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# Business Responsibilities and Investment Treaties

OECD Public Consultation – Jan-Feb. 2020

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## Compilation of Comments Received

Draft as of 15 May 2020

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Investment Division, Directorate for Financial and Enterprise Affairs  
Organisation for Economic Co-operation and Development  
Paris, France



## Context

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This document is a compilation of responses received to date in response to a public consultation in January-February 2020 on an OECD Secretariat [paper](#) on Business responsibilities and investment treaties. [<https://oe.cd/BR-consult>] The consultation paper and comments received to date have been made available on the OECD website in order to foster informed debate. They will form part of the material for discussion at the [OECD Investment Treaty Conference](#) on Business responsibilities and investment treaties. [<https://oe.cd/BR-conf>] They will also be considered by governments and others at the OECD in further work on Business responsibilities and investment treaties.

The OECD Investment Committee has hosted an intergovernmental Roundtable since 2006 that brings together over 60 OECD, G20 and other governments from around the world to exchange information and experiences on investment policies.<sup>1</sup> Government participants in the Roundtable, which is known as the Freedom of Investment (FOI) Roundtable, have been considering [investment treaty policy](#) at [regular meetings](#) since 2011.

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## Contact

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David Gaukrodger, Senior Legal Adviser, Investment Division  
([david.gaukrodger@oecd.org](mailto:david.gaukrodger@oecd.org) ; +33 1 4524 1848)

Baxter Roberts, Policy Analyst, Investment Division  
([baxter.roberts@oecd.org](mailto:baxter.roberts@oecd.org) ; +33 1 4524 1427)

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<sup>1</sup> Economies invited to the Roundtable include: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, and the European Union.

## *Table of Contents*

<b>1. Comments received to date.....</b>	<b>5</b>
1.1. Russia-OECD Center of the Russian Presidential Academy of National Economy and Public Administration (RANEPA) .....	5
1.2. Martijn Scheltema (Partner, Pels Rijcken & Droogleever Fortuijn N.V., The Hague, The Netherlands; co-chair, Academic Friends of the OECD Guidelines network) .....	7
1.3. Lorenzo Cotula (Principal Researcher, Law and Sustainable Development, International Institute for Environment and Development (IIED), Edinburgh, United Kingdom) .....	7
1.4. Lucia van Westerlaak (Policy Advisor, on behalf of the Netherlands Trade Union Confederation) .....	11
1.5. Thomas Kentsch (Siemens Operations, Supply Chain Management, Standards, Munich, Germany).....	13
1.6. Christian Bellak (Associate Professor, Vienna University of Economics and Business, Vienna, Austria).....	14
1.7. Confederación sindical de comisiones obreras (CCOO) (Spanish Trade Unions Organisation).....	15
1.8. Yılmaz Argüden (Chairman of Trustees, on behalf of Argüden Governance Academy) .....	17
1.9. Peter Muchlinski (Emeritus Professor of International Commercial Law, The School of Oriental and African Studies (SOAS), University of London) .....	18
1.10. Lene Wendland (Chief, Business and Human Rights, Development and Social and Economic Issues Branch, on behalf of the Office of the United Nations High Commissioner for Human Rights) .....	36
1.11. Manjiao CHI (Professor and Founding Director, Center for International Economic Law and Policy (CIELP), Law School, University of International Business and Economics (UIBE), China).....	37
1.12. Jan Eijsbouts (Professor, Institute for Corporate Law, Governance and Innovation Policies Faculty of Law, Maastricht University).....	38
1.13. Ruth Bergan (Senior Advisor, on behalf of Trade Justice Movement).....	40
1.14. Edward Guntrip (Senior Lecturer in International Law, Sussex Law School, University of Sussex).....	47
1.15. Nisawan Pitchdumrong (Thailand).....	50
1.16. Nontihès Koné (Coordinator of the Human Rights Violations Observatory, Association for the Protection of Human Rights, Ivory Coast) .....	50
1.17. Yulia Levashova (Assistant Professor, Nyenrode Business University; Associate Research Fellow, Utrecht University) .....	51

---

1.18. Margarita Pirovska (Head of Fiduciary Duty in the 21st Century, on behalf of Principles for Responsible Investment) .....	54
1.19. Andrea Shemberg and Andrea Saldarriaga (SILA, Business & Human Rights Advisory) .....	60
1.20. Jose Daniel Amado (Lima, Peru); Jackson Shaw Kern (Washington, DC and Addis Ababa, Ethiopia); Martin Doe Rodriguez (The Hague, Netherlands).....	65
1.21. Trade Union Advisory Committee to the OECD (TUAC) .....	67
1.22. Paul Bagust (Global Property Standards Director, Royal Institution of Chartered Surveyors) .....	71
1.23. Business at OECD (BIAC) .....	73
1.24. Martins Paporinskis (Reader in Public International Law, UCL Faculty of Laws, University College London).....	77
1.25. Eric Teynier, Pierre Pic, Arianna Rafiq (Teynier Pic).....	79
1.26. Gaelle Dusepulchre (Permanent representative to the EU, on behalf of International Federation for Human Rights).....	82
1.27. Michela Cocchi (Founder and CEO, Lady Lawyer Foundation).....	88
1.28. Marc Proksch (Chief, Investment and Enterprise Development Trade, Investment and Innovation Division, on behalf of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)).....	92
1.29. Matthew Stephenson (Policy and Community Lead, International Trade & Investment, on behalf of the World Economic Forum) .....	94
1.30. Brooke Güven and Jesse Coleman (on behalf of the Columbia Center on Sustainable Investment).....	95
1.31. Gisèle Stephens-Chu and Amanda Neil (Freshfields Bruckhaus Deringer LLP, Paris and Vienna).....	106
1.32. Robert Howse (Professor of International Law, New York University Law School) .....	109
1.33. Raymond Saner (Director of Diplomacy Dialogue, Centre for Socio-Economic Development (CSEND), Geneva; co-chair, Academic Friends of the OECD Guidelines network).....	110

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## 1. Comments received to date

### 1.1. Russia-OECD Center of the Russian Presidential Academy of National Economy and Public Administration (RANEPA)

**1. The concept of responsible business conduct should be integrated into investment agreements in its entirety.** The issue of responsible investment should not be limited to certain aspects of responsible behavior (for example, only to human rights, or environment). It is necessary to follow a holistic approach to responsible investment. It is embodied in the concept of responsible business conduct, which covers 11 different areas set in the OECD Guidelines for multinational enterprises (human rights, employment relations, environment, taxation, competition, anti-corruption, etc.).

**2. Standards for responsible business conduct designed for every single area or industry should be directly fixed in the text of investment agreements.** The expression of commitment of Contracting parties to the OECD Guidelines for multinational enterprises is a positive step, but it cannot be sufficient. Investment agreements should include references to international standards and best practices, implementation of which will confirm that investors comply with standards of responsible conduct. For instance, by compliance with the standards of responsible conduct in the area of anti-corruption, investors can be guided by international documents such as the OECD Anticorruption Ethics and Compliance Handbook for Business, ICC Rules on Combating Corruption, Global Principles for Countering corruption («PACI principles»), etc. Investment agreements should include references to sectoral standards, which are elaborated by the OECD and other international organizations for the mining industry, conflict minerals, financial markets, agriculture, garment, etc. Relevant provisions can be introduced into international investment agreements in different ways, including a separate article on responsible business conduct.

**3. National contact points should be included in dispute settlement provisions of investment agreements.** Investment disputes are traditionally divided into two types: disputes between States and disputes between investor and State (so-called "diagonal" disputes). In light of the growing initiative of civil society and public organizations in global governance, a legal framework should also be created for resolving disputes between society and investor. The well-trying mechanism of National contact points (NPCs), established under the OECD Guidelines for multinational enterprises, could serve as an institutional framework for this type of disputes. Thereby States would reiterate their commitment to these Guidelines; raise awareness among investors and the public about the work and capabilities of the NPCs; promote the work of the NPCs. Since the NPC is not a judicial body, its decisions do not have binding legal force; they serve as a platform for dialogue between the investor and the society, but it can also perform the notification function on existing problems in the world. Thuswise, the provision on NPCs in investment agreements will facilitate transparency of investment activities and remove tensions between the investor and the society, whereas the judicial process usually aggravates controversial situations.

**4. Investment agreements may contain separate provisions on the most sensitive issues.** Some issues can be characterized as "urgent" or "sensitive" in relation with foreign investment. Those include environment, labor protection, human rights. The fight against

corruption ranks among sensitive issues, as the consequences of corruption are strongly felt in the above-mentioned spheres. Therefore, the Contracting parties should confirm their commitment to international obligations and recognized international standards, principles of sustainable development, human rights, environment, labor protection, and the fight against corruption within their investment agreements. Besides declarative points, the following wording will be more effective: “the parties recognize unacceptable any investment promotion that leads to weakening of the following standards” and further – “the parties shall ensure that their actions do not allow any deviation from the regulation of these issues and their enforcement in favor of the establishment, acquisition, expansion or retention of investments in their territory”. It’s recommended to States to use references to standards and/or international agreements mentioned in the OECD Guidelines for multinational enterprises in their investment agreements to strengthen singular articles.

Provisions on protection of workers’ rights can be formulated as follows: “the parties confirm the value of human resources in investment and support investors who, in accordance with the provisions of the OECD Guidelines for multinational enterprises, comply with international standards such as the provisions of the Tripartite declaration of principles concerning multinational enterprises and social policy of 1977; the ILO recommendations on child labor, illegal employment relations; organization of employment relations; employment relations with vulnerable categories of the population”.

To account for environmental matters in investment activities, investment agreements should include the following wording: “the Contracting Parties shall promote investments that contribute to the achievement of the goals set out in the Rio Declaration on environment and development of 1992 (other agreements in the field of environment protection, including regional and bilateral ones). The Contracting parties encourage investors to act in accordance with the Aarhus Convention of 1998, ISO standards and other international environmental standards.”

In terms of anti-corruption compliance, investment agreements should provide that “the Contracting parties welcome responsible honest investors who are committed to the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997; the UN Convention against corruption of 2003. The Parties support investors in their efforts to combat corruption in all areas of their business practices according to relevant OECD recommendations”.

**5. Investment agreements should provide the right of the State to reasonably restrict investments that violate the RBC standards.** Restriction of investments is a sovereign right of the State, since the State initially allow foreign investments on its territory as long as they conform to its national interests. However, such a restriction must be reasonable and non-discriminatory, in terms of responsible business conduct as well. The requirements of RBC should not constitute unjustified discrimination among investors. At the same time, responsible investment conduct should be confirmed not only by formal statements, but also by the implementation of standards in practice. Therefore, restrictions imposed by States on violators of RBC standards should not be considered as a breach of investment promotion. Investment agreements should include a clause about the right to restrict the investor's activities to protect public health, environment, etc with a reservation “even if it puts the investor in a less favorable position”. The clause should be introduced cautiously, given that violations of RBC standards can vary in scale, degree, and severity of consequences. Therefore, restrictions should be justified and used only when other forms of influence on the investor’s conduct are insufficient. It is possible to justify restrictions on investors by assessment of investor's compliance with certain standards set in the OECD

Guidelines for multinational enterprises and the recommendations provided in the OECD sectoral guidances.

**6. Investment agreements should take into account prevention of digital risks.** Digital risks are not directly covered by the OECD Guidelines for multinational enterprises. But in a digital economy, when data-driven innovations become key assets, adherence to standards in digital security and privacy is particularly important for investors. Digital compliance should help investors avoid such key risks as: digital security risks, privacy violations, other non-financial risks. Draft of Guidance for digital compliance for business was developed by Russia-OECD Center to show companies that operate in the digital economy how they can reduce non-financial risks. The document is based on international standards, including the OECD. Further standards should be developed in the OECD.

## **1.2. Martijn Scheltema (Partner, Pels Rijcken & Droogleever Fortuijn N.V., The Hague, The Netherlands; co-chair, Academic Friends of the OECD Guidelines network)**

Under 356 you observe that it appears that the approaches in trade agreements and accompanying agreements do not address the responsibilities of companies whether trader or investors. However, under 417 and 423-433 you describe interesting new developments in the Dutch Model BIT which incentivizes compliance with RBC norms and implements consequences of irresponsible conduct in connection with the amount of damages. Although not implemented as such in a trade agreement yet, it does address business responsibilities. Moreover, the existing Morocco-Nigeria BIT (you refer to under 417) does address business conduct. So it may be relevant to mention under 356 that (rare) exceptions exist.

Furthermore, under 404-416 you describe avenues to address irresponsible business conduct, for example through the clean hands doctrine and legality requirements. It may be good to illustrate this with decisions in investment arbitrations in which these doctrines have been applied. In addition some arbitrators have already reduced the amount of damages because of business conduct (as is included in the Dutch Model BIT). This may be relevant for your paper too. I have analyzed these awards in a paper discussing access and recourse of victims in investment arbitrations in connection with irresponsible business conduct (Martijn Scheltema, Protection of victims in international investment dispute resolution: juxtaposing different topics?, In: China, the EU and International Investment Law (Yuwen Li e.a. (red.)), Routledge: London 2019, p. 212-226, attached to this email, especially para. 3.1 and 4). This may be of assistance in identifying the relevant arbitral awards. Beyond this, I have proposed to make better use of the NCP function (if available) in connection with investor responsibilities and investor protection under treaties (see para 4). This may be of relevance too.

## **1.3. Lorenzo Cotula (Principal Researcher, Law and Sustainable Development, International Institute for Environment and Development (IIED), Edinburgh, United Kingdom)**

Thank you for the opportunity to comment on the draft report “Business responsibilities and investment treaties”, as part of the ongoing public consultation.

First of all, I would like to congratulate the team both on initiating this work, and on the quality of the results. Relative to other policy issues such as the relation between investment

protection and regulatory space, the role investment treaties could play in promoting more responsible business conduct has often been neglected in public debate and action on reform of international investment law. Further, the fragmentation of ongoing reform processes – such as the UNCITRAL Working Group on ISDS reform, and the proposed binding treaty on business and human rights – creates challenges for systemic thinking about reform options. In this context, the draft report is an important step towards more joined-up thinking. It is also an impressive piece of work, both qualitatively and quantitatively, and given its depth and scope I expect it will be a useful resource for the next few years. What follows are a few comments I hope might be of help in finalising the report.

### **Length and structure**

The report is fairly long, and its discussion of trends in RBC standards detailed and largely descriptive. This will undoubtedly provide a useful resource but could perhaps be a little more succinct, to enable the reader to reach more quickly to the more analytical – and arguably more original – part about the RBC / investment treaties interface. I note that the section on “the interaction and possible interaction of investment treaties with policies on BHR and RBC”, arguably the core of the report, starts at paragraph 338 (p. 80), and the section “Speaking about and to business: express attention to BHR/RBC considerations in investment treaties” at paragraph 395 (p 95).

Apart from a readability question, there is also the risk readers might miss key points, such as the one about the interrelatedness of the RBC and regulatory space agendas, as per principle 9 of the Guiding Principles on Business and Human Rights (paragraph 107 of the report).

A couple of more specific points:

- Paragraphs 29-35: by this point, the paper started discussing the substantive issues, these paragraphs seem to return to the purpose and structure of the report. Consider moving this part further up, if it does not duplicate information already provided?
- “The traditional approach to investment protection treaties did not address BHR/RBC” (paragraph 53). Important statement, in such explicit / unequivocal terms, given the topic of the report. It could perhaps come a little earlier?

### **Broadening the framing**

The introduction provides a helpful framing of the issue but could outline a broader set of considerations. For example, paragraph 3 reads: “Because many trade agreements (or their accompanying linked agreements) have long expressly addressed issues such as human rights, labour, the environment, anti-corruption or sustainable development, investment treaties that do not address those issues, including with regard to business responsibilities, are increasingly exposed to criticism”.

In my view, the criticism is not limited to the fact that standalone investment treaties do not have the chapters typically present in integrated trade and investment treaties. At a deeper level, the concern is about asymmetries in legal rights and remedies – with most investment treaties effectively granting investors rights but no obligations. This asymmetry also exists in many integrated trade & investment treaties: while these may well have chapters on labour and other issues relevant to responsible business conduct, the nature of the normative standards set, and of the legal remedies provided, are substantially different from those available to investors under the investment chapter.



There is also the wider issue, which the report could also more explicitly address, that if investment treaties are meant to promote investments for sustainable development, then there is arguably a compelling policy case for tying any protections to minimum standards of investment quality that can help ensure the investments do, in fact, advance sustainable development. This policy case has been articulated by many, including IIED: Raising the Bar on Responsible Investment: What Role for Investment Treaties? (IIED, 2018), <http://pubs.iied.org/17454IIED/>.

### **Discussion of investment treaty trends**

“Investment treaties ... typically provide covered investors with protection from government actions such as discrimination, uncompensated expropriation of property, denial of justice or limitations on rights to transfer capital” (paragraph 36). Arguably, arbitral tribunals have interpreted and applied investment treaties more expansively than this, particularly in connection with FET. The sentence that follows alludes to this, but I wonder whether it would make sense to revise the broader characterisation of investment treaties instead of adding a caveat.

“Government acceptance of legitimate constraints on policies can provide investors with greater certainty and predictability, lowering unwarranted risk and the cost of capital” (paragraph 37). Any evidence / references to support this statement?

“Similarly, they [ie Foreign and trade ministries] can deflect requests by their investors for intervention by referring the investor to its ISDS options” (paragraph 40): but there is evidence, including in published academic research, that availability of ISDS has not excluded home country government intervention. This is noted further down in the paragraph – but if the argument has been debunked, why reproduce it in the first place?

“Some commentators contrast military interventions in favour of investor interests in the 19th and early 20th centuries with the peaceful resolution of disputes through ISDS” (paragraph 40). If these comments are referred to in the report, it would seem worth clarifying they are ill-informed. Even in the absence of investment treaties, use of force would be prohibited under the UN Charter, unless it falls under specified exceptions (self-defence and Security Council resolution). And of course, state-state disputes can be and often are settled peacefully, including through legal proceedings, so the ISDS vs military action framing found in some public commentary is misleading.

“The vast majority of existing investment treaties are narrow” (paragraph 41). Perhaps clearer to say “are post-establishment”, given the context? Investment protection standards are often formulated in broad terms and have been activated in relation to a wide range of policy areas.

