (2008).

[25] Article 12 Canadian Model FIPA (2021).

[26] Tae Jung Park, *Incomplete International Investment Agreements: Problems, Causes and Solutions* (Edward Elgar 2021). Park observes that the South Korea-Turkey BIT (2015) included a prohibition on PR, but only made certain provisions of the article subject to ISDS mechanism. This reflected a protracted negotiation on the policy space for particular export subsidy programs planned by Turkey.

Where there is a clause governing investors' conduct, States often opt for a less *prescriptive* approach requiring investors to *endeavour* to manage their investment in compliance with international obligations or standards on human rights, responsible business conduct, and environmental protection. For example, The Netherlands Model BIT (2019)[27] and the Morocco Model BIT (2019)[28] make failure to comply with these standards a consideration when determining compensation. However, to ensure full effectiveness of these clauses, especially coupled with any counterclaim, a more prescriptive approach is advisable.

3.5 General exception clauses and smart flexibility clauses

General exception clauses determine the bounds of legitimate action a state may take in the public interest.[29] "Purpose restricted" exception clauses define the scope of legitimate action. However, it is possible to include a less prescriptive exception clause with reference to legitimate social and economic policy objectives.[30] Exception clauses are not uncommon. Less common is the explicit inclusion of climate action, sustainable development, labour rights, gender equality, and indigenous rights.[31]

Even with the inclusion of general exception clauses, there is a possibility that tribunals may interpret these clauses restrictively.[32] There is an ongoing issue with determining the level of ex ante specificity required to reduce recourse to arbitration[33] and the need to maintain *ex post* regulatory flexibility to address emerging policy objectives.

Smart flexibility clauses may determine, in advance of a dispute, the scope of review ISDS tribunals must follow; and carve out greater regulatory flexibility for states to legislate for a

[27] see Article 23.

[28] see Article 20.

[29] UNCTAD, *International Investment Agreements: Flexibility for Development* (Series Paper UNCTAD/ITE/IIT/18, 2000).

[30] Article 23 of the 2016 Morocco-Nigeria BIT likewise provides that the host State may take regulatory measures to ensure sustainable development and *other legitimate social and economic policy objectives.* Furthermore Article 23(2) provides that "non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

[31] United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021). See, however, Article 3 of Canadian Model FIPA (2021) which reaffirms "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." See also Article 2(2) of The Netherlands Model BIT (2019). Kathryn Gordon, and Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD Working Papers on International Investment No. 2011/1, 2011) 5. Gordon and Pohl estimated that only 8.2% of IIAs included reference to environmental concerns, although this was increasing over time.

[32] See e.g., decisions in *Bear Creek v Peru* and *Eco Oro v Colombia*. Robert Garden, "Eco Oro v Colombia: The Brave New World of Environmental Exceptions" (2023) 38 *ICSID Review - Foreign Investment Law Journal*, 17; J. Benton Heath, 'Eco Oro and the twilight of policy exceptionalism' (2021) *Investment Treaty News*, <https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/> accessed 10 May 2023.

[33] The threat of arbitration may be sufficient to produce a "regulatory chill", see Jane Kelsey, "Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law" (2017) 17(2) QUT Law Review 21.

just transition. Options for smart flexibility clauses include a *good faith* review standard that focuses on whether the action taken was "honest, fair, and reasonable" or whether the measure was taken in the public interest and was non-discriminatory.[34] Alternatively, a proportionality review would be satisfied where "the measure is 'suitable to achieve the goal' and 'does not cause disproportionate impact on the investor.'"[35]

3.6 Accountability and Access to a Remedy

Host states' and affected communities' capacity to hold investors to account in the context of just transition and human rights are limited to: (i) the host states' right to counterclaim against the investor for breach of obligation, and (ii) a non-disputing party's (NDP) participation in the proceedings as amicus curiae (i.e., friend of the court).