### **More fully engaging with the Binding Treaty process**

When it comes to business and human rights, the report provides an extensive discussion of the UN Guiding Principles. Rightly so, as these are the main existing global instrument and are referred to in some investment treaties or treaty templates. Arguably, however, the report could engage more fully with the ongoing negotiation of a proposed binding treaty. The report does mention this process, but the emphasis often seems to be on the purported divisiveness and controversy, rather than any contribution this process could make (eg paragraph 25).

Also, while it is true that the Guiding Principles came into being after the controversy surrounding the proposed “UN Norms”, my sense is that the draft report overplays the contrast between the Guiding Principles and the proposed binding treaty. My personal impression at the time of the John Ruggie mandate was that the Special Representative deemed binding rules not to be politically feasible, and in a spirit of “principled pragmatism” he focused on an approach that would advance the agenda at that point. But the choice arguably reflected the context at the time, and these issues – like all policy issues – are subject to evolution over time. In more recent interventions, Professor Ruggie has stated that “international human rights law, like any other body of law, would need to continue to evolve to reflect new realities”, and that a binding treaty would not be incompatible with the Guiding Principles. He also made constructive comments on an early draft of the binding treaty (see eg his Open Letter to the Intergovernmental Working Group of 9 October 2018, [https://www.business-humanrights.org/sites/default/files/documents/Guiding%20Principles%20for%20Treaty%20Negotiations\\_Open%20Letter%20from%20Professor%20John%20Ruggie.pdf](https://www.business-humanrights.org/sites/default/files/documents/Guiding%20Principles%20for%20Treaty%20Negotiations_Open%20Letter%20from%20Professor%20John%20Ruggie.pdf)).

In fact, a binding treaty could build on the conceptual infrastructure the Guiding Principles established. This would be in line with the way at least some of the wider body of international human rights law has historically been developed, with ground-breaking soft-law instruments (eg UDHR) providing the foundations for binding treaties (eg ICESCR, ICCPR).

#### **The interface between national and international law**

“Investment policy makers may need to re-examine the degree to which the traditional primary reliance on national law suffices to address investor and business conduct, and to consider a possibly stronger contribution of investment treaty policy in this area” (paragraph 27).

I agree, though I also think the issue is not only whether to rely on national law, or on international instruments, as a source of regulation. The key question concerns the balance of investor rights and obligations, and the implications that breaching those obligations may have in an ISDS context. Investment treaties could play a useful role, particularly because, in many jurisdictions, national law is not aligned with international standards. But there may also be legitimate arguments in favour of using national law to regulate investor obligations, eg: i) it would create a level playing field for all investors, irrespective of the provisions of any applicable BITs; ii) national standards may enjoy greater local legitimacy, if they have been adopted through local democratic processes; and iii) government agencies may find national regulation more straightforward to monitor (as opposed to diverse standards that may be negotiated in investment treaties).

A key question, then, is how to ensure any breaches of national law can be factored into ISDS. Legality requirements concerning the making of an investment are one route, and some tribunals have deemed them to be implied even if the relevant treaty is silent on this issue. But arbitral jurisprudence is divided, particularly on the implications of breaches occurring during the operation phase, partly due to the additional complexities involved. The treaties could play a useful role in clarifying this articulation, and the report could more explicitly look into this issue.

#### **Reflective loss**

Excellent to see the draft report explicitly linking the RBC agenda to another important strand of OECD Investment work, on reflective loss. The analysis (eg at paragraphs 266-269) could bring out more explicitly the implications asymmetries in the conceptualisation

of shareholder/company relations can have for the overall balance of investor rights and obligations. In effect, the way arbitral tribunals have dealt with reflective loss, versus the approach that tends to prevail in corporate law, including in relation to business and human rights, compounds the asymmetries many have critiqued in relation to the investment treaty regime.

Incidentally, there is good analysis out there that looks at these issues in both investment treaty and business & human rights contexts, including from a comparative perspective, which the report could build on. I am thinking particularly of work by Anil Yilmaz Vastardis (eg Yilmaz Vastardis, A. and Chambers, R., 2018, “Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?” *International and Comparative Law Quarterly* 67(2):389-423). If I am not mistaken, the paper Julian Arato and others did on reflective loss for the UNCITRAL-linked Academic Forum also touched on these issues.

### **Trends in investment treaty provisions on responsible investment**

This part (sections 342 onwards) could analytically separate out more clearly treaty clauses concerning investor responsibilities/obligations from those concerning state conduct. Many of the developments reported in the text concern the latter. This partly reflects trends in investment treaty policy, but given the theme of the report perhaps more space could be devoted to discussing investor obligations/responsibilities clauses (not only in the Dutch model but also other BITs eg Morocco-Nigeria, and the ECOWAS investment instrument).

“Clauses expressly setting out legality requirements for treaty coverage of investments appear to be rare in the overall treaty pool. Consequently, illegal investments may be covered under some treaties” (paragraph 405). Some arbitral tribunals have deemed legality requirements to be implied (eg *Cortec v Kenya*, *Alvaro Marin v Panama*). Also, this paragraph could be articulated more effectively with paragraph 412, which deals with the same issue and does seem to refer to these developments in arbitral jurisprudence.

### **References to the new Dutch Model BIT**

The report pays significant attention to the new Dutch Model BIT (paragraphs 4 and 417-434). Rightly so, as the model innovates, and it is particularly significant because of the role of Dutch treaties in ISDS. The report outlines interesting critical reflections (paragraphs 430-433), I for one would have also been interested in a discussion of whether damages are really an appropriate place to address claims of irresponsible business conduct, and whether in fact there could be more effective ways for coordinating the application of investment treaty and RBC norms (what is the policy rationale for extending protection to a business committing human rights abuses?).

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I would like to congratulate you again on this important and impressive work, and thank you for giving me the opportunity to comment. I hope these few thoughts might be of assistance.

## **1.4. Lucia van Westerlaak (Policy Advisor, on behalf of the Netherlands Trade Union Confederation)**

The Dutch Trade Union Federation FNV would like to inform you that the Dutch Social and Economic Council (<https://www.ser.nl/en/SER/About-the-SER>) has developed criteria

for a responsible trade agreement, while discussing its position on TTIP. You will find that document attached.

This important and influential Dutch advisory council up until now has not been able to support a draft text of a trade agreement because (even) these criteria are not being met.

The FNV adds to this that ISDS and ICS both are a threat to public policies and thus to the democratic process. And together with the ETUC, the FNV states that promises or agreements concluded in the (draft) texts need to be completed by enforceable labour rights. Business and civil servants sometimes accuse the labour movement of protectoral demands in this context. Or they find them “colonial” – we are not making this up. But unions are simply making clear that the protection of human and thus, labour rights by governments need firm legislation as a condition.

The OECD paper “Business Responsibilities and Investment Treaties” points out that the protection of human/labour rights by governments still is not being provided for in (draft) Trade Agreements. That is so true. We are still far from what is needed. Therefore please know that therefore the FNV also supports TUAC in every aspect of its comment on this.

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#### **Attachment: Basic principles for assessing the EU trade agreements**

1. The EU and other countries must strive to focus the globalisation process on increasing social prosperity that is sustainable, including in emerging economies and developing countries. EU trade agreements must be designed in such a way that third countries will also be able, on balance, to profit from it. Such agreements will thus contribute to reducing global inequality.
2. The EU trade agreements must follow the “gold standard” for future European trade and investment policy. It should promote European values, including the protection of human rights and workers’ rights, the environment, democracy, and the rule of law. Compliance with the core labour standards – freedom of association in trade unions, the right to collective bargaining, a ban on child labour, forced labour and discrimination – must be the mandatory foundation for the economic activity of the EU and all its trade and investment partners.
3. Europe must be able to maintain its relatively high level of protection, both in legislation and regulations and via other (policy) measures, and to raise that level if so desired. The EU trade agreements and its provisions for regulatory cooperation liberalisation of the services market, lowering of tariffs, and arrangements for investment protection should not be detrimental to this.
4. Governments must retain sufficient policy leeway to be able to adequately safeguard and improve the levels of protection afforded to people and the environment. Shortcomings concerning decent work will be tackled, and transition problems and distributional effects dealt with by means of flanking policies.
5. Governments must remain free to declare certain services – according to their own preferences – to be “of general public interest” and thus to exclude them from the provisions of the EU trade agreements.
6. In addition to enshrining human and workers rights in the agreements themselves, flanking policies are needed in order to properly manage the effects of trade and investment agreements, so that they contribute to inclusive growth.

7. To promote more effective involvement of the parliament, the business community, the trade unions, and civil society organisations, it is essential for the negotiations to be transparent. The national governments must also communicate the findings of the sustainability impact reviews to parliament and the general public in good time.
8. Latest developments on enforcement of sustainability chapters must be included, such as the European Green Deal should ensure that all international trade and investment agreements include strong, binding and enforceable sustainable development chapters, including on the climate and the environment, that fully respect international commitments in resolution of European Parliament 2019/2956(RSP) par 110.

### 1.5. Thomas Kentsch (Siemens Operations, Supply Chain Management, Standards, Munich, Germany)

Our sincere thanks for this great work. As an industry representative, we welcome your excellent initiatives on human rights and the synchronization/standardization around the globe.

In the following, please see my comments. Please be aware that I see this paper mainly through a Supply Chain Management view, managing around 90,000 suppliers in more than 150 countries with a Purchasing Volume of 45 Billion Euros.

With this said, I melt human rights activities in the industry sector down to three main activities:

1. Company internal
2. Domestic trade (supply chain)
3. International trade (supply chain)

Ad 1: As Siemens follows the respective UN and OECD rules/guidelines and guidance (I was personally involved in the developing of the guidance), we believe that company internal protection of the human rights is essential and the most effective way of changing the human rights situation globally. We welcome your strong definitions and outreach to even governmental companies/institutions with which we had most discussions e.g. signing a Code of Conduct or asking them to allow an sustainability audit on their premises for verification of the situation. We, therefore, agree that State-Owned Enterprises (SOEs) are explicitly included in the human rights responsibility (page 75, 319).

Ad 2: As stated on page 75, 318., it seems not clear if human rights violations are only covered in transnational trade or might include national trade (transnational corporations). We would welcome to include all trades including of national character as this ensures the commitment to human rights further down in our supply chain (tier 2+) where often Small and Medium Sized Enterprises (SMEs) trade locally.

Ad 3: International trade seems to be most complicated for companies to adhere to the different laws/regulations internationally by implementing e.g. procurement processes. We appreciate the excellent summary of the different legal requirements in this paper. Our policy is to follow the UN/OECD regulations/guidelines and cross-check them with the requirements of the local legislation. In case of stronger local requirements, we adapt our trade processes. This, however, can lead to different interpretations. One example is the term "liability": while page 75, 322 defines "...to establish liability for natural or legal

persons for failing to prevent another person with which it has A CONTRACTUAL RELATIONSHIP....”, the French Loi de Vigilance goes far beyond down into non-contractual relationships in the supply chain. In similar, it seems that the UK and Australian Anti-Modern Slavery Acts define responsibility (liability?) down in the complete supply chain. This has great implications which industry is currently – in general – not able to fulfill. Even consultations with University experts do not show any practical approach.

Example: An average medium-sized company has between 3,000 to 6,000 suppliers. If each of these suppliers have only 100 own suppliers (tier 2+) – which is unrealistically low – we come to the following picture in its supply chain.

		medium sized company suppliers
tier 1 suppliers		5.000
each supplier has 100 own suppliers	100	
tier 2 suppliers		500.000
each supplier has 100 own suppliers	100	
tier 3 suppliers		50.000.000
each supplier has 100 own suppliers	100	
tier 4 suppliers		5.000.000.000
each supplier has 100 own suppliers	....	

In our example, the medium -sized company will have 5 billion sub-sub-sub suppliers (4<sup>th</sup> tier) – or possible supplier combinations to follow and check for human right risks. Surely, suppliers like Microsoft, Apple, Samsung, ... and many others will appear in the different tiers but the path of risks must be followed through according to some legislation. Even a risk-based approach as promoted by the OECD does not help below tier 2. A company will be able to follow/audit/control some hundred suppliers, larger corporations some thousand suppliers in its supply chain. Unfortunately, international trade traffic data shows that most 3+ tier suppliers are based in BRICS and third world countries with high human rights risks.

We would welcome - and even like to participate in - additional discussions on how to ease this particular problem which is a fundamental hold-up in the fight for human rights and in the discussions with NGO- and Governmental expectations.

### 1.6. Christian Bellak (Associate Professor, Vienna University of Economics and Business, Vienna, Austria)

- It is really the best comprehensive report on this issue I have seen!
- Discussion of the Ruggie Report is indeed very useful, as the middle way will play an important role also with respect to business responsibilities.

- The report talks a lot about obligations of firms. Yet, if I am right, the report does hardly mention consequences, if obligations are violated by businesses; similarly to the consequences of violations of obligations of governments enshrined in BITs. Perhaps, this is the next step in the discussion? Yet, obligations without consequences of their violation will not be effective. Perhaps the aspect of violations should be included, as the paper discusses policy options.
- A clear distinction needs to be made between actual treaties (in force) and model treaties, as we know that model treaties are never translated into actual treaties 1:1. I think the whole discussion about the reform of investment treaties suffers from the fact that the treaties applied are overwhelmingly those concluded before 1990 (see UNCTAD quote below), which are far from the model treaties of today. Thus, decision makers have in mind the modern treaties, while the old ones are still the relevant ones.
- “Ninety-five per cent of intra-EU cases were based on investment treaties signed in the 1990s or earlier. About 45 per cent of the cases were brought pursuant to the ECT (1994).” Source: IIA Issues Note, Dec. 2018.
- Para. 419: I think one should stress the fact that the preamble is not legally binding. Many decision makers are not aware of this and are happy when something is mentioned in the preamble. Yet, if I am correct, for arbitration councils the preamble does not count at all.
- In my view, the most important points are mentioned in section 8.3.4. These would be my conclusions.
- Para. 439: I think that collaboration with stakeholders should also include labour. Business and labour interests and sensitivities are key in framing appropriate approaches.

My main conclusion is that treaties are highly unbalanced, but this is intended by governments. So far, governments have shown little willingness to shift the balance, as model treaties and preambles of treaties in force do not have any legal weight. Hence, actually everything is left on a voluntary basis. Ruggie has put forward many arguments, why a purely voluntary approach is not acceptable, as reviewed in your paper. This is what I would emphasize in the conclusions. In my view, it would strengthen the report, as your reflections on the discussion of mandatory due diligence for companies in Switzerland shows.

Finally, let me point your attention to the following paper: M. Krajewski (2020) A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Journal.

### 1.7. Confederación sindical de comisiones obreras (CCOO) (Spanish Trade Unions Organisation)

Firstly, we appreciate the possibility offered by the OECD with its public consultation to make some comments on the consultation paper by David Gaukrodger for the OECD Secretariat.

We welcome the Secretariat's interest in addressing a reflection on corporate responsibilities and investment treaties. The proposed note compiles the main



developments in the field of business and human rights and responsible business conduct, an interesting piece of work that is already useful and interesting in itself.

As members of TUAC, we support and share the input that it regularly provides to the Secretariat and, in this case, we believe that while it is important that the document outlines the potential of investment agreements to contribute to more responsible business conduct, they cannot be considered sufficient instruments to design an appropriate legal framework which should always remain in hands of governments.

However, and as general considerations, it is key to include RBC and human rights -in their broadest definition- in investment agreements, as in trade agreements, and not only as an obligation for governments and states, but also for investors and companies. Trade and investment agreements increasingly function as true regulators of the parties' economic and commercial activity, and their role can be instrumental in introducing RBC and due diligence requirements and conditions.

The note lists in particular the numerous initiatives that exist or are about to emerge at national and regional levels. Several OECD countries have introduced in their laws various forms of due diligence requirements. The EU, representing 27 jurisdictions, is currently discussing the possibility of enacting a binding standard. Various reporting obligations are also widespread throughout the OECD.

It is obviously important to ensure a level playing field for all parties and this must be sought through upward convergence of all applicable rules, so that governments, investors and businesses, but also workers, benefit economically and socially from trade and investment flows, preventing inequality and with it political mistrust and economic resentment from growing further. As an example of unlevel playing field and unfair competition, multinational companies tend to pay fewer taxes (5% less effective rate) than national companies and we have to fight a race to the bottom and try to avoid such unfair competition through homogenization upwards.

In line with these considerations, we endorse the comments that TUAC sent some time ago and which are listed below.

TUAC strongly encourages the Investment Committee to reflect in particular on the following:

- Pre-conditions. Foreign investors should establish that they are observing OECD standards of due diligence in their supply chains in order to benefit from an IIA coverage. Trade union engagement in that process is indispensable to verify that due diligence is occurring and effective. For companies, trade unions' involvement at the pre-investment stage can also serve to guarantee of social peace and lessened reputational risks.
- Enforceable labour clauses. Whilst the inclusion of human rights and labour clauses in trade and investment agreements is no longer a taboo, their enforceability remains a major issue. As the note rightly underlines, labour provisions are usually not subject to dispute settlement and there are no provision applicable to companies. As far as state-to-state disputes are concerned, the procedural hurdles are too high for stakeholders to bring meaningful complaints. The trade union movement has as a result long been criticising the primacy of investors' protection over social and human rights.



Further reflection should take place on how fully independent settlement mechanisms, entitling trade unions to bring complaints, might help enforcing labour rights.

- Domestic policy space. The note makes multiple references to policy coherence: Economic or business focused departments should no longer conduct their work in isolation from their human rights counterparts. TUAC strongly agrees with this statement: governments' ability to regulate in the area of labour rights and public services should not be constrained by IIAs. Expanded links between investment and human rights should be explored.

Policy coherence is also a concern that equally applies within the OECD. For instance, the issue of limited liability of directors / corporate management is described in the note as potentially conflicting with the responsibilities of the parent company for actions carried by subsidiaries. Such a legal issue deserves full attention in national corporate law. On that, the work initiated by the OECD Corporate Governance Committee on “duties and responsibilities in company groups”<sup>2</sup> would deserve attention of the Investment Committee. For the sake of policy coherence, this work must no longer be conducted in isolation from responsible business conduct considerations.

The OECD has a unique role to play in fostering upward convergence and a level playing field. TUAC recommends that the Investment Committee aims at producing fully-fledged models for the interpretation and negotiation of RBC clauses in IIA. OECD high-profile work on tax can offer inspiration in this regard (including a “model convention”). The OECD can do more to equip policy- makers with tools and standards.

## 1.8. Yılmaz Argüden (Chairman of Trustees, on behalf of Argüden Governance Academy)

### Views on inclusion of RBC and BHR in investment treaties

Inclusion of RBC and BHR principles in the investment treaties and trade agreements will help to create a sustainable World and to achieve SDGs.

- Private investments are very important for the development of countries. They create employment, transfer of technology, promote social development and improve wellbeing in countries of investment. Inclusion of RBC and BHR principles would guarantee fair treatment of workforce, environment and society in investment country.
- Harmonization of investment treaties with local regulations of bilateral parties, which would determine and establish the basic conditions for investors, need to be considered for successful implementation of the policy. This issue is sensitive since some jurisdictions consider such an act as intervention to their sovereignty. Therefore, an international mechanism under OECD or UN could be very useful

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<sup>2</sup> See the “overview of the legal/ regulatory frameworks with respect to the duties and responsibilities of boards in company groups”, DAF/CA/CG(2019)12. See also TUAC recommendations to OECD on corporate governance, 13 May 2019 <https://tuac.org/news/tuac-recommendations-to-oecd-work-on-corporate-governance/>

in harmonization of regulations and enforcement systems in every country which are party to the agreements.

- Investment agreements mostly consider only investment phases. However, these principles need to be implemented through out the life of investments. Therefore, clauses covering operational phase of investments need to be considered in treaties.
- The investment agreements should not include clause which gives excessive rights to foreign investors. The level playing field in the investment country needs to be protected for the development of the country.
- Due diligence regarding compliance to treaty clauses need to be conducted at investment and operation phases by third parties. Encouraging the reporting of due diligence findings would help to achieve treaty and policy goals.
- A fair system for resolving complaints regarding investors by the local inhabitants would be very useful to investigate the incompatibilities to the treaty clauses. In most of the cases local inhabitants lack the financial capability to reach relevant mechanism to resolve inconsistencies.
- Review and revision of existing bilateral treaties could be useful for inclusion of RBC and BHR principles.
- Promotion of investments are very important for the achievement of SDGs. Since the world needs resources of private sectors besides governments. Investment amount for achieving SDGs are very high. Investment treaties would help to solve important problems of less developed countries. However they should be in harmony with RBSC and BHR.

### **1.9. Peter Muchlinski (Emeritus Professor of International Commercial Law, The School of Oriental and African Studies (SOAS), University of London)**

1. I have the pleasure to offer this submission to the OECD Consultation on “Business Responsibilities and Investment Treaties” in my capacity as Emeritus Professor of International Commercial Law in the School of Law, SOAS, University of London. I have extensive scholarly and consultative expertise in the fields of international investment law and business and human rights having served between 1997 and 2012 as a legal adviser on International Investment Agreements (IIAs) to UNCTAD/DIAE, and between 2003 and 2008 as Co-Rapporteur of the International Law Association Committee on the International Law of Foreign Investment. I participated in a number of workshops and meetings organised by John Ruggie and his team during the drafting of the UN business and human rights framework. I am a member of the Editorial Board of the *Business Ethics Quarterly*. This submission draws upon, and updates, my previous publications covering reform of IIAs, focusing on the balance between investor protection and business responsibilities, including human rights responsibilities.<sup>3</sup> It is also informed by research

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<sup>3</sup> Peter Muchlinski: “Holistic approaches to development and international investment law: the role of international investment agreements” in Julio Faundez and Caline Tan (eds) *International Economic Law, Globalization and Developing Countries* (Cheltenham, Edward Elgar, 2010) ch 9; “Towards a coherent international investment system: Key issues in the reform of international investment law” in Roberto Echandi and Pierre Sauve (eds) *Prospects in International Investment Law and Policy* (Cambridge, Cambridge University Press, 2013) ch 27; “International finance and

that will be included in the forthcoming third edition of my textbook *Multinational Enterprises and the Law* (Oxford University Press, 2<sup>nd</sup> ed, 2007, 3<sup>rd</sup> ed forthcoming).

2. It is my strong conviction that so-called “first generation” IIAs, with their almost exclusive emphasis on investor and investment protection, are no longer fit for purpose in a world where the investment environment, and political context, have shifted towards a situation in which the goal of protecting investors and their investments can no longer exist without the counterbalancing need for corporate responsibility and accountability.

3. This shift arises out of changes in the contemporary environment for foreign direct investment (FDI). As noted by UNCTAD, it is characterised by changes in the destination of foreign investment, with many developing countries now receiving the bulk of FDI; new types of investors, including state-owned enterprises, from emerging and transitional economies; greater government involvement in regulating and steering the economy; a greater need for global co-ordination of investment policy; and emerging “new generation” investment policies that place inclusive growth and sustainable development at their heart as well as investor responsibilities.<sup>4</sup>

4. In particular, the adoption of the UN Sustainable Development Goals has created a new policy climate.<sup>5</sup> FDI must be harnessed in the service of sustainable development if it is to be protected. This entails not merely changing substantive protection standards so as to avoid over-broad investor/investment protections, but also requires rethinking the very aims, structure and content of IIAs.<sup>6</sup> Indeed, it may be legitimately asked whether “new generation”

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investment and human rights” in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Abingdon, Routledge, 2013) 263; “Operationalising the UN Business and Human Rights Framework: The Corporate Responsibility to Respect Human Rights and Due Diligence’ in Sarianna Lundan (ed) *Transnational Corporations and Transnational Governance: The Costs of Crossing Borders in the Global Economy* (Basingstoke, Palgrave MacMillan, 2015) 325; “Negotiating new generation international investment agreements: New sustainable development oriented initiatives” in Steffen Hindelang and Markus Krajewski (eds) *Shifting Paradigms in International Investment Law* (Oxford, Oxford University Press, 2016) ch II; “The Impact of a Business and Human Rights Treaty on Investment Law and Arbitration” in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge, Cambridge University Press, 2017) 346.

<sup>4</sup> UNCTAD *Investment Policy Framework for Sustainable Development* (New York and Geneva, United Nations, 2015) at [https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf) ch 1 “The Changing Investment Policy Environment” and see too <https://investmentpolicyhub.unctad.org/ipfsd>. See further J.A. VanDuzer, P. Simons and G. Mayeda *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, August 2012) at [https://www.iisd.org/pdf/2012/6th\\_annual\\_forum\\_commonwealth\\_guide.pdf](https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf).

<sup>5</sup> UN Sustainable Development Goals at <https://sustainabledevelopment.un.org/?menu=1300>

<sup>6</sup> See UNCTAD above n 3 and Commonwealth Secretariat above n 3. For analysis of the UNCTAD and Commonwealth Secretariat models see; Muchlinski in Hindelang and Krajewski (eds) above n 2; Jean Michael Marcoux “Embedding the International Investment Regime: An Assessment of UNCTAD’s Proposal for Reform” (2015-2016) Yearbook of International Investment Law and Policy 261 arguing that UNCTAD’s policy is an example of “embedded liberalism”. See further Lise Johnson, Lisa Sachs, and Nathan Lobel “Aligning International Investment Agreements with the Sustainable Development Goals” American Review of International Arbitration available at <http://ccsi.columbia.edu/files/2016/08/SSRN-id3452070-2.pdf>; IISD *Model International Agreement on Investment for Sustainable Development* (April 2005) in 20 ICSID Rev-FILJ 91 (2005) and IISD *Model International Agreement on Investment for*

IAs will remain IAs at all. Perhaps a new type of “Sustainable Development and Investment Agreement”, which shifts the emphasis away from investor protection towards facilitating state regulation for sustainable development, will eventually emerge.<sup>7</sup> Indeed, the Netherlands Model Bilateral Investment Treaty (BIT) of 22 March 2019 Article 6(1) already contains a commitment by the Contracting Parties “to promote the development of international investment in such a way as to contribute to the objective of sustainable development.” In addition, Article 6(4) commits the Contracting Parties “to promote equal opportunities and participation for women and men in the economy.”<sup>8</sup>

5. Amid these changes, the accountability of business actors for violations of human rights is a major concern. As noted in the OECD Consultation Paper *Business Responsibilities and Investment Treaties*,<sup>9</sup> a key initiative was the adoption, in 2011, of the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>10</sup> This creates a business and human rights framework based on three pillars: a binding state duty to protect against human rights abuses by business enterprises, a corporate responsibility to respect human rights, and access to an effective remedy. The UNGPs do not create binding international duties for corporate actors to observe human rights. Rather, they rely on corporate human rights risk assessment through the due diligence procedure outlined in Paragraph 17 of the UNGPs.<sup>11</sup>

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*Sustainable Development Negotiators’ Handbook* (2<sup>nd</sup> ed 2006) at <https://www.iisd.org/library/iisd-model-international-agreement-investment-sustainable-development-negotiators-handbook>; IISD *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements* (IISD April 2018) at <https://www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade>; Marie-Claire Cordonier Segger, Markus W. Gehring and Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer Law International, 2011).

<sup>7</sup> See further Emma Aisbett, Bernali Choudhury, Olivier de Schutter, Frank Garcia, James Harrison, Song Hong, Lise Johnson, Mouhamadou Kane, Santiago Peña, Matthew Porterfield, Susan Sell, Stephen E. Shay, and Louis T. Wells, *Rethinking International Investment Governance: Principles for the 21st Century* (September 2018) at <http://ccsi.columbia.edu/2018/08/13/rethinking-international-investment-governance-principles-for-the-21st-century/> who advocate a radical restriction of investor protection rights that goes beyond the more limited reforms from existing agreements; Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, et al., “Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action” 36(1) *Journal of International Arbitration* 7 (2019). See too Fabio Morosini and Michelle Rattón Sanchez Badin (eds) *Reconceptualizing International Investment Law from the Global South* (Cambridge, Cambridge University Press, 2018).

<sup>8</sup> Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

<sup>9</sup> David Gaukrodger *Business Responsibilities and Investment Treaties* (Consultation Paper by the OECD Secretariat, 15 January 2020) at <http://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf>.

<sup>10</sup> UN Human Rights Council Seventeenth Session 21 March 2011: *Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework*.

available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> or [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>11</sup> According to Paragraph 17: “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts,

In addition, the access to remedy pillar, which flows from the previous two pillars, covers both judicial and non-judicial remedies, including corporate based grievance mechanisms. It does not direct states or corporations towards the development of any particular type of remedy but notes the major obstacles that states, in particular, should act upon. These include the problem of extraterritorial enforcement of obligations, corporate group liability issues and financial obstacles to access to remedies.

6. To some legal minds, this has appeared as an incomplete approach, relying too much upon the hope that changes in corporate culture, without binding legal duties, will provide the necessary impetus to avoid and mitigate adverse human rights impacts of corporate activities.<sup>12</sup> By contrast, John Ruggie, the former UN Special Representative of the Secretary General on Business and Human Rights (SRSG), has noted that the UNGPs represent the limits of what may be politically possible in a world where non-state actors have traditionally not been subject to binding international obligations.<sup>13</sup> In addition, in a world of polycentric governance, the development of corporate procedures that avoid, or at least mitigate, operational human rights risks may be a practical way forward that avoids many of the pitfalls which binding international treaty norms will undoubtedly bring up.<sup>14</sup>

7. Professor Ruggie was commenting on a future legally-binding business and human rights instrument. This is currently under negotiation in the UN Human Rights Council Working Group, “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>15</sup> Should such an instrument ever be concluded, its impact may be considerable in numerous fields of international law, not least international investment law and arbitration. However, that is a distant goal.

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integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

“(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”

<sup>12</sup> See Surya Deva and David Bilchitz (eds) *Human Rights and Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge, Cambridge University Press, 2013).

<sup>13</sup> John G. Ruggie, “A UN Business and Human Rights Treaty?” (Harvard University, Kennedy School of Government, 28 January 2014) available at <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

<sup>14</sup> See John Ruggie, “Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights”. (January 23, 2015). Available at SSRN: <http://ssrn.com/abstract=2554726> or <http://dx.doi.org/10.2139/ssrn.2554726>.

On polycentric governance and the UNGPs see further Jamie Darin Prektert and Scott J. Shackelford “Business, Human Rights, and the Promise of Polycentricity” 47 Vand. J. Transnat’l L. 451 (2014).

<sup>15</sup> Human Rights Council Res. 26/9 of 26 June 2014 (UN Doc. A/HRC/RES/26/9) para.1.

8. By contrast, the reform of existing “first generation” IIAs is now a real process, as so clearly shown in the Consultation Paper.<sup>16</sup> According to UNCTAD the majority of new IIAs concluded up to 2017 contain sustainable development objectives by way of safeguarding the right to regulate while providing investor protection, promoting and facilitating investment, ensuring responsible investment, enhancing consistency in the interpretation of investor protection provisions and reforming Investor-State Dispute Settlement (ISDS).<sup>17</sup> Many states are also reforming their existing IIAs to comply with sustainable development norms through joint interpretations, treaty amendments by exchanges of letters or notes, replacing existing “first generation” agreements with new more modern treaties or by terminating, or abandoning unratified, old treaties.<sup>18</sup> UNCTAD identifies these developments as Phases I and II of their IIA Reform Package. Phase III requires the coherence of new IIAs with national investment policies and other bodies of international law to ensure conformity with sustainable development goals.<sup>19</sup>

9. It is possible to envisage the use of IIAs as a vehicle for operationalising business responsibilities, including human rights responsibilities, before any more comprehensive UN agreement materialises. The major advantage would be that IIAs are usually bilateral, or plurilateral, agreements with a smaller number of Contracting Parties. Agreement is therefore, in principle, easier to attain. In addition, a more tailor-made model can be adopted that all the participating states accept. The flexibility involved is a true asset, allowing for creative adaptations of existing IIAs towards the more balanced agreements that are already being concluded and which have been covered in some detail by the Consultation Paper.

10. In the remainder of this submission I shall lay down what I see as the main alternatives that could be pursued in reforming IIAs to reflect sustainable development and business responsibility. As noted in the Consultation Paper, business responsibilities, including human rights responsibilities, find limited impact in “first generation” IIAs but are increasingly used in “new generation” agreements.<sup>20</sup> Accordingly, this submission focuses on the probable “impact routes” that an IIA might take in relation to business responsibility.<sup>21</sup> I shall consider how these alternative “impact routes” may affect how

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<sup>16</sup> Above n 9.

<sup>17</sup> UNCTAD *World Investment Report 2018* (New York and Geneva, United Nations, 2018) at 95-8. This trend has continued to the end of 2018: UNCTAD *World Investment Report 2019* (New York and Geneva, United Nations, 2019) at 104-9.

<sup>18</sup> *World Investment Report 2018* *ibid* at 98-103; *World Investment Report 2019* *ibid* at 109-15.

<sup>19</sup> *World Investment Report 2018* *ibid* at 104-15; *World Investment Report 2019* *ibid*. See further UNCTAD “Reform Package for the International Investment Regime” at <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition->; UNCTAD “Taking Stock of IIA Reforms: Recent Developments” IIA Issues Note No 3 June 2019 at [https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf)

<sup>20</sup> Above n 8 paras 363-365. See further Muchlinski in Deva and Bilchitz above n 2; Pierre-Marie Dupuy, Francesco Fancioni and Ernst-Ulrich Petersmann (eds) *Human Rights in International Investment Law and Arbitration* (Oxford, Oxford University Press, 2009); Eric De Brabandere “Human Rights and International Investment Law” in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham, Edward Elgar, 2019) ch 20.

<sup>21</sup> I am adapting the methodology used in my contribution to Deva and Bilchitz *ibid* on the possible impacts of a business and human rights treaty on IIAs. The difference here is that the

arbitral tribunals approach business responsibilities when confronted with such questions in arbitrations. This is not covered in detail in the Consultation Paper but is a significant consideration when drafting business responsibility provisions.

11. A major criticism of existing IIAs is that they do not raise the requirement to examine business responsibilities as a treaty-based issue, leaving a great deal of discretion to arbitral tribunals on whether, and to what extent, such questions can, or should, be aired in arbitral proceedings. The relative failure of tribunals to give sufficient weight to these issues is a significant factor in the so-called “backlash” against IIAs and ISDS. However, I do not believe that arbitral tribunals are wilfully avoiding such key questions. Rather, arbitrators are applying the treaties they see before them and, as these mostly do not address human rights and other business responsibilities, such issues may legitimately be said to fall outside the subject-matter competence of the tribunal.<sup>22</sup> Therefore, the key to change lies in reformed drafting in new IIAs and not in reliance on arbitrators to read into “first generation” IIAs requirements that are simply absent from their contents. That said, the submission will end by considering what arbitrators faced with “first generation” IIAs have already done in relation to business responsibilities and human rights, as this may guide negotiators as to what may be done to further embed these initiatives in IIAs.

12. Three “impact routes” for business responsibilities in IIAs can be distilled:

- (a) The strongest “impact route” is a binding statement of corporate obligations, directly imposing treaty-based international law obligations on business actors. In addition, direct duties might be imposed on arbitral tribunals, when making arbitral decisions, to consider the human rights, labour, environmental and other responsibilities of corporate claimants.
- (b) An intermediate “impact route” involves the development of state obligations to further the aims of the UNGPs in domestic law as part of the first pillar of the UN Framework. However, this would not raise the corporate responsibility to respect human rights under the UNGPs into a set of binding international law duties.
- (c) The weakest “impact route” is a formulation of voluntary corporate obligations, encouraging corporate responsibility but without legal liability. Equally, weak procedural modalities, such as state reporting mechanisms, may be used.

***(a) Strong Impact: Legally Binding Business Responsibility Provisions***

13. The Consultation Paper focuses on the Netherlands Model BIT of 2019 and the Nigeria-Morocco BIT of 2016 as examples of a “strong impact” business responsibility provision.<sup>23</sup> Undoubtedly these are among the most extensive business responsibility provisions yet to be included in model, or concluded, IIAs. However, they fall short of a full treaty-based binding business obligation to respect human rights and other social responsibilities that

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Contracting Parties to the IIA will determine the scope of their obligations without considering the content of any applicable business and human rights treaty.