Tribunals maintain a broad discretion in deciding admittance of a counterclaim or NDP, which has led to conflicting decisions, a lack of predictability, and the erosion of public trust in the ISDS system. We highlight the main challenges for effective implementation of these procedural tools. We offer recommendations to reform the ISDS system to be more transparent, independent, and accessible for all relevant stakeholders.[36]

3.6.1 Non-Disputing Parties Participation

Public participation is central to environmental governance, responsible business conduct and the sustainable development agenda.[37] As an NDP, affected communities can only participate in ISDS as an amicus curiae.[38] Specifically, NDPs can apply for a leave to file an amicus curiae brief, the right to access the documents, and to attend the main hearing.[39] While, it is generally

[34] Aniruddha Rajput, "Climate Justice and the Greening of Investment Arbitration" (2023) 52 Netherlands Yearbook of International Law 161, 177. However, further guidance on the precise meaning of these terms would be required to ensure the contemplated scope of review was applied in ISDS.

[35] Aniruddha Rajput, "Climate Justice and the Greening of Investment Arbitration" (2023) 52 Netherlands Yearbook of International Law 161, 183.

[36] United Nations General Assembly, *Human Rights-Compatible International Investment Agreements* (Working Group Report A/76/238, 2021), para 76, pt (l), (27 July 2021).

[37] SDGs 5, 10, and 16 together focus on participation of vulnerable groups, such as women (SDG target 5.5), developing countries, including African countries, least developed countries, land-locked developing countries, small-island developing States and middle-income countries (SDG target 10.6) to the decision-making process. SDG target 16.7 aims to "Ensure responsive, inclusive, participatory and representative decision-making at all levels".

[38] ICSID Arbitration Rules, Rule 67, the UNCITRAL Transparency Rules, and other investment arbitration specific rules, allow the non-disputing parties to file a leave to participate in the proceedings as amicus curiae. A small number of BITs also contains the rules on amicus curiae participation. A study of cases covering the period from 2000 - 2018, revealed that 16 cases filed for amicus curiae leave, out of which 11 granted, and in 7 the amicus brief affected the case. See Nicolette Butler, "Non-Disputing Party Participation in ICSID Disputes: Faux Amici?" (2019) 66 Netherlands International Law Review 143. Our study of the cases available at ICSID official website show that from 2018 – to 2022, NDPs (individuals, NGOs, and EU), filed a request for leave in 13 cases, out of which 5 granted, and the rest denied.

[39] An interesting example of the different outcomes is a study of Centre for International Law's (CIEL) application for amicus curiae in five cases with similar factual scenarios: *Methanex*, *Vivendi*, *Biwater*, *Pac Rim*, *Eco Oro*, *Odyssey*. Except in *Eco Oro* where the tribunal confirmed that applicants have a right to attend the public hearing,

recognized that amicus curiae contribute to the fairness, equality, transparency, and accountability of ISDS, there are several limits that impede the effective participation of affected communities, especially in the context of extractive industry disputes and just energy transition.[40]

Procedural rules limit NDP participation based on their profile, expertise, and proximity to the dispute, and how these factors may assist the tribunal in determining the dispute between the investor and the host State. [41] Further, to protect the disputing parties' confidentiality, consent, and transparency, the institutional rules, such as ICSID Rules, UNCITRAL Rules, SCC Rules, and ISDS practice allow the disputing parties to deny their consent for NDP participation.[42] Tribunals also consider if NDP participation will disrupt or delay the proceedings or prejudice the parties.[43]

Lastly, even where NDP have been permitted to file an amicus curiae brief, its impact on the decision making of the tribunals is inconsistent.[44] The NDP will usually not have access to the parties' submission and generally echo the same arguments as the host state.[45] Overall, the application of the relevant rules in practice impedes the potential of public participation to remedy some of the asymmetries between the investors and the host states in ISDS.[46]

States have an opportunity to proactively design a holistic system for public participation in their IIAs that captures the pre-dispute stage – through Social License to Operate – and the dispute stage – through NDP participation as amicus curiae.