<sup>22</sup> See to this effect *Channel Tunnel Group v Governments of the United Kingdom and France* (Permanent Court of Arbitration) Partial Award 30 January 2007 para148. Available at <https://pca-cpa.org/en/cases/70/>

<sup>23</sup> Above n 8 paras 420-434. The Nigeria-Morocco BIT is available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheria/3711/morocco---nigeria-bit-2016->

gives rise to international liability. They reflect the current limits of what may be achievable in practice.

14. Regarding access to remedy against a business that has allegedly caused harm, Article 5(3) of the Netherlands Model BIT offers an expression of the access to remedy pillar of the UNGPs in the context of the first pillar state duty to protect:

“As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”<sup>24</sup>

This provision is a welcome addition to the Contracting Parties responsibilities, but it does little to address how, in an investor claim before an arbitral tribunal, this provision might play out. There is nothing to tell the tribunal what inferences it should draw from the existence of business-related human rights claim, or how this should sit procedurally alongside any claims made under the IIA. Article 5(3) is also silent on whether access to remedy also includes access on the part of those who claim to have been harmed by the investor to an arbitral tribunal on equal terms to the investor and respondent state. As noted in the Consultation Paper, the Netherlands Model BIT retains the exclusivity of ISDS for investors in Article 16(1). Finally, one can only echo the view of the Consultation Paper that the provision fails to cover the key problem arising from the relationship between IIAs and the state duty to protect against business related human rights abuses, namely, the absence of any guarantee that state actions in fulfilment of that duty will not risk being subjected to a claim by the investor under the IIA.<sup>25</sup>

15. The Nigeria-Morocco BIT of 2016 Article 20 introduces a novel development in IIA practice stating, “[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.”<sup>26</sup> This opens the way for transnational litigation against parent companies from the home state on the part of claimants in host states. It remains unclear whether this provision allows for group liability claims as it remains silent on the issue of veil lifting between parent and affiliate.

16. Turning to substantive responsibilities I can only agree wholeheartedly with the views expressed in the Consultation Paper, at paragraphs 423-434, regarding the limited scope of investor obligations under the Netherlands Model BIT, which retains a predominantly hortatory approach. It does, however, require due diligence in relation to environmental and social risks and impacts of the investment, but not expressly to human rights risks and impacts. Furthermore, by Article 23, a tribunal may take account of the investors conduct in assessing compensation regarding “non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.” Again, I agree with the findings of the Consultation Paper on this provision. I would add that, tribunals have, in practice, addressed investor conduct not only in relation to compensation but also in relation to

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<sup>24</sup> Above n 7.

<sup>25</sup> *ibid* para 422.

<sup>26</sup> Above n 22.



whether a breach of an IIA protection standard has actually arisen.<sup>27</sup> Thus, this provision is more limited than its apparently innovative contents suggests.

17. Under the Nigeria-Morocco BIT, investors are subjected to certain binding post-establishment obligations under Article 18.<sup>28</sup> These include, in paragraph 1, the maintenance of an environmental management system to ISO 14001 or equivalent standard while, in relation to labour and human rights standards:

“2) Investors and investments shall uphold human rights in the host state.

3) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

4) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.”<sup>29</sup>

Article 19 adds that, in accordance with the size and nature of an investment, investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices. In addition, where appropriate, local community liaison processes will be established and maintained, in accordance with available internationally accepted standards to which developing states have contributed, in the absence of which the Joint Committee of the Contracting Parties may establish such standards. Article 24 adds a commitment to corporate social responsibility on the part of investors and their investments, striving to maintain the highest international standards of sustainable development and committing investors to the ILO Tripartite Declaration on Multinational Enterprises and Social Policy as well as specific or sectorial standards of responsible practice where these exist. These provisions come as close to a binding obligation as is possible in current treaty practice. However, there is no clarification on how breaches of these provisions are to be litigated and so they appear not to be fully enforceable.

18. Future IIAs may seek to include a binding corporate responsibilities clause. A model for such a clause has been offered by UNCTAD as an option for negotiators.<sup>30</sup> According to UNCTAD, to correct the asymmetry created by existing IIAs, which only set out obligations for states, “an IIA could also set out investor obligations or responsibilities, noting the evolving views on the capacity of international law to impose obligations on private parties”. By Section 7.1.1. of the UNCTAD Framework an IIA could:

“Require that investors comply with host State laws at both the entry and the post-entry stage of an investment. Establish sanctions for non-compliance:

- deny treaty protection to investments made in violation of the host State law;

<sup>27</sup> See Peter Muchlinski “‘Caveat Investor’? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard” 55 ICLQ 527 (2006); Jorge E. Viñuales “Investor Diligence in Investment Arbitration: Sources and Arguments” 32(2) ICSID Review 346 (2017), doi:10.1093/icsidreview/siw041.

<sup>28</sup> Above n 22.

<sup>29</sup> *ibid* art 18 (2)-(4).

<sup>30</sup> UNCTAD *Investment Policy Framework for Sustainable Development* above n 3.

- deny treaty protection to investments operating in violation of those host State laws that reflect international legally binding obligations (e.g. core labour standards, anti-corruption, environment conventions) and other laws as identified;
- consider investor conduct when interpreting IIA protection standards;
- provide for States' right to bring counterclaims in ISDS arising from investors' violations of host State law."

UNCTAD states that these options will condition treaty protection upon certain investor behavior and raise the obligation to comply with domestic laws to the international level thereby increasing its relevance in arbitration.<sup>31</sup> This formulation is made taking account of existing circumstances, hence the emphasis on host state laws. However, were such a clause to refer directly to a future business and human rights treaty as well as domestic laws the impact would be that much greater. Neither the negotiators or any future investment tribunal tasked with the interpretation of the IIA in question could doubt that the intent was to subject investors to the human rights obligations contained in the new treaty.

19. The inclusion of binding business-related human rights obligations in IIAs would necessitate the establishment of an effective business and human rights adjudicative body. As currently constituted, ISDS tribunals, even if operating under reformed "new generation" IIAs, would be inadequate for the task on the basis of their limited human rights expertise. Something more like a specialised business and human rights arbitral body would be required, as proposed by the Centre for International Legal Cooperation.<sup>32</sup>

***(b) Intermediate Impact: Following the UNGPs***

20. From the above it is clear that the most advanced IIAs examined in the Consultation Paper fall short of genuine "strong impact" provisions. They do not have a binding international law-based obligation upon investors to observe business responsibilities and to be liable for infringements as a matter of international law. Rather, they follow the UNGPs, either expressly or by implication, and make legal liability contingent upon national remedies before the courts, tribunals and administrative bodies of the Contracting Parties. Both the Netherlands Model BIT and the Nigeria-Morocco BIT offer access to remedy in only one of the Contracting States for business-related human rights claims, thus limiting the claimant's choice of forum. Under the Netherlands Model BIT, this is the host state as access to remedy is limited under Article 5(3) to cases where the alleged violation occurs within the territory or jurisdiction of a Contracting Party, which would logically be the host state. In the case of the Nigeria Morocco BIT it is the home state, given that Article 20 sanctions transnational litigation for events arising in the host state but is silent on claims in the host state. Future IIAs may consider ensuring a full choice of domestic fora for business-related human rights claimants through a suitably drafted provision.

21. Future innovations in intermediate impact IIAs could further develop certain issues left open by the UNGPs. In relation to the state duty to protect this could require a clearer obligation on both home and host states to:

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<sup>31</sup> *ibid* at 108

<sup>32</sup> See "The Hague Rules on Business and Human Rights Arbitration" at <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>

- pass laws that would increase the domestic legal obligations of corporations to observe human rights and apply due diligence to business responsibility issues, whether through specialist legislation and/or amendments to corporate and securities laws;
- to make grants of state assistance or investment risk insurance by the home state subject to effective human rights risk assessments;<sup>33</sup>
- to require, as a matter of host state law, that all investment proposals be accompanied by such a risk assessment;
- address the issue of extraterritorial application of home state domestic human rights obligations to the overseas activities of MNEs domiciled in that state.

22. In relation to access to remedies, the major obstacles cited in the UNGPs to the availability of formal legal remedies could be dealt with. These include:

- the question of extraterritorial jurisdiction over claims made by affected groups or individuals in the host state;
- the removal of the obstacle of separate corporate personality and limited liability in claims made against the parent company for the acts of its overseas subsidiaries; and
- the availability of legal aid for the bringing of such claims.<sup>34</sup>

23. A further important development highlighted in the Consultation Paper is the use of legality requirements in IIAs as a condition for the enjoyment of treaty protections.<sup>35</sup> The Consultation Paper notes that current practice varies from including a requirement of legality only at the time of making the investment to a general requirement of legality both at the time of making, and in the operation, of the investment. In cases where the investor has committed serious breaches of host state law through, for example, causing or assisting in serious violations of human rights, it would appear unacceptable for them to benefit from the protection of the IIA. Accordingly, a useful future development would be to have a strong legality requirement in IIAs covering both the making and operation of the investment, as suggested in the Consultation Paper. It should be noted that some arbitral tribunals have already accepted the need to consider the legality of investments as a relevant factor in determining subject-matter jurisdiction where the IIA in question requires that

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<sup>33</sup> See further Bruno Simma “Foreign Investment Arbitration: a Place for Human Rights?” 60 ICLQ 573 at 594-6 (2011); IFC *Guide to Human Rights Impact Assessment and Management (HRIAM)* available at [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/GuidetoHRIAM.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM.pdf); James Harrison “Establishing a meaningful human rights due diligence process for corporations : learning from experience of human rights impact assessment” 31 (2) *Impact Assessment and Project Appraisal* 107 (2013).

<sup>34</sup> See Olivier de Sutter “Towards a New Treaty on Business and Human Rights” 1 BHRJ 41 at 44-55 (2016). On legal aid issues see further Richard Meeran “Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations” in Deva and Bilchitz (eds) above n 11 378 at 395-401 citing John Ruggie’s criticism of the UK Legal Aid Sentencing and Punishment of Offenders Act 2012 for limiting access to legal aid and its impact on human rights cases against MNEs.

<sup>35</sup> Above n 8 paras 405-416.

investments shall be made “in accordance with the law”. This is discussed further in paragraph 26 below.

***(c) Weak Impact: Hortatory Provisions on Business Responsibilities***

24. At the lowest impact level, an IIA could include little more than a hortatory commitment for states to use their best efforts to further the observance of human rights by corporate actors. This might be accompanied by an obligation on the Contracting Parties to make regular reports to a Joint Committee of the Contracting Parties under the IIA on progress made to further this aim, in line with the practice of some human rights instruments, most notably the International Covenant on Economic, Social and Cultural Rights.<sup>36</sup> According to Olivier De Sutter, such a system could be made more demanding than under existing human rights treaties citing the World Health Organisation Framework Convention on Tobacco Control as a model of a convention that sets general aims and requires states to submit reports detailing *inter alia* legislative efforts to meet those aims. However, he views such a development as being of questionable political feasibility.<sup>37</sup> Furthermore, so far as impact on investment law and arbitration is concerned, such an approach would appear to have none as it would not demand that a tribunal take account of the contents of such a report when adjudicating an investor claim. Indeed, a Contracting Party business and human rights report is likely to be factually irrelevant to any claim before the tribunal, given the level of generality at which it would be written.

***(d) Dealing with Business Responsibilities and Human Rights under “First Generation” IIAs: Possible Avenues for Further Consideration in “New Generation” IIAs***

25. This final section of the submission considers what tribunals have already done to enhance the business responsibilities of investors under “first generation” IIAs, which may be silent on such issues or include, at most, only hortatory provisions. These developments offer guidance on possible future business responsibility provisions in IIAs, as a means of guiding arbitral tribunals in how to approach business responsibility questions arising out of the facts of a claim. The focus is on the admissibility of claims and tribunal jurisdiction, the admissibility of evidence from third party stakeholders, the establishment of state liability under the IIA and the measure of compensation.

26. Regarding admissibility and jurisdiction, for example, the China-Canada BIT defines “covered investment” as including “an investment of an investor admitted in accordance with its laws and regulations thereafter, and which involves the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>38</sup> Article 2 clarifies that the agreement, “shall apply to measures adopted or maintained by a Contracting Party relating to investors of the other Contracting Party and covered investments” and Article 3 states that, “[e]ach Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws, regulations and rules.” The effect of these provisions is that investments infringing the host states laws and regulations will fall outside the definition of a “covered investment” as they are illegal and so deserve no

<sup>36</sup> See De Sutter above n 33 at 55-58.

<sup>37</sup> *ibid.*

<sup>38</sup> Canada-China BIT 2012 art 1(4) at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/778/canada---china-bit-2012->.

protection.<sup>39</sup> Consequently, a tribunal will refuse jurisdiction over any subsequent claim made by the investor.<sup>40</sup> The investor has a due diligence obligation to ensure its investment complies with local law, and failure to do so will render any resulting claim inadmissible.<sup>41</sup> A future IIA provision could spell out such procedural requirements as part of the “in accordance with law” clause and in the ISDS clauses.

27. Equally, international public policy may be invoked before a tribunal to bar claims. In *World Duty Free v. The Republic of Kenya* the Kenyan Government successfully opposed a claim made under the investment contract between the claimant, a company that ran the duty-free concessions at Nairobi and Mombasa airports, and the relevant government agency, where it was shown that the concessions had been procured by the bribery of the then President of Kenya.<sup>42</sup> After an extensive examination of national and international legal sources the tribunal held that,

“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”<sup>43</sup>

Such public policy-based reasoning could be extended to claims tainted by evidence that the claimant has failed to respect the human rights of persons and communities affected by their investment as where investments are made, “in pursuance of torture or genocide or in

<sup>39</sup> See C. McLachlan, L. Shore and M. Weiniger *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2<sup>nd</sup> ed, 2017) paras 6.106-6.112; *Salini Construction v Morocco* ICSID Case No ARB/00/4 Decision on Jurisdiction 23 July 2001, 42 ILM 609 (2003) at <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf> para 46; *Tokios Tokeles v Ukraine* ICSID Case No ARB/02/18 Decision on Jurisdiction 29 April 2004, 20 ICSID Rev-FILJ 205 (2005) at <https://www.italaw.com/sites/default/files/case-documents/ita0863.pdf> para 84: “The requirement in Article 1(1) of the Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs. The purpose of such provisions, as explained by the Tribunal in *Salini Costruttori S.p.A and Italstrade S.p.A v Morocco*, is “to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.””.

<sup>40</sup> See *Fraport AG Frankfurt Airport Services Worldwide v. The Philippines* ICSID Case No ARB/11/12 Award of 10 December 2014 at <https://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf> para 328; *Inceysa Vallisoletana SL v. El Salvador* (Decision on Jurisdiction), ICSID Case No ARB/03/26, Award of 2 August 2006 at [https://www.italaw.com/sites/default/files/case-documents/ita0424\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf) para 257; *Phoenix Action v Czech Republic* ICSID Case No ARB/06/5 Award 15 April 2009 at <https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf> paras 100-113.

<sup>41</sup> *Anderson v Costa Rica* ICSID Case No ARB(AF)/07/3 Award 19 May 2010 at <https://www.italaw.com/sites/default/files/case-documents/ita0031.pdf> para 58.

<sup>42</sup> *World Duty Free v. The Republic of Kenya* ICSID Case No ARB/00/07, Award 4 October 2006 at <https://www.trans-lex.org/241400/world-duty-free-co-ltd-v-the-republic-of-kenya-icsid-case-no-arb-00-7/>. See too *Metal-Tech v Uzbekistan* ICSID Case No ARB/10/3 Award 4 October 2013 at <https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf> paras 372-3.

<sup>43</sup> *World Duty Free* *ibid* para 157.

support of slavery or trafficking of human organs.”<sup>44</sup> Again business responsibility and ISDS clauses could contain references to public policy questions, including prohibitions on corruption and participation in, or collusion with, the types of crimes listed above. These provisions could extend the ban on claims where the claimant has violated a norm of international *jus cogens*. Some progress along these lines can be seen in the Netherlands Model BIT, which, by Article 16(2) states, “[t]he Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.” However, this falls short of listing clearly any public policy or international *jus cogens* grounds for declining jurisdiction, thus limiting its scope below the actual level of international legal responsibility that a business actor is already subjected to under general international law.<sup>45</sup>

28. Human rights and other business responsibility issues may be the basis of a counterclaim on the part of the respondent state. In *Urbaser v Argentina* the tribunal accepted the respondent state’s right to argue that the claimant investors conduct amounted to a breach of human rights giving rise to a counterclaim.<sup>46</sup> Argentina counterclaimed that the claimant’s failure to provide adequate investment in its concession to supply water and sewage services to Buenos Aires led to violations of the human right to water. The Tribunal held that a BIT should, “be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”<sup>47</sup> Although the counterclaim was rejected on the merits, this award points the way towards the inclusion of a right to bring business-related human rights and other responsibility counterclaims as a matter of course in future IIAs.

29. Such a provision is exemplified by Article 43 of the draft Pan-African Investment Code of 2016 which states:

“1. Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

2. A Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief resulting from an alleged breach of the Code.”<sup>48</sup>

<sup>44</sup> See *Phoenix Action Ltd v Czech Republic* above n 39 para 78.

<sup>45</sup> On which see further International Commission of Jurists *Report of the ICJ expert legal panel on corporate complicity in international crimes* 3 vols. (Geneva, International Commission of Jurists, 2008) at <https://www.icj.org/report-of-the-icj-expert-legal-panel-on-corporate-complicity-in-international-crimes/>.

<sup>46</sup> *Urbaser v Argentina*, ICSID Case No. ARB/07/26 (8 December 2016) [https://www.italaw.com/sites/default/files/case-documents/italaw8136\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf).

<sup>47</sup> *ibid* para 1200.

<sup>48</sup> Draft Pan African Investment Code 2016 at [https://au.int/sites/default/files/documents/32844-doc-draft\\_pan-african\\_investment\\_code\\_december\\_2016\\_en.pdf](https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf)

This provision follows general international law practice concerning counter-claims and requires that the counterclaim is materially relevant to the main claim. The second international law requirement of party consent to the counterclaim is given through this provision. As the Pan-African Code contains express human rights and other business responsibility provisions, the subject-matter jurisdiction issue is also resolved.<sup>49</sup>

30. As to admissibility of third party evidence, some tribunals have accepted the right of interested third parties to provide *amicus curiae* briefs on adverse human rights or environmental impacts arising out of the operations of the claimant investor.<sup>50</sup> However such evidence need not be taken into consideration by the tribunal, which retains full discretion as to how far it should be used.<sup>51</sup> Of note in this connection is ICSID Arbitration Rule 37(2) which states:

“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”<sup>52</sup>

A similar provision is sometimes found in new IIAs. A good example is Article 29 of the Canada-China BIT of 2012 which states:

<sup>49</sup> Investor obligation provisions cover: corporate governance (art 19), socio-political obligations to respect *inter alia* national sovereignty, non-interference with local politics and respect for labour rights (art 20); prohibition of bribery (art 21) adherence to host state CSR laws and development objectives (art 22) respect for state and community rights to natural resources and land (art 23) and compliance with business ethics and human rights (art 24).

<sup>50</sup> For example the tribunal in *Glamis Gold Ltd v United States* UNCITRAL Rules Arbitration Award of 7 May 2009 at <http://www.italaw.com/cases/487> accepted *amicus* briefs on behalf of the Quechuan Nation asserting their indigenous peoples rights to the use of their sacred ancestral sites for spiritual and ceremonial practices, thereby depriving future generations of their cultural heritage, where these sites were the subject of a mining investment by the Canadian claimant corporation: see paras 267-286. Many tribunals have rejected the relevance of such submissions: see further Muchlinski in Deva and Bilchitz above n 2 at 353-62

<sup>51</sup> *Glamis Gold* *ibid.*

<sup>52</sup> ICSID Convention Arbitration Rules at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx>.

“1. A Tribunal, after consultation with the disputing parties, may accept written submissions from a person or entity that is not a disputing party if that non-disputing party has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it.

2. An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, shall be made in accordance with Annex C.29.”

31. As noted above, a key issue in relation to business responsibilities and investment treaties is whether treaty-based investor protection provisions could be invoked by the investor against the state where it exercises its right to regulate to avoid or mitigate possible human rights, environmental or other social harm caused by the actions or omissions of the investor. Human rights-based arguments have been put to tribunals over the years in relation to the legality of an expropriation, and human rights case-law has been considered by tribunals as a guide to their analysis of the proportionality of the respondent states actions towards the investor.<sup>53</sup> A further area in which the relationship between investment treaties and human rights has been examined by investment tribunals concerns the rights of indigenous peoples and communities affected by an investment.<sup>54</sup>

32. In several awards arising out of the Argentine Peso crisis of 2001, the Argentine Government sought to defend its emergency legislation, which caused significant financial losses to foreign investors, on the grounds that these measures protected the human rights of citizens by ensuring basic order and/or access to those services which are instrumental to public health and welfare.<sup>55</sup> This argument met with mixed responses from tribunals, none of which made any significant contribution to answering the question whether human rights issues were integral to BIT interpretation.<sup>56</sup>

33. In *Biwater v United Republic of Tanzania* the tribunal accepted, at the procedural stage, that human rights considerations might be raised by the dispute, as it concerned the operation of a privatised water company and this involved significant public interests in relation to the right to water and to health.<sup>57</sup> However, when making its award in 2008, the

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<sup>53</sup> See generally UNCTAD, ‘Selected Developments in IIA Arbitration and Human Rights’, UNCTAD IIA MONITOR No. 2 (2009), available at: [http://www.unctad.org/en/docs/webdiaeia20097\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20097_en.pdf) and see Luke Peterson and Kevin Gray *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (Winnipeg, International Institute for Sustainable Development, 2005) available at [https://www.iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf); Clara Reiner and Christoph Schreuer ‘Human Rights and International Investment Arbitration’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann *Human Rights in International Investment Law and Arbitration* (Oxford, Oxford University Press, 2009) 82; Andreas Kulick *Global Public Interest in International Investment Law* (Cambridge, Cambridge University Press, 2012) ch.7.

<sup>54</sup> *Glamis Gold Ltd v United States* UNCITRAL Rules Arbitration Award of 7 May 2009 at <http://www.italaw.com/cases/487>.

<sup>55</sup> UNCTAD, ‘Selected Developments’ above n 52 at 8.

<sup>56</sup> See e.g. *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi v Argentina* ICSID Case No. ARB/03/19 Decision on Responsibility 28 July 2010 para 261.

<sup>57</sup> See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (Procedural Order No.5), ICSID Case No. ARB/05/22, 2 February 2007, para 52.



tribunal noted that the public interest issues surrounding the right to water were admissible but it did not explore the United Republic of Tanzania's human rights law obligations in further detail.<sup>58</sup> The case was decided against the claimant on the basis that the claimant had not shown that the actions taken by the Tanzanian authorities in breach of the United Kingdom (UK)–Tanzania BIT had actually caused the losses complained of.

34. In the case of *Foresti and others v the Republic of South Africa*, significant issues arose relating to the right of the host state to legislate so as to correct historic injustices involving gross violations of human rights.<sup>59</sup> This claim was brought before ICSID by Italian mining investors, who had invested after the fall of apartheid, and who argued that their investment had been indirectly expropriated as a result of South Africa's post-apartheid equal opportunities and land rights policy. The claimants informed ICSID of their wish to discontinue proceedings in 2009. The tribunal awarded a default, ordering a partial recovery of fees and costs by South Africa from the Claimants on the basis that, "while claimants in investment arbitrations are in principle entitled to the costs necessarily incurred in the vindication of their legal rights, they cannot expect to leave respondent States to carry the costs of defending claims that are abandoned."<sup>60</sup>

35. A key consideration in such cases is whether the drafting of the IIA in question permits the tribunal to read into it a right to regulate in the public interest so as to protect the public and other stakeholders against business irresponsibility and associated harm. For example, the tribunal in *Al Tamini v Oman* noted that in applying the fair and equitable treatment (FET) standard under the US-Oman Free Trade Agreement due regard for environmental regulation was required. The State Parties had made an express commitment to measures that they consider, "appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" under Article 10-10, while the Environment Chapter in the agreement protected state rights to regulate in this field.<sup>61</sup> Accordingly, it was clear, "that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws."<sup>62</sup> The Tribunal held that for the FET standard to be breached:

"the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard. That is particularly so, in a context such as the US–Oman FTA, where the

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<sup>58</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (Award), ICSID Case No. ARB/05/22, 24 July 2008, para 358.

<sup>59</sup> *Foresti and others v the Republic of South Africa* (Award), ICSID Case No ARB (AF)/07/1, 4 August 2010.

<sup>60</sup> *ibid*, para 132.

<sup>61</sup> *Al Tamini v Oman* ICSID Case No ARB/11/33 Award of 3 November 2015 at <https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf> para 387.

<sup>62</sup> *ibid* para 389.

impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment."<sup>63</sup>

The tribunal was able to offer greater regulatory space to Oman as a result of the clear drafting of the FTA. In this light reform of "first generation" IIAs, to offer better guidance to arbitrators over the correct balance to be struck between investor protection and legitimate regulation, appears entirely possible.

36. In order to avoid doubt over the state's right to regulate some more recent model, and concluded, BITs contain a clause clarifying the scope of the right and thereby provide protection for the state against claims that might unduly restrict it in legitimate cases of regulatory action. Thus, the Nigeria-Morocco BIT, in Article 23, grants the host state the, "right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives" in accordance with customary international law and other general principles of international law.<sup>64</sup>

37. However, such provisions create a degree of ambiguity. It remains uncertain how far international law circumscribes the right to regulate generally or whether investor protection standards are exceptions to the general sovereign right of the state to regulate affairs within its territory. Once the right to regulate is subjected to investor protection standards, treaty-specific carve-outs will govern its operation.<sup>65</sup> It is possible, therefore, that the right to regulate is a treaty-based *lex specialis*. This understanding is reinforced by Article 23(2) of the Nigeria-Morocco BIT which adds, "[e]xcept where the rights of Host State are expressly stated as an exception to the obligation of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in the Agreement." In addition, Article 23(3) clarifies that the right to regulate permits Nigeria and Morocco to take non-discriminatory measures in relation to investors/investments to comply with their international obligations under other treaties and that this shall not constitute a breach of the Agreement.

38. The express inclusion in the Nigeria-Morocco BIT of the right to regulate in the fields of environment, human and labour rights, the inclusion of investor responsibilities in these areas, good corporate governance and social responsibility standards, and a more general right to regulate are not inconsistent with rights of investors. The key here is the co-operation mechanism under Article 4, setting up a Joint Committee of the Contracting Parties, that gives Nigeria and Morocco a means by which to develop practice under the agreement in consultation with investors and other stakeholders. In addition, Article 26

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<sup>63</sup> ibid para 390.

<sup>64</sup> See too Netherlands Model BIT above n 7 art 2(2); Norway Model BIT 2015 at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download> art 12: "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns."

<sup>65</sup> See Aiakaterini Titi *The Right to Regulate in International Investment Law* (Baden-Baden, Nomos Verlag, 2014) at 52 who defines the right to regulate as "a legal right that permits a departure from specific investment commitments assumed by a state on the international plane without incurring a duty to compensate".

contains a dispute prevention procedure allowing recourse by investors, the Contracting Parties and other stakeholders to the Joint Committee before ISDS is instituted.

39. Investor conduct may be a ground for reducing, or in appropriate cases eliminating, compensation even though a breach of an IIA provision has been established. For example, in *MTD Equity v Chile* the claimant, a property development company skilled in urban development, successfully argued that the fair and equitable treatment standard had been breached by Chile when the Foreign Investment Commission wrongly authorised a major property development investment by the claimant that was incompatible with established planning regulations. However, the tribunal reduced the amount of compensation by 50 per cent, representing the amount of loss that was attributable to the claimant's failure to exercise caution, by relying on incorrect advice offered by owner of the land on which the investment was to have been made, rather than to the unlawful authorisation decision.<sup>66</sup> Such reasoning could also extend to cases where the investor, through their own conduct, has caused or contributed to human rights violations or other serious environmental or social harms.

40. As noted in the Consultation Paper and above, Article 23 of the Netherlands Model BIT permits a tribunal, "in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises." While a number of issues, identified in the Consultation Paper, remain to be resolved, this provision undoubtedly points to an important innovation that other IIAs could follow.<sup>67</sup>

**(e) Business Human Rights?**

41. A final point to note is that, should a future investment law regime integrate human rights and other business responsibilities into its subject-matter, it is probably inescapable that not only will the human rights responsibilities of corporate actors towards third parties affected by their operations become relevant, but that the human rights responsibilities of home and host states towards those third parties, and towards the corporate actors themselves will become matters of significance. It is hard to imagine that human rights questions will not cover all these eventualities. Thus, one consequence of the move towards greater corporate accountability in this field may well be the rise of corporate human rights-based claims.<sup>68</sup> For example, in the *Channel Tunnel Arbitration* the claimants, The Channel Tunnel Group and France-Manche, claimed, ultimately unsuccessfully, that their right to peaceful enjoyment of possessions under Article 1 Protocol I of the European Convention on Human Rights had been infringed by the actions of the UK and French authorities in

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<sup>66</sup> *MTD Equity v Chile* ICSID Case No ARB/01/7 award of 25 May 2004: (2005) 44 ILM at <https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf> paras 242-6.

<sup>67</sup> On which see above n 8 at paras 428-433.

<sup>68</sup> See further Jose Alvarez "Are Corporations "Subjects" of International Law" 9 Santa Clara J. Int'l L. 1 at 27-31 who warns that the inclusion of human rights-based arguments in investor-State arbitration is likely to result in the extension of human rights to corporate actors, especially if they are seen as having a measure of international personality. On the human rights of corporate actors in international investment law see further Nicolas Klein "Human Rights and International Investment Law: Investment Protection as Human Right?" 4 Gottingen Jo. Int. Law 1 (2012) doi: 10.3249/1868-1581-4-1-klein

their handling of illegal migrants through the Tunnel.<sup>69</sup> Accordingly, human rights clauses in future agreements may include express language protecting investors against breaches of human rights by home and host States.

#### **1.10. Lene Wendland (Chief, Business and Human Rights, Development and Social and Economic Issues Branch, on behalf of the Office of the United Nations High Commissioner for Human Rights)**

On behalf of the OHCHR Business and Human Rights Unit, I would like to congratulate you on the comprehensive and informative consultation paper prepared in advance of the 2020 OECD Investment Treaty Conference. It provides an excellent reference and resource document to inform the upcoming deliberations on business responsibilities and investment treaties at the Conference.

While the document is very comprehensive, we would like to recommend that reference be made to the OHCHR Accountability and Remedy Project (<https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx>) either in the section that covers access to remedy (paragraphs 117 – 122) and/or in the section on follow-up at the UN (paragraphs 123 – 125).

The six year Project, which has been carried out by OHCHR pursuant to successive mandates from the UN Human Rights Council, provides extensive, evidence-based guidance for more effective implementation of Pillar III of the UN Guiding Principles on Business and Human Rights. Given that the Project was mandated by the Human Rights Council, and that OHCHR's work from the first two phases of the Project was welcomed by the Council in consecutive consensus resolutions (the third and final phase of the project will be presented to the Council in June), the guidance in our view constitutes an authoritative complement to the UN Guiding Principles themselves, and as such provides relevant information for the readers of the paper.

It should be noted that the second phase of the Project focused on state-based non-judicial grievance mechanisms and was informed in significant ways by the role of the OECD NCPs.

We would also like to recommend that the section on follow-up at the UN (paragraphs 123-125) be amended to reflect the following:

- Expand the description of the role of the UN Working Group on Business and Human Rights to refer to the range of thematic reports prepared by the Working Group some of which are relevant to the issue of investment. <https://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>
- Expand on the description of the Annual Forum on Business and Human Rights to reflect that it has become the largest annual global gathering on BHR with up to 3000 participants, and that many sessions at the Forum are relevant to the BHR/ trade and investment nexus.
- As you are referring to the General Comment from the Committee on Economic, Social and Cultural Rights, we suggest that you add a reference also to the General Comment 16 on business developed by the Committee on the Rights of the Child <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

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<sup>69</sup> Above n 21.

- Consider amending the description of OHCHR’s general role and mandate to align better with what is set out here: <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>
- In the reference to OHCHR’s “important work” on issues relating to BHR and RBC (paragraphs 124), refer to the Accountability and Remedy project, but also to the series of tools and guidance documents related to the UN Guiding Principles prepared by OHCHR, notably the Interpretive Guide on the corporate responsibility to respect human rights ([https://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf)) and the Frequently Asked Questions on the UNGPs ([https://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf)), as well as to OHCHR’s role in providing authoritative advice on the interpretation of the UN Guiding Principles (see examples here: <https://www.ohchr.org/EN/Issues/Business/Pages/Resources.aspx>)

Many thanks for considering these comments while finalising the paper, and congratulations again on this important effort.

### **1.11. Manjiao CHI (Professor and Founding Director, Center for International Economic Law and Policy (CIELP), Law School, University of International Business and Economics (UIBE), China)**

There is a growing global consensus that responsible business conducts (“RBCs”) issues relating to transnational investment should be effectively addressed to ensure the sustainable development of all countries. The Consultation Paper is a timely response to these urgent issue and has adequately served its goal to provide a study of the status quo of the interaction between RBCs and international investment agreements (“IIAs”).

Based on the conclusions of the fact-finding pointed out in the Consultation Paper, this comment has three major points.

First, lack of an international accountability mechanism (“IAM”) for business players, especially multinational enterprises (“MNEs”) seems a major obstacle for adequately addressing the RBC issues relating to transnational investment. In this regard, IIAs could play a helpful role in helping establish such an IAM. Countries around the world have concluded a large number of IIAs. While not many IIAs incorporate RBC provisions, the existing RBC provisions often lack enforceability and normativity. It remains to be the case despite the improvements made by some recent IIAs as mentioned in the Consultation Paper. Consequently, in general, IIAs remain insufficient in addressing RBC issues effectively. As many countries are interested in concluding IIAs, it is important and possible to stress that countries should use IIAs as a platform to discuss the design and establishment of an IAM. OECD could play an important role in this regard, given its membership (less member states compared to some other international organizations) and previous experience in investment treaty-making. It would be helpful to outline some practical policy approaches for countries and the international community in discussing the issue of IAM. Countries may also need to consider how to integrate some existing efforts in the discussion, such as the Hague Rules on Business and Human Rights Arbitration.

Second, the consultation paper correctly points out that there is a governance gap, but its focus remains largely on governments and international organizations (“IOs”). Though it is true that governments and IOs are major players of global investment governance, other

stakeholders, such as MNEs, non-governmental organizations (“NGOs”) and civil society groups should also be given a place in global investment governance. It would be helpful for countries to clarify what possible role(s) these stakeholders could play, and how such roles could be reconciled with those of governments and IOs to fill in such a governance gap. For this purpose, fact-finding efforts should be extended to national laws with regard to NGOs, transparency in law/rule-making and other related aspects.

Third, the international community is engaged in an ongoing investor-state dispute settlement (“ISDS”) reform nowadays. Although the ISDS Reform meetings chaired by United Nations Commission for International Trade Law (“UNCITRAL”) focus on ISDS procedural aspects, without dealing with investment protection and other substantive issues, OECD and other organizations could take the opportunity to engage stakeholders in discussing how to use or reform ISDS to promote RBCs. This could be a compliment to the UNCITRAL process, and help address the long-standing issue that ISDS mechanism, international arbitration in particular, seems insufficient in addressing RBC issues associated with investment disputes. Indeed, as argued by many, ISDS procedures could be improved to help address such issues, such as reforming the rules of counterclaim in arbitration. Countries could take this point into consideration.

#### **1.12. Jan Eijbouts (Professor, Institute for Corporate Law, Governance and Innovation Policies Faculty of Law, Maastricht University)**

First of all, thank you for the invitation to comment on and provide additional information to your excellent and very informative draft scoping paper on Business and Human Rights and Investment Treaties.

As Project Leader and member of the Working Group and Drafting Team of the Hague Rules on Business and Human Rights Arbitration (Hague Rules) project I may herewith provide the following additional information to paragraph 5.3 on the Hague Rules project in the draft scoping paper.