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in all other cases (including *Eco Oro*), the tribunals denied the applicants' request to obtain access to the documents and to access the hearing, primarily due to the objection of the claimants in the respective proceedings. In three cases – *Vivendi, Biwater, and Pac Rim* – the tribunals granted the applicants right to file an *amicus curiae* brief but engaged with the briefs differently in the final decision. In two cases – *Eco Oro* and *Odyssey* – the tribunals denied the applicants' request to file *amicus curiae* briefs. While the tribunal reached the decision in *Eco Oro* unanimously, in *Odyssey* it was a majority, with Professor Sands dissenting.

[40] The benefits of the amicus curiae were recognized first in *Methanex* and later affirmed in *Vivendi* and *Biwater.*

[41] ICSID Arbitration Rules, Rule 64; UNCITRAL Transparency Rules, Art 4; and SCC Rules, Appendix III, Art 3.

[42] See e.g., ICSID Arbitration Rules 2022, Rule 62, 64, 65, and 66.

[43] Nicola Sharman, "Objectives of Public Participation in International Environmental Decision-Making" (2023) 72 International & Comparative Law Quarterly 333, 336.

[44] In relation to amicus curiae, an interesting study conducted in 2019 classified two possible types of impact: direct – where an ISDS tribunal accepted and referenced the amicus curiae brief in their decision – and indirect – where the tribunals accepted the amicus curiae participation, did not reference it, but the decision indicates they did consider it indirectly. An example of a direct impact would be *Biwater; in Vivendi the tribunal accepted the amicus curiae but did not engage with it in the decision*. See further Butler (n. 44), 150.

[45] See e.g., *Odyssey v. Mexico*, Procedural Order 6, para. 23; *Pezold v Zimbabve*, Procedural Order 2. For a commentary on the case, see e.g., Christian Schliemann, "Requirements for Amicus Curiae Participation in International Investment Arbitration A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15" (2013) 12 The Law and Practice of International Courts and Tribunals 365.

[46] See Sherman (n. 48) 337, 338 on the consequences of conflict on the principal objective of public participation that led to scepticism and frustration, which does not necessarily reflect the perceived quality of the participation, but a "more fundamental lack of shared understandings and attitudes towards what it is supposed to achieve."

Concerning amicus curiae, states can decrease the requirement of disputing parties' consent on NDP participation, especially in relation to access to documents and hearings. Improved access to information for NDPs would increase transparency. Notable examples that have taken a similar approach include Colombia Model BIT (2017)[47] South African Development Community Model BIT (2012)[48] and The Netherlands Model BIT (2019).[49]

In addition, states can adopt interpretive guidelines to reflect a broader interpretation of the relationship between the investment and the public interest. Instead of giving the tribunal a broad discretion whether to accept NDP application, the interpretive guidelines could require the tribunal to carefully consider, based on the explicit treaty language, if the circumstances are exceptional to justify *refusal* of the application.

Further NDP provisions could be linked with pre-establishment provisions. States could require investors to obtain a social license to operate, identify and engage with affected communities and a broad range of stakeholders, further granting them *prima facie* right to intervene as NDP in case of a dispute. This is a stronger framework toward effective NDP participation.

Designing the rules for public participation in IIAs, through ISDS clauses, is a direct reflection of the UNGP 9, 25, and 31. It further aligns with the values set out in the UN 2030 Agenda, specifically, SDGs 5, 10, and 16. Public participation through IIAs in this way would avoid some of the challenges around public participation in international environmental law[50] as it would allow an inclusive participation of the affected communities reflecting their development goals in their unique socio-economic, cultural, and legal structures.

3.6.2 Host States' Right to Counterclaim

Institutional arbitration rules generally envisage a possibility for states to counterclaim.[51] However, due to the asymmetrical nature of IIAs, issues arise relating to jurisdiction and applicable law to the counterclaim. Because a counterclaim is an autonomous claim - although linked with the main claim - it does not have a procedural or substantive anchor in the IIA. The tribunal has to independently assess if it has jurisdiction over the counterclaim, and then, determine the applicable law to the claim.