As you rightfully observe in the scoping paper, the Hague Rules do aim at a different set of disputes than State - Investor disputes in the context of Investment Treaties. While in the latter, business is effectively on the claiming side in the dispute, in disputes aimed at by the Hague Rules business is the defending party. However, the dynamics of both categories of disputes are pointing indeed to quite a few common aspects which they share based on the public policy nature of RBC in general and business and human rights as addressed by the UNGP's and the OECD Guidelines for Multinational Enterprises in particular. Therefore, the Hague Rules may contribute also to the thought evolution of RBC in the context of Investment Treaties.

The Hague Rules were successfully launched on 12 December 2019 at the Peace Palace in the Hague, hosted by the Permanent Court of Arbitration with a well-attended symposium, the report on which I attach herewith next to the text of the Rules themselves. In addition, you may find a short video-impression on the project's webpage: <https://www.cilc.nl/nudging-arbitration-for-business-and-human-rights-disputes/>.

For your convenience I summarize the most relevant aspects below. The Foreword, Preamble and Introductory Rules provide the background and procedure followed, the approach of the Rules as a quasi-global, consensual, flexible and multipurpose private judicial remedy mechanism for victims of corporate human rights violations and the specific amendments to the basis of the Rules, the UNCITRAL Arbitration Rules 2013, to make them suitable for the resolution of business and human rights disputes. The Hague

Rules are accompanied by extensive commentary where needed or useful in the opinion of the Drafting Team, a tailor-made Code of Conduct for BHR Arbitrators and model clauses for specific constellations.

The main categories of the amendments to the UNCITRAL Arbitration Rules are summarized in the Preamble, par 6, as follows:

- (a) The particular characteristics of disputes related to the human rights impacts of business activities;
- (b) The possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities;
- (c) The potential imbalance of power that may arise in disputes under these Rules;
- (d) The public interest in the resolution of such disputes, which may require, among other things, a high degree of transparency of the proceedings and an opportunity for participation by third persons and States;
- (e) The importance of having arbitrators with expertise appropriate for such disputes and bound by high standards of conduct; and
- (f) The possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses.

In order to reflect the corporate responsibility to respect human rights as cornerstone of a RBC-inspired corporate governance approach to responsible conflict management, particular attention is paid to the Effectiveness criteria of UNGP Principle 31. For instance, various provisions aim at the protection of vulnerable parties or witnesses from intimidation and retaliatory actions and, otherwise than regular arbitration rules which take confidentiality as starting point, the Hague Rules take transparency of proceedings as default situation with confidentiality of certain information to be granted by the tribunal as exception. Also interim measures and expedited arbitration is possible. As costs may be important hurdles, certain cost allocation decisions with a view to the position of victims may be taken by the tribunal and third party funding is under certain conditions possible. I note, that group actions are also possible. Finally, the rules provide incentives for the tribunal to refer parties (possibly back) to non-binding procedures such as mediation during the arbitration proceedings. The Hague Rules offer the whole range of legal remedies (restitution, injunctions, declaratory judgements etc.). For more detailed procedural and substantive comments I may refer to the observations by Profs Ursula Kriebaum and Steven Ratner in the Launch Symposium Report.

The multipurpose application range of the Rules can be illustrated by the following non-limitative listing:

- Disputes between (international) companies and affected rights holders directly;
- Disputes between companies and their suppliers on non-compliance with contractually stipulated conditions in the field of business and human rights;
- Disputes in multi-stakeholder arrangements in the field of business and human rights (such as the Dutch Multi-stakeholder Industry Agreements, the Bangladesh Accord or the Voluntary Principles on Security and Human Rights as potential examples);
- Binding BHR dispute resolution as follow on to non-binding mechanisms such as (e.g. OECD NCP) mediation, which did not result in the solution sought;

- BHR dispute resolution in so-called Global Framework Agreements between individual companies and global unions;
- BHR dispute resolution in the field of mega sporting events (e.g. Olympics, FIFA) and individual sporter cases, now resolved by CAS to the sporters' dissatisfaction;
- BHR dispute resolution in international development finance agreements.

As you will understand, for the most part the above categories of disputes are not ad hoc (pursuant to alleged torts), but may assist corporations in the implementation of their corporate responsibility to respect human rights pursuant to pillar II, such as for instance arbitration in supply chain agreements between the sourcing corporation and their suppliers, which may contain also so-called third party beneficiary rights for the potential BHR victims of the suppliers. That same attitude may be expected from RBC compliant companies in their state-investor disputes.

On the process followed I note, that the Drafting Team has been set up with divergence in mind, such that all relevant expertise and regions are represented (the names of the members of the team are mentioned under the Foreword and you may find the background of the members at the project's webpage on the CILC-website (<https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>)).

Moreover, as mentioned in the Foreword, in order to arrange for stakeholder involvement the Drafting Team has followed a procedure allowing representatives from all relevant stakeholder groups to provide input in the process in two consultation rounds, the first one to offer views and opinions on the elements identified by the Team as relevant for BHR disputes and suggest other elements and the second to offer comments and suggestions on the draft for the Rules developed by the Team based on the reactions provided in the first round. The attached final version of the Hague Rules has been prepared taking into account those reactions.

We trust you will find this information relevant and useful indeed for the topic of the scoping paper and are of course happy to provide any further information you may wish.

### 1.13. Ruth Bergan (Senior Advisor, on behalf of Trade Justice Movement)

#### Introduction

1. The Trade Justice Movement (TJM) appreciates the opportunity to respond to the OECD public consultation on business responsibilities and investment treaties.
2. TJM is a UK coalition of sixty civil society organisations with millions of members, calling for trade rules that work for people and planet. Our members include trade unions, aid agencies, environment, social justice and human rights campaigns, Fair Trade organisations and consumer groups.
3. This submission summarises our main concerns regarding investment treaties and in particular Investor-to-State Dispute Settlement (ISDS) and suggests a number of alternative approaches that OECD members should seriously consider as alternatives. In particular, we believe that countries must urgently take steps to ensure that investment provisions within trade and investment agreements are compatible with their commitments on international development, climate change and human rights.



## About Investment Protection Provisions

4. Investment protection provisions are primarily found in Bilateral Investment Treaties (BITs) and in a small number of Free Trade Agreements (FTAs). When originally developed, the intention of these provisions was to provide investors with legal certainty when investing overseas: they offer a range of broadly-defined protections, including those of fair and equitable treatment, protection from expropriation (including indirect expropriation), and national and most favoured nation treatment. These rights are enforceable through Investor to State Dispute Settlement (ISDS) mechanisms which allow investors to seek compensation from governments for measures that they consider to have negatively impacted on the profitability of their investment, using ad-hoc arbitration tribunals. The UK for example, currently has 96 of its own BITs, mostly signed in the 1980s and 1990s, and is party to four EU agreements that contain ISDS provisions.<sup>70</sup>

5. In recent years questions have increasingly been raised regarding the appropriateness of ISDS as a tool to protect international investment. This has been prompted by:

- (a) The kinds of government measures that have been challenged under ISDS, including: (raising water quality standards, the introduction of a sugar tax, a ban on a toxic fuel additive and the introduction of plain packaging on cigarette packets.<sup>71</sup>
- (b) The significant awards that have been made to investors, generally in the hundreds of millions of dollars.<sup>72</sup>
- (c) The high legal costs, averaging US\$8 million, faced by governments even when they are successful in defending a claim.<sup>73</sup>
- (d) Evidence that governments are being deterred from introducing new policies because they are concerned that it will trigger an ISDS claim.<sup>74</sup>
- (e) The lack of obligations on investors, for example to comply with human rights or environmental standards in the host country, as a condition of accessing treaty protections.

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<sup>70</sup> CETA, the EU-Canada deal, and the EU-Mexico revised FTA contain provisions for an Investment Court System; the EU has separate FTAs and Investment Protection Agreements (IPAs) containing ICS with Singapore and Vietnam.

<sup>71</sup> See: Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6); Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5 (NAFTA); Ethyl Corporation v. Canada, NAFTA/ UNCITRAL (1976); Philip Morris Asia Ltd v. The Commonwealth of Australia, UNCITRAL (2010).

<sup>72</sup> UNCTAD (2017) IIA Issues Note: Special Update on Investor-State Dispute Settlement: Facts and Figures. Available at: [https://unctad.org/en/PublicationsLibrary/diaepcb2017d7\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf), accessed 07/06/19.

<sup>73</sup> OECD (2012) Investor-State Dispute Settlement: Public Consultation. Available at: [https://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments\\_web.pdf](https://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf), accessed 07/06/19.

<sup>74</sup> Van Harten, G., and Scott, D. N. (2016) 'Investment treaties and the internal vetting of regulatory proposals: A case study from Canada', *Journal of International Dispute Settlement*, 7(1), 92–116.

The following outlines a number of concerns that we believe provide a strong case for rethinking the system.

### **ISDS could hamper efforts to tackle climate change and address the loss of biodiversity**

6. There is widespread consensus that preventing extreme climate change and reversing the global loss of biodiversity are among the most urgent issues of our time and that addressing them will require significant changes to government policy. ISDS mechanisms could allow investors to sue for compensation if these changes negatively affect the profitability of their investments, potentially impeding the development of policy in this area:

- (a) Half of all ISDS cases registered at the World Bank by the end of 2015 related to oil, mining, gas, electric power or other energy forms, all of which have climate and environmental impacts.
- (b) Overwhelmingly, the findings of the tribunals hearing ISDS cases support the proposition that companies should be compensated if their ‘legitimate expectations’ of a ‘stable business environment’ are undermined, whether or not environmental concerns are at stake.
- (c) Many BITs contain nothing to exempt environmental or climate measures from their provisions.<sup>75</sup>

7. Cases brought on the basis of environmental policy changes include: Vattenfall vs Germany, where the company challenged the introduction of higher water quality standards; Lone Pine vs Canada in response to a moratorium on fracking under the St. Lawrence river; Bilcon vs Canada for the denial of a mining permit; TransCanada threatened the US with a \$15 billion case when President Obama denied a permit for an oil pipeline.<sup>76</sup>

### **ISDS has not kept pace with developments in international human rights law**

8. Human rights are fundamental rights and therefore merit the most rigorous standard of protection. The past twenty-five years have seen significant developments in human rights protections, including the recognition of economic, social, cultural, civil and political rights.<sup>77</sup>

9. BITs have not kept pace with these developments. They contain no language on human rights, which means that there can be no certainty that human rights will be protected in an agreement or taken into account should a dispute arise and tribunals rarely

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<sup>75</sup> Trade Justice Movement (2015) Worried About UK BITs? Available at <https://www.tjm.org.uk/resources/reports/worried-about-uk-bits-analysis-of-uk-bilateral-investment-treaties> accessed 07/06/19.

<sup>76</sup> See: Vattenfall AB and others vs. Federal Republic of Germany, ICSID, ARB/09/6; Lone Pine Resources Inc v. Canada, ICSID case no. UNCT/15/2; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04; TransCanada Corp v. United States of America, ICSID, ARB/16/21.

<sup>77</sup> Fowles, S. (2017) How Investment Treaties Have a Chilling Effect on Human Rights, The Foreign Policy Centre: London, p.4. Available at: <https://fpc.org.uk/wp-content/uploads/2017/05/1803.pdf>, accessed 21/03/19.

consider human rights arguments because they are not required to do so.<sup>78</sup> This creates a situation of significant inequality: BITS create a special class of rights for investors which are extensive and benefit from powerful enforcement mechanisms with no means for balancing them against fundamental human rights and no equivalent mechanism to protect human rights.

### **ISDS can undermine the rule of law**

10. There are a number of ways in which BITS can undermine the rule of law in host countries. Many BITS, including those to which the UK is a party, do not require companies to exhaust domestic remedies before they can access ISDS mechanisms. This bypasses domestic legal systems and creates a parallel system. This is problematic because:

- (a) A process that effectively requires taxpayers to insure the business risk of international investors does nothing to raise governance standards for society as a whole and instead removes some of the incentives for host countries to strengthen domestic governance and judicial systems;
- (b) It eliminates opportunities for domestic judges and administrative agencies to consider and address the substantive problems faced by investors and to develop corresponding domestic law and expertise;
- (c) It can create incentives for governments to favour the concerns of foreign investors over other constituencies because ISDS offers significant amounts of protection to foreign investors only;
- (d) National treatment provisions in fact often duplicate existing domestic laws, many of which already offer international investors the same treatment as domestic investors. This offers the potential for investors to have ‘two bites of the cherry’ when bringing a case;<sup>79</sup>
- (e) Most Favoured Nation clauses mean that companies can access the benefits of treaties to which their own home state is not a signatory by looking at the full range of deals that the host country has signed and picking the one that offers them the best terms;
- (f) The ISDS system has no established system of case law or precedent such that the potential outcomes of a case and the amount of an award are often unpredictable and inconsistent.<sup>80</sup>

11. ISDS is only accessible to international investors, there is no equivalent provision made for domestic investors. Whilst compensation proceedings by domestic investors are

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<sup>78</sup> Office of the High Commissioner for Human Rights (2015) UN Experts Voice Concern Over the Adverse Impact of Free Trade and Investment Agreements on Human Rights. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>, accessed 27/01/20; Schill, S.W. (2015) Reforming ISDS: Conceptual Framework and Options for the Way Forward, The E15 Initiative. Available at: [https://www.ictsd.org/sites/default/files/research/E15-Investment-Schill-FINAL\\_0.pdf](https://www.ictsd.org/sites/default/files/research/E15-Investment-Schill-FINAL_0.pdf), accessed 27/01/20.

<sup>79</sup> Fowles (2017).

<sup>80</sup> Sachs, L. and Johnson, L. (2017) Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities. Available at: <http://ccsi.columbia.edu/files/2017/11/ISDS-and-Intra-national-inequality.pdf>, accessed 23/03/19.

possible through the European Convention on Human Rights/Human Rights Act, historically the process has proven problematic and foreign investors covered by BITs have a stronger claim both procedurally and substantively which strengthens the legal force of their economic rights and “expectations”.<sup>81</sup> This creates a significant imbalance between domestic and international companies.

12. A further barrier to access for small and medium-sized companies is that the ISDS process is very costly, cases can take several years and the outcomes are uncertain. This puts the system out of reach of the majority of investors who lack the resources to bring a case: whilst the UK is a significant source of cases, relatively few UK companies investing overseas have made use of the system: the 69 UK cases registered by 2018 were brought by 61 companies - a very small proportion of the UK’s total outward investment flows – and only 16 cases have resulted in awards for these companies.<sup>82</sup>

### **ISDS now goes far beyond protection against arbitrary deprivation of property**

13. The right to compensation for ‘indirect expropriation’ has meant that investors have been able to claim not just for the uncompensated seizure of physical assets but also for issues such as the perceived infringement of intellectual property rights, the limiting of tariffs in public utilities and increased environmental standards.

14. Investors have been compensated not only for actual losses suffered but often also for a loss of anticipated future profits; this can significantly increase the amount of compensation awarded. For example, in the case of *Al-Kharafi and Sons vs Libya*, US\$935 million in compensation was awarded, of which US\$900 million was for lost profits. The investor had only invested US\$5 million at the time of bringing the case and sought US\$2 billion in compensation to cover an 83-year land lease.<sup>83</sup> BITs generally offer no guidance to tribunals as to how an award is to be calculated and, although some tribunals have applied the full reparation principle of customary international law, there are significant variations in the methods of calculation used and disagreement regarding the factors that should be taken into account.<sup>84</sup>

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<sup>81</sup> Sachs, L. and Johnson, L. (2019) ‘Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities’, Colombia Centre on Sustainable Investment Working Paper 2019. Available at: <https://ssrn.com/abstract=3452136>, accessed 21/01/20; Clifford Chance (2019) ‘UK Nationalisation: The Law and Cost - 2019 Update’. Available at: <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/07/UPDATE%20Nationalisation%20July%202019.pdf>, accessed 21/01/20.

<sup>82</sup> Poulsen, L. (2018) Investment Policy After Brexit: Investment Treaties and Beyond, Written evidence submitted to the House of Commons International Trade Committee UK Investment Policy Inquiry. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/internationaltrade-committee/uk-investment-policy/written/84748.pdf>, accessed 06/06/19.

<sup>83</sup> See: *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya*, ad hoc arbitration rules, Cairo Regional Center for International Commercial Arbitration.

<sup>84</sup> UNCTAD (2018) IIA Issues Note, Investor-State Dispute Settlement: Review of Developments in 2017. Available at: [https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf), accessed 04/07/19; Garcia Dominguez, Marcos D. (2017) ‘Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into account?’, *Arizona Journal of Comparative Law*, 31 (1): 96-122. Available

### **There is no direct relationship between signing an investment treaty and increased investment**

15. When BITs were first developed, the promise was that they would bring additional investment. A number of studies have been undertaken to assess whether they have delivered on this promise. The overall conclusions are that:

- (a) There is no clear evidence that they bring additional investment.<sup>85</sup>
- (b) Investors tend to prioritise other factors before they look at whether a country has an investment treaty including the skill level of the labour force, quality of infrastructure and proximity of target markets.<sup>86</sup>
- (c) Some of the biggest investment destinations in the world do not have investment treaties: Brazil is among the world's top five investment destinations and has no investment treaties that contain ISDS and there are no investment treaties between the EU and the US, despite significant investment flows.<sup>87</sup>

16. In light of the concerns raised about investment protection provisions, and ISDS in particular, a number of countries are rethinking their approach to investment protection and promotion:

- (a) The US-Mexico-Canada Agreement (USMCA - the revised version of NAFTA) removes dispute settlement provisions between the US and Canada, and significantly restricts those between Mexico and the US. Canada and Mexico are both members of the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) and therefore continue to be subject to investment provisions.<sup>88</sup>
- (b) New Zealand has sought to limit the applicability of ISDS to inward investment coming from other members of the CPTPP.
- (c) Countries including South Africa and Ecuador have cancelled their BITs outright.<sup>89</sup>

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at: [http://arizonajournal.org/wp-content/uploads/2017/04/03\\_GARCIA\\_DOMINGUEZ.pdf](http://arizonajournal.org/wp-content/uploads/2017/04/03_GARCIA_DOMINGUEZ.pdf), accessed 04/07/19.

<sup>85</sup> Poulsen, L.N.S. (2010) 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl Sauvant (ed.) *Yearbook on International Investment Law and Policy 2009/10*, Oxford: Oxford University Press.

<sup>86</sup> Ibid.

<sup>87</sup> UNCTAD (2018) *World Investment Report 2018: Investment and new industrial policies*, p.4. Available at: [https://unctad.org/en/PublicationsLibrary/wir2018\\_overview\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf), accessed 07/06/19.

<sup>88</sup> Osterwalder, N.B (n.d) *USMCA Curbs How Much Investors Can Sue Countries – Sort of*. Available at: <https://www.iisd.org/library/usmca-investors>, accessed 14/02/20.

<sup>89</sup> Horrigan, B., and Naish, V. (9th May, 2018) *New Zealand signs side letters with five CPTPP members to exclude compulsory investor state dispute settlement*. Available at: [https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-toexclude-compulsory-investor-state-disputesettlement/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=LinkedIn-integration](https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-toexclude-compulsory-investor-state-disputesettlement/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration), accessed 14/02/20.

- (d) A number of other countries, including India, Morocco and Nigeria have undertaken a significant overhaul of their investment protection models, introducing innovations such as limitations on investor rights, increased investor responsibilities and requiring that investors be liable in domestic law for their activities overseas.
- (e) Brazil has introduced an alternative model called a ‘Cooperation and Facilitation Investment Agreement’ which introduces a number of innovations, including: the exclusion of an ISDS mechanism, instead establishing a national ombudsman to whom investors can appeal; clarifying the range of investor protections, for example by replacing ‘fair and equitable treatment’ with more specific standards like access to justice and excluding indirect expropriation. The agreement also narrows the definition of which investments are covered, excluding short term speculative portfolio investments.
- (f) The EU has introduced a new ‘Investment Court System’ (ICS) into some of its trade agreements and its proposal for a Multilateral Investment Court, currently under discussion at the UN. ICS is problematic because it leaves investment protections largely unchanged, but it does introduce procedural reforms including the creation of a permanent tribunal with government appointed arbitrators, an appeal tribunal, and the obligation to disclose third party funding.<sup>90</sup>

#### **Alternative protections are already available to international investors**

17. There are a number of alternative ways that investors can seek to protect their investments overseas:

- (a) *Investors can help to avoid problems arising in the first place by taking a number of steps, such as:*
  - a. Undertaking due diligence before an investment is considered;
  - b. Undertaking impact assessments that engage with local communities;
  - c. Consider designing investment to ensure strong backward linkages into local or national economies, for example by exploring the possibility of a joint venture;
- (b) *Non-legal mechanisms may prove to be the best way to avoid disputes:*
  - a. Disputes can be addressed in the initial stages via mediation;
  - b. Investors may be able to develop good relationships with local actors, such as other businesses or civil society, who could support efforts to address issues that arise;
- (c) *Investors can use market-based products to protect their investments:*
  - a. Commercial political risk insurance is available through a number of private banks, or for investments in developing countries through the World Bank’s Multilateral Investment Guarantee Agency;
- (d) *There are a number of alternative legal mechanisms:*

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<sup>90</sup> Trade Justice Movement (August 2017) Stepping Away from ISDS. Available at: <https://www.tjm.org.uk/documents/briefings/Stepping-away-from-ISDS.pdf>, accessed 07/06/19.

- a. Investors should seek to exhaust domestic remedies before looking to international instruments;
- b. In cases of the most egregious behaviour, disputes can be dealt with under human rights instruments;

(e) *State-to-state dispute settlement may also be available.*

### **Conclusion**

18. OECD members must seriously consider their approach to international investment protection. Existing agreements have not kept pace with developments in human rights and environmental protections, they create a parallel legal system and offer significant benefits to investors with no corresponding obligations. Their vague wording has allowed for broad interpretation by tribunals without any requirement to follow case law, making the system unpredictable. Finally, there is little evidence to support the proposition that BITs lead to increased investment in partner countries. Given the range of alternative options that are available and the continuing rejection of ISDS by countries around the world, members must use the opportunity of the OECD review to rethink their approach.

### **1.14. Edward Guntrip (Senior Lecturer in International Law, Sussex Law School, University of Sussex)**

#### ***Counterclaims in Investor-State Dispute Settlement: A Procedural Means of Encouraging Business Responsibility***

##### **Introduction**

1. This paper has been prepared for the purposes of the OECD's public consultation on business responsibilities and investment treaties. The content of the paper responds to the OECD Secretariat's 'Business Responsibilities and Investment Treaties' Consultation Paper dated 15 January 2020 (Consultation Paper).

2. The paper aims to supplement section 8 of the Consultation Paper, which discusses the potential role of investment treaties in generating business responsibilities. In particular, this paper addresses the role that counterclaim procedures in investor-state dispute settlement (ISDS) may play in enforcing treaty provisions that generate obligations for foreign investors.

##### **Investment Treaty Practice**

3. Traditionally, investment treaties only generated obligations for host states. Later generations of investment treaties evolved to include provisions that govern responsible business conduct by foreign investors. As identified in the Consultation Paper, many treaty provisions that address business responsibility are hortatory in nature and only encourage compliance with responsible business conduct or corporate social responsibility frameworks (see Consultation Paper, paras 397 – 404). This style of treaty provision does not give rise to a legally binding obligation on the foreign investor to conduct their business responsibly.

4. In contrast, recent treaties such as the Morocco-Nigeria 2016 BIT have generated legally binding obligations for foreign investors in international law. The Morocco-Nigeria 2016 BIT contains treaty provisions that explicitly require foreign investors to conduct their business responsibly by:



- (a) undertaking impact assessments (Articles 14(1) and 14(2) Morocco-Nigeria 2016 BIT);
- (b) taking measures to protect the environment (Articles 14(3) and 18(1) Morocco-Nigeria 2016 BIT);
- (c) acting to prevent and combat corruption (Article 17 Morocco-Nigeria 2016 BIT); and,
- (d) operating investments in a manner that upholds and respects human rights, labour rights and environmental law (Articles 18(2), 18(3) and 18(4) Morocco-Nigeria 2016 BIT respectively).

The Consultation Paper outlines the provisions of the Dutch Model BIT, which also reflects new developments in investment treaty practice (see Consultation Paper, paras 417 – 432).

5. The emergence of treaty provisions that bind foreign investors alters the traditionally asymmetric structure of investment treaties. By creating obligations that bind foreign investors, host states are able to challenge foreign investor conduct based on international law. Host states can enforce these treaty provisions using counterclaim procedures in ISDS.

#### **Counterclaim Procedures in ISDS**

6. Counterclaim procedures in ISDS permit host states to claim against foreign investors for violations of legal obligations owed to the host state.<sup>91</sup> Hence, counterclaim procedures can be used to enforce treaty provisions that require foreign investors to conduct their business responsibly. There are certain conditions that must be met before a host state can rely on counterclaim procedures. As a result, counterclaims will not be applicable in every investment dispute.

7. A counterclaim is an independent claim in response to an originating claim.<sup>92</sup> Thus, counterclaims can only be invoked when an investment dispute exists, and the foreign investor has commenced a claim in ISDS. This requirement restricts the use of counterclaims to a small sub-set of foreign investors. Despite this limitation, the potential threat of counterclaim procedures in ISDS may encourage all foreign investors to conduct their business responsibly in accordance with the applicable treaty provisions in order to avoid facing a counterclaim in any future investment dispute.

8. Party consent is required to bring a counterclaim in accordance with both the ICSID Arbitration Rules<sup>93</sup> and the UNCITRAL Arbitration Rules (as amended in 2010).<sup>94</sup> The terms of consent are established when a host state sets out their standing offer to arbitrate. Therefore, host states must ensure that the terms of their standing offer to arbitrate

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<sup>91</sup> Kryvoi, 'Counterclaims in Investor-State Arbitration' (2012) 21 *Minnesota Journal of International Law* 216, 220.

<sup>92</sup> KP Berger, 'Set-off in International Economic Arbitration' (1999) 15 *Arbitration International* 53, 60.

<sup>93</sup> ICSID Arbitration Rules, Rule 40(1) together with ICSID Convention, Article 46.

<sup>94</sup> UNCITRAL Arbitration Rules (as amended in 2010), Article 21(3).



encompasses counterclaims. This can be achieved by consenting to ‘all disputes’, or by using words to this effect.<sup>95</sup>

9. A connection must exist between the claim and the counterclaim. Prior arbitral practice has required a legal connection between the originating claim and the counterclaim (e.g. *Saluka v Czech Republic*). The UNCITRAL Arbitration Rules (as amended 2010) no longer require a legal connection between the originating claim and the counterclaim.<sup>96</sup> In relation to ISDS governed by ICSID arbitration, the award in *Urbaser v Argentina* (*Urbaser*) indicates that it is sufficient for the claim and the counterclaim to be connected by the same factual background.<sup>97</sup> A counterclaim based on a treaty provision in the applicable investment treaty provides a legal connection. Therefore, the requirement for a connection between the originating claim and the counterclaim is likely to be easily met.

10. The counterclaim must fall within the jurisdiction of the arbitral tribunal. For arbitrations governed by the UNCITRAL Arbitration Rules, jurisdiction is limited by the terms of party consent, the governing law and the investment treaty.<sup>98</sup> As the obligation to conduct the business responsibly is sourced from the investment treaty, jurisdiction is likely to exist. For ICSID arbitrations, the dispute must be within the jurisdiction of ICSID. This requires compliance with Article 25 ICSID Convention, which only permits an investment tribunal to hear a ‘legal dispute arising directly out of an investment’. The *Urbaser* tribunal did not consider international investment law and international human rights law to be mutually exclusive for the purposes of this provision.<sup>99</sup> Therefore, counterclaims relating to responsible business conduct based on the provisions of the investment treaty are likely to be covered by the ICSID Convention.

11. If these three conditions are met (consent, connection and jurisdiction) then it may be possible for a host state to enforce treaty provisions that require responsible business conduct against a foreign investor.

### **Implications of Counterclaim Procedures in ISDS for Business Responsibility**

12. Recent investment treaty practice has generated treaty provisions that create obligations on foreign investors to conduct their business responsibly. This type of provision can be enforced by host states through the use of counterclaim procedures in ISDS. If host states wish to make use of counterclaim procedures, they must ensure that they meet the jurisdictional requirements. Even then, counterclaim procedures have limited application as an investment claim must already exist. Nonetheless, if foreign investors are aware that counterclaims may be invoked against them in the event of an investment dispute, they are more likely to comply with this type of treaty provision. Thus, counterclaim procedures in ISDS may provide a means of encouraging foreign investors to conduct their business responsibly and offer a potential means of enforcement when they do not.

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<sup>95</sup> Z Douglas, *The International Law of Investment Claims* (CUP 2009) p. 257.

<sup>96</sup> c.f. UNCITRAL Arbitration Rules (1976), Article 19(3).

<sup>97</sup> Para 1151.

<sup>98</sup> D Caron and L Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) pp. 426-8.

<sup>99</sup> Para 1154.

### 1.15. Nisawan Pitchdumrong (Thailand)

#### Paragraph 142

“...Human rights are the fastest growing basis for claims – accounting for over half of the cases since 2011 as opposed to only 4% prior to 2011. Most cases are brought by NGOs, followed by trade unions....”

Human rights are naturally not number one issues which business concerns. Most businesses have activities concerning human rights for the purpose of public relations. Real activities concerning human rights are mostly conducted only in large business, not medium and small business.

#### Paragraph 144

“...Once a specific instance has been submitted, there are potentially four steps which follow, all of which include NCP decisions:...”

It should be stated that NCP should have authority to set penalty for the case that the recommendations have not been followed, or help making the recommendation works.

#### Paragraph 321

“...The 2019 Revised Draft also clarifies the definition of due diligence, in line with the “identify, prevent, mitigate and account” process defined in the UNGPs. It sets out four necessary steps in the due diligence process: (a) identifying and assessing any actual or potential human rights violations or abuses; (b) taking appropriate actions to prevent human rights violations or abuses; (c) monitoring the human rights impact; and (d) communicating to stakeholders and accounting for the policies and measures adopted....”

To mitigate is not only to monitor the human rights impact. There should be some measures to heal the damage from human right violation in step (c) before going to step (d). In order to know the exact amount of damage mitigation, Impact Evaluation might be needed to quantify total impact from the human rights violation.

### 1.16. Nontihès Koné (Coordinator of the Human Rights Violations Observatory, Association for the Protection of Human Rights, Ivory Coast)

Incorporating the challenges of responsible business conduct into company management policies and systems comes at a cost. This could be a bottleneck. Businesses could indeed argue that to avoid their obligation of responsible conduct.

The company must communicate within the limits permitted by issues relating to the confidentiality of commercial affairs, to competition and to security. It will be interesting to avoid abuses to provide guidelines which determine its limits otherwise companies can pretend to be exempt from their obligation to communicate.

In Africa, there is a high rate of illiterate people, especially in rural areas. These populations ignore their rights and sometimes passively suffer the negative impacts of businesses. It is therefore often recurrent to find that they do not have access to remedies.

Indeed, the States are being influenced by the large investments of multinationals and turn a blind eye to the negative impacts of the latter.

At that time, the company which is guided by the spirit of speculation takes advantage of a favourable atmosphere to work in peace.

Civil society must play a major role in educating the population about their rights but also in ensuring that these populations have access to remedies.

Regarding the national contact points, it will be interesting to extend their skills to countries which have not joined the guide, taking into account the nationality of multinationals.

For example, if a large firm sets up in a country which is not a member of the OECD, for the settlement of disputes arising from its activities, the national contact point of its country of origin may be entered.

### 1.17. Yulia Levashova<sup>100</sup> (Assistant Professor, Nyenrode Business University; Associate Research Fellow, Utrecht University)

#### **The Role of Investor's Due Diligence in International Investment Law: Zooming in into the Legitimate Expectations of Investors**

##### 1. Introduction

The investor's due diligence has a strong link with business responsibilities. Arbitral tribunals in interpreting one of the most contested investment treaty protection standard – fair and equitable treatment – have increasingly referred to the necessity for an investor to conduct a due diligence investigation before investing in a host state. Foreign investors have been required to assess not only commercial, but also socio-political risks. The investor's due diligence in the context of the fair and equitable treatment standard (FET) goes beyond the risk-based business due diligence performed by a foreign investor for his own benefit. It has implications for a state's right to regulate in a public interest and a broader notion of business responsibilities. The following contribution elaborates on this issue.

##### 2. An investor's due diligence and the fair and equitable treatment

A breach of the FET standard is one of the most frequent bases for investor-state dispute settlement (ISDS) claims. Presently, the protection of the legitimate expectations of an investor constitutes a central element of the FET standard.<sup>101</sup> Under the concept of legitimate expectations in international investment law, states are required to maintain a certain degree of stability and predictability in their regulatory framework as this is relied upon by investors when making investments.<sup>102</sup> Tribunals have considered there to be a breach of an investor's legitimate expectations where a host state makes substantial changes to the legal framework, which have resulted in serious financial losses being suffered by the investor.<sup>103</sup>

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<sup>100</sup> The author can be contacted at: [j.levashova@nyenrode.nl](mailto:j.levashova@nyenrode.nl).

<sup>101</sup> J. Bonnitcha (2014). *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*. Cambridge University Press, pp. 161-162; I. Laird et al. (2015) 'International Investment Law and Arbitration: 2014 in Review' in A. J. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2013-2014* (Oxford University Press, 2015), p. 105.

<sup>102</sup> K. Vandeveld (2010) A Unified Theory of Fair and Equitable Treatment, *New York University Journal of International Law and Policy* 43(1), p. 66.

<sup>103</sup> M. Valenti (2014) The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard. In Sacerdoti G et al. (eds) *General Interests of Host States in International Investment Law*. Cambridge University Press, p. 41.

In this regard, many states are concerned with their right to adopt and change their laws for public good, as these regulatory changes may trigger investment claims. Currently, a significant number of ISDS claims relate to state's changes to renewable energy policies. Spain, Italy and the Czech Republic are among the respondent states that currently face investment claims because of alterations to their regulatory frameworks for renewable energy.<sup>104</sup> In these cases, the investor's due diligence has been a significant factor in the assessment of the FET standard and the determination of a state's liability by investment tribunals.

The notion of investor's due diligence in the context of a FET standard extends beyond the risk-based business due diligence performed by a foreign investor for his own benefit. The investor's responsibility to conduct an investigation into a state's regulatory framework, as emphasised in numerous investment decisions, has an impact on a state's ability to regulate in a public interest. To what extent a state can change or adapt its laws and policies in a public interest without violating the FET standard depends on how the notion of stability is balanced against other factors, e.g. the investor's due diligence in interpretation by tribunals.

As tribunals consistently provided, an investor cannot expect the legal system to freeze.<sup>105</sup> Laws always evolve and will always change. The challenge appears to lie in being able to pinpoint the extent to which a regulatory change is permissible under the FET standard.

To balance the obligation of stability, many tribunals, such as in renewable energy cases, require an investor to exercise proper due diligence and to conduct a risk assessment when considering investing in a host state. The threshold for the violation of the legitimate expectations is whether the state's contested regulatory changes were not foreseeable by a prudent investor.<sup>106</sup> The extent of foreseeability of regulatory changes are determined by the form and the content of due diligence and the efforts undertaken by an investor to assess the risks of change.<sup>107</sup> There are variations between tribunals regarding the role of due

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<sup>104</sup> E.g. *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic* (2018); *Natland and others v. Czech Republic* (2013); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (2018); *CSP Equity Investment Sarl v. Kingdom of Spain* (2013); *DCM Energy and others v. Kingdom of Spain* (2017); *Aharon Naftali Biram, and others v. Kingdom of Spain* (2016); *FREIF Eurowind v. Kingdom of Spain* (2017); *Portigon AG v. Kingdom of Spain* (2017); *ESPF Beteiligungs GmbH and others v. Italian Republic* (2016); *Sun Reserve Luxco Holdings SRL v. Italy* (2016); *Eskosol S.p.A. in liquidazione v. Italian Republic* (2015); *Blusun S.A., J.-P. Lecorcier and M. Stein v. Italy* (2016). For example, Spain has been subject to 50 investment claims (almost all of them, except one, lodged between 2011 and present), whereas the regulatory changes to renewable energy framework were the subject matter of the dispute in more 90% of all cases. UNCTAD (2020), Investment Policy Hub.

<sup>105</sup> Y. Levashova (2019), *The Right of States in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*. Kluwer, International Arbitration Law Library, pp. 140-151.