The practice of counterclaims, especially in the context of environmental protection and human rights, is far from widespread and uniform among ISDS tribunals. Tribunals have demonstrated an inconsistent interpretation of the applicable dispute resolution clauses, even when these clauses contain the same or similar language.[52] Even if the tribunal accepts jurisdiction and

[47] Colombian Model BIT (2017) does not number the proposed provisions; the relevant parts stipulate that tribunal may invite amicus submissions, with consultation with the parties (but not consent); the tribunal shall accept the amicus submissions on the interpretation of the agreement.

[48] SADC Model BIT (2012), Arts 29.15. (tribunal's authority), 29.17 (transparency), and Schedule 4 (procedure).

[49] The Netherlands Model BIT (2019), Art 13 (stipulating that "UNCITRAL Transparency Rules" shall apply).

[50] See Sherman (n. 48) 337, 338.

[51] ICSID Arbitration Rules, Rule 48; UNCITRAL Arbitration Rules, Art 22, SCC Arbitration Rules, Art 9.

[52] Compare *Hamester v. Ghana*, and *Goetz v. Burundi*. For a detailed analysis see Arnaud de Nanteuil, "Counterclaims in Investment Arbitration: Old Questions, New Answers" (2018) 17 Law and Practice

admits a counterclaim, the question of its success on the merits is still unresolved as it concerns the question of liability of investors – as private entities – for the violation of human rights.[53]

We are aware of instances where states succeed with their counterclaims,[54] and, in some instances, influenced the outcome of the decision on damages.[55] However, these are exceptional situations based on the wording of the applicable treaties and the tribunals openness to an innovative interpretative approach.

As a result of these challenges (and other issues around "crisis of legitimacy" of investor-state arbitration), some authors have suggested replacing ISDS with either a multilateral investment court or the domestic system. Some states have taken a similar path by withdrawing from ICSID Convention (and more recently, the Energy Charter Treaty), incorporating State-to-State dispute resolution options, or incorporating a more robust system of investment screening.[56] However, others have argued, instead for reform of IIL and ISDS.

SADC Model BIT (2012)[57] and Morocco Model BIT (2019)[58] explicitly recognize states' right to counterclaim. The Netherlands Model BIT (2019) and Colombia Model BIT (2017) do not make such an explicit recognition, however, they do set out less prescriptive investor obligations.[59] In the absence of a specific provision recognizing states' right to counterclaim, there is no certainty that tribunals will accept it, even if the treaty imposes substantive obligations for the investor. Thus, to ensure predictability and harness the full potential of the IIL, the right to counterclaim should be an essential part of an ISDS clauses, coupled with specific investor obligations.

International Courts and Tribunals 374, 378-379. Anne K. Hoffmann, "Counterclaims", in Meg Kinnear et al (eds.), *Building International Investment Law. The First 5o Years of ICSID* (Wolters Kluwer, 2006), 505. Andrea Marco Steingruber, "Antoine Goetz and others v Republic of Burundi: Consent and Arbitral Tribunal "Competence to Hear Counterclaims in Treaty-based ICSID Arbitrations" (2013) 28 *ICSID Review - Foreign Investment Law Journal* 291–300.

[53] From significant literature on these issues, see e.g., Shahrizal M. Zin, "Reappraising Access to Justice in ISDS: A Critical Review on State Recourse to Counterclaim", in Alan M. Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International 2020), 225.

[54] *Urabaser v Argentina*.

[55] *Perenco v Ecuador*.

[56] See n. 8.

[57] SADC Model BIT (2012), Art 19.2.

[58] Morocco Model BIT (2019), Art 28.4 (a host state may submit a counterclaim where the investor has not complied with its obligations, such as the obligations to comply with domestic laws and not to engage in corruption).

[59] Colombia Model BIT (2017) stipulates a clause on Investor's Corporate Responsibility and a provision on Disputes and Claims raised by the Host State; The Netherlands Model BIT (2019), Art 7 (Corporate Social Responsibility) (prescribe investor obligation to comply with the relevant domestic laws and regulations, and their liability for loss of life and environment in the host state; affirms the treaty parties' commitment to UN Guiding Principles and OECD Guidelines).