<sup>106</sup> *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, (2016) para. 781; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic* (2018); *Belenergia v. Italy* (2019).

<sup>107</sup> This categorization is based on the author's extensive research on a due diligence in the context of the FET standard. The results of this research are forthcoming in the article "The Fair and Equitable Treatment and Investor's Due Diligence under International Investment Law" in the *Netherlands International Law Review* 2: 2020.

diligence in an overall assessment of a FET claim and concerning criteria for a proper due diligence to be conducted by an investor. These differences are explained below.

*The role of due diligence in the assessment of a FET claim*

In some cases, tribunals clearly provided that exercising due diligence is a prerequisite for an investor to have his legitimate expectations protected under the FET standard. For example, in *Stadtwerke Munchen and others v. Spain* (2019), the tribunal provided that for an investor's expectation to be reasonable, it 'must also arise from a rigorous due diligence process carried out by the investor.'<sup>108</sup> In *Antaris v. Czech Republic* (2018), the tribunal denied the investor's claim for the protection of legitimate expectations, as there was 'no evidence of any real due diligence.'<sup>109</sup> In *Belenergia v. Italy* (2019), the tribunal found that the due diligence reports presented by the investor had not concerned the Italian regulatory risks in regard to the feed-in tariffs.<sup>110</sup> A tribunal emphasised that 'prudent' investor was required to examine Italian PV laws and regulations, which suggest a clear trend toward incentives' reduction.<sup>111</sup> Hence, the due diligence conducted by the investor was deemed insufficient.

However, in other awards the role of an investor's due diligence has been limited in an overall appraisal of a breach of the FET standard. Some tribunals indicated that there was no requirement to conduct a formal due diligence process and that it cannot be considered a pre-condition to a successful claim for the protection of legitimate expectations.<sup>112</sup>

*The extent of the required due diligence*

There are also no specific criteria regarding what constitutes a proper investor's due diligence for the purpose of assessment of a claim based on a stability of a regulatory framework. Only a few tribunals have accepted that some type of formal written legal advice about the potential changes of a regulatory framework was necessary to constitute acceptable due diligence. In other cases, informal sources such as oral legal opinion, information from officials or general knowledge about a regulatory framework were considered to be sufficient to constitute the required level of due diligence. In terms of the content of a diligent inquiry, tribunals' opinions also differ. In some cases, the tribunal expects an extensive risk appraisal of a specific legal regime relied upon by an investor at time of investment.<sup>113</sup> In other decisions, moderate due diligence efforts of an investor not specifically directed at the analysis of disputed legislation, has sufficed in demonstrating that the due diligence undertaken was enough.<sup>114</sup> In addition to the requirement that concrete efforts to conduct due diligence be undertaken, some tribunals have examined

<sup>108</sup> *Stadtwerke Munchen and others v. Spain* (2019), para. 264

<sup>109</sup> *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (2018), para. 432.

<sup>110</sup> *Belenergia v. Italy* (2019) para. 585.

<sup>111</sup> *Belenergia v. Italy* (2019) para. 587.

<sup>112</sup> *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (2019), para. 396; *SolEs Badajoz GmbH v. Kingdom of Spain* (2019), para. 331.

<sup>113</sup> Y. Levashova, *The Fair and Equitable Treatment and Investor's Due Diligence under International Investment Law* forthcoming in the *Netherlands International Law Review* 2: 2020.

<sup>114</sup> *Ibid.*

whether changes in the regulatory framework were foreseeable based on a broader appraisal of a host's state legal and political environment.<sup>115</sup>

### 3. Conclusion

To conclude, there is a need of a stricter duty, even a legal requirement, for an investor to conduct a risk based due diligence including an appraisal of the socio-political circumstances in a host state. The divergence on the scope of required due diligence observed in the jurisprudence creates uncertainty regarding the existence and the extent of investor's responsibility to act with diligence while investing in a host state. This gap creates risks for opportunistic investment claims. This is particularly problematic for weak political regimes or economies in transition. Some tribunals, like *Mamidoil v. Albania* (2015), have stressed the pivotal role of investor's due diligence in the context of a transition economy like Albania that 'overcome a highly repressive and isolationist communist regime.'<sup>116</sup>

At present, no treaties refer to investor's duty to conduct due diligence in the context of the FET standard, or as a condition to access ISDS. By introducing the investor's obligation to conduct formal due diligence process that requires a legal assessment of a regulatory framework can certainly prevent some of conflicts arising out of an investor's claim of stability. From a host state's perspective, the number of FET claims based on the change of a regulatory framework could be reduced by clarifying in their IIAs or additional protocols that an investor has a duty to conduct due diligence as a requirement for the protection of his legitimate expectations.

## 1.18. Margarita Pirovska (Head of Fiduciary Duty in the 21st Century, on behalf of Principles for Responsible Investment)

### Introduction

The United Nations-backed Principles for Responsible Investment (PRI) is the world's leading initiative on responsible investment. The PRI has over 2800 signatories (pension funds, insurers, investment managers and service providers) globally with approximately US \$90 trillion in assets under management.

Responsible investment explicitly acknowledges the relevance to the investor of environmental, social and governance (ESG) factors in investment decision-making for the long-term health and stability of financial markets.

The PRI welcomes the opportunity to contribute evidence to the OECD Consultation Paper on Business Responsibilities and Investment Treaties.

*Within this consultation paper, the PRI provides comments to the chapter 5, "Investor, business, trade union and civil society action", specifically on the topic of "sustainable or 'environmental, social and governance' (ESG) investing".*

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<sup>115</sup> *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania* (2015); *Antaris v. Czech Republic* (2018); *Belenergia v. Italy* (2019).

<sup>116</sup> *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania* (2015), para 625 and para 671.

## About the consultation

Investment treaty policy makers are increasingly faced with pressures to integrate policies relating to business responsibilities into investment treaties. As policy makers contemplate whether and how to respond in their particular field, they need to understand the broader framework for business responsibilities.

In October 2019, governments participating in the OECD-hosted Investment Roundtable initiated work on business responsibilities and investment treaties. Business and human rights (BHR) and responsible business conduct (RBC) are fast-developing fields with converging approaches to business responsibilities. The convergence is demonstrated in the alignment of the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and core ILO standards. Governments, business, trade unions and civil society are all engaged in efforts in this area.

The OECD is now inviting comments from business, trade unions, civil society and experts on a consultation paper that provides governments with a preliminary overview of the fields of BHR and RBC. The paper considers a range of recent government actions, including in response to growing calls for policy coherence across government, as well as a few important stakeholder initiatives. The paper also provides a brief overview of relevant investment treaty developments.<sup>117</sup>

## PRI's definition of responsible investment

The PRI defines responsible, or sustainable investment as a strategy and practice to incorporate environmental, social and governance (ESG) factors in investment decisions and active ownership.<sup>118</sup>

Responsible investment aims to combine better risk management with improved portfolio returns, and to reflect investor and beneficiary values in an investment strategy. It complements traditional financial analysis and portfolio construction techniques.

Responsible investment is driven by:

- *Materiality*: There is a growing recognition in the financial industry and in academia that ESG factors influence investor returns. An analysis of over 2,000 academic studies on how ESG factors affect corporate financial performance found “an overwhelming share of positive results,” with just one in 10 showing a negative relationship.<sup>119</sup> PRI-commissioned research indicates that engaging with companies on ESG issues can create value for both investors and companies, by encouraging better ESG risk management and more sustainable business practices.<sup>120</sup>

<sup>117</sup> <http://www.oecd.org/investment/public-consultation-on-business-responsibilities-and-investment-treaties.htm>.

<sup>118</sup> <https://www.unpri.org/pri/an-introduction-to-responsible-investment>.

<sup>119</sup> [https://download.dws.com/download?elib-assetguid=714aed4c2e83471787d1ca0f1b559006&wt\\_eid=2156623951900953270&wt\\_t=1566240624353](https://download.dws.com/download?elib-assetguid=714aed4c2e83471787d1ca0f1b559006&wt_eid=2156623951900953270&wt_t=1566240624353).

<sup>120</sup> <https://www.unpri.org/academic-research/how-esg-engagement-creates-value-for-investors-and-companies/3054.article>.

- *Client demand:* Beneficiaries and clients are increasingly calling for greater transparency about how and where their money is invested. This is driven by growing awareness that ESG factors influence company value, returns and reputation, and by an increasing focus on the environmental and social impacts of the companies they are invested in. Negative screening, which excludes certain sectors, companies or practices, is the most widespread approach to integrating values in a portfolio or fund.
- *Regulation:* Since the mid-nineties, responsible investment regulation has increased significantly, with a particular surge in policy interventions since the 2008 financial crisis. Regulatory change has also been driven by a realisation among national and international regulators that the financial sector can play an important role in meeting global challenges such as climate change, modern slavery and tax avoidance.

The responsible investment industry is evolving rapidly, resulting in misconceptions about what it entails, including:

- *It involves investing in a specific investment strategy or product.* Responsible investment does not necessarily require investing in a specific strategy or product. It simply involves including ESG information in investment decision-making and stewardship practices, to ensure that all relevant factors are accounted for when assessing risk and return. The way in which an investor practices responsible investment varies widely.
- *It leads to lower investment returns.* Responsible investment does not require sacrificing returns; evidence demonstrates that it should, in fact, enhance risk and return characteristics. Investors apply a range of techniques to identify risks and opportunities that might remain undiscovered without the analysis of specific ESG data and broad ESG trends.
- *It is the same as ethical, socially responsible and impact investing.* There are many terms associated with the plethora of investment approaches that consider environmental, social and governance issues. Most lack formal definitions, and they are often used interchangeably. A key to understanding how responsible investment is broader than these concepts is that where many make moral or ethical goals a primary purpose, responsible investment can and should also be pursued by the investor whose sole focus is financial performance.

**PRI's response to Chapter 5, Section 5.1 "sustainable or 'environmental, social and governance' (ESG) investing"**

Paragraph 297:

"297. There is broad interest today among investors and asset managers in environmental, social and governance (ESG) investment. ESG investing grew out of the UN Global Compact. The goal of the initiative was to find ways to integrate ESG considerations into capital markets. The number of funds using ESG factors increased from fewer than 50 in 2,000 to nearly 1,100 in 2016. Today, ESG investing is estimated at over USD 20 trillion in assets under management or around a quarter of all professionally managed assets around the world. "

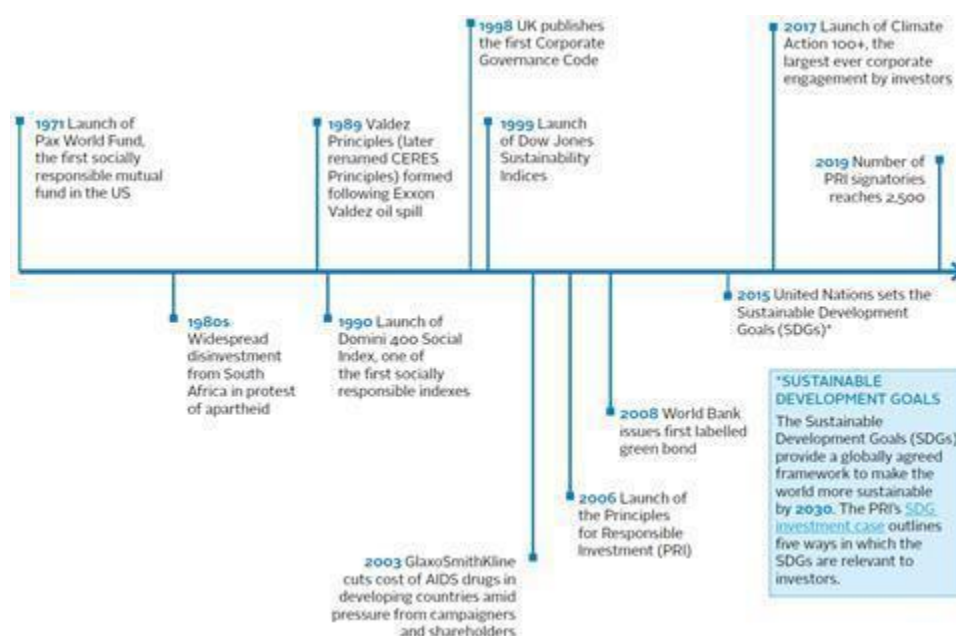


We recommend to use the definition of responsible investment instead of ‘ESG investing’ throughout this section, as presented above and available in detail on PRI’s website.<sup>121</sup> PRI’s definition is implemented by its 2800 signatories around the world. The use of standard definitions will avoid confusion around the key theme of this section. We recommend replacing the first sentence with:

“There is broad interest today among investors and asset managers in responsible investment and the incorporation of environmental, social and governance (ESG) in investment decision making.”

On the origins of responsible investment, we recommend noting that the modern history of responsible investment is related to the development of socially responsible mutual funds in the 1970s.

Key milestones of the evolution of responsible investment include:

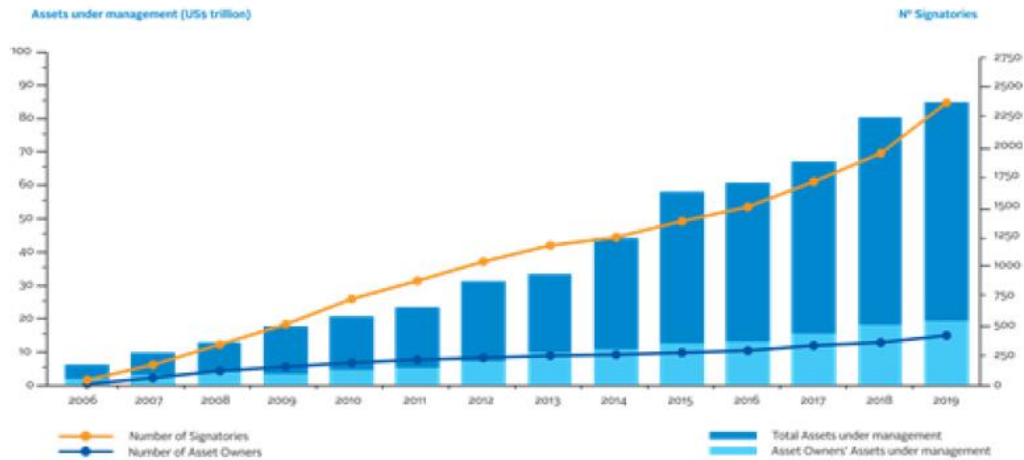


On the growth in responsible investment policies, data is available in our regulation database:

<https://www.unpri.org/sustainable-markets/regulation-map>

PRI’s signatories have reached 2800 in 2020 with 90 trillion USD in AUM:

<sup>121</sup> <https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-is-responsible-investment>.



**Paragraph 298:**

“298. ESG investing is promoted by numerous initiatives. The Principles for Responsible Investment (PRI), dating from 2006, are a private initiative supported by UN agencies. It seeks to understand the investment implications of ESG factors and to support an international network of investor signatories in incorporating these factors into their investment and ownership decisions. The Sustainable Stock Exchange Initiative (SSEI), seeks to integrate ESG considerations into stock exchange policies. Some exchanges now require ESG disclosure for listed companies or provide guidance on reporting.”

*We recommend the use of the term responsible investment instead of ESG investing. We also suggest adding the following information about the PRI:*

*“The number of PRI signatories reached 2800 in 2020, with 90 trillion USD of AUM. In 2018, the PRI introduced minimum requirements for signatories including an investment policy that covers the investor’s responsible investment approach, which must account for more than 50% of assets under management.”*

**Paragraph 299:**

“299. Fund managers and other institutional investors were initially reluctant to embrace the concept. Consideration of ESG factors is increasingly seen as a legitimate part of the fiduciary duty of institutional investors. Views that fiduciary duties are limited to the maximization of shareholder value without regard to environmental or social impacts, or governance issues such as corruption, are receding.”

We recommend changing the last part of the last sentence from ‘are receding’ to ‘are no longer supported’.

We also recommend referring to the latest analysis on fiduciary duty by the PRI and UNEP FI as part of their four year research programme<sup>122</sup> on this topic, which concluded that the fiduciary duties of investors require them to:

<sup>122</sup> <https://www.unpri.org/sustainable-markets/fiduciary-duty>.

- Incorporate environmental, social and governance (ESG) issues into investment analysis and decision-making processes, consistent with their investment time horizons.
- Understand and incorporate beneficiaries' and savers' sustainability-related preferences, regardless of whether these preferences are financially material.
- Encourage high standards of ESG performance in the companies or other entities in which they invest.
- Support the stability and resilience of the financial system.
- Report on how they have implemented these commitments.

Paragraph 300:

“300. While there is strong consumer demand and a clear market response, it is unclear that investors are getting what they seek because the quality of information about ESG performance can be uncertain. Funds and agencies marketing ESG ratings use non-public algorithms that are difficult to evaluate. Some academic work has shown that the same company can be at top of one service's ratings and at the bottom of another's.<sup>159</sup> The ESG factors have generally been developed autonomously by financial market service providers actors without regard for agreed frameworks such as the UNGPs or Guidelines. Uncertainty about the measurement of ESG performance by companies remains a major issue that affects the transmission of consumer demand to company performance.”

*We recommend to add in this paragraph the need for an international dialogue on ESG reporting harmonisation and standardisation. Multilateral organisations and ESG reporting stakeholders should work together to create a global, standardised and comparable corporate ESG reporting framework, including standardised ESG indicators and underlying methodologies.*

Paragraph 301:

“301. Various initiatives seek to produce standardised forms of disclosure. For example, the Global Reporting Initiative (GRI) was launched in 2000. Today, 80% of the world's largest corporations use GRI standards. Other include the International Integrated Reporting Initiative (IIRC) and the US-based Sustainability Accounting Standard Board (SASB). These voluntary initiatives reflect regulatory disclosure requirements in key jurisdictions and extend further.”

*We recommend adding the following information to this paragraph:*

*IOSCO, the International Organisation of Securities Commissions, has published in 2019 a statement<sup>123</sup> on ESG disclosure and a report<sup>124</sup> encouraging securities regulators to require ESG disclosures from issuers. Financial market authorities around the world are updating their listing rules and disclosure requirements to introduce mandatory ESG disclosures. Further information on ESG disclosure consultations by market authorities can be found on PRI's briefings and consultations page.<sup>125</sup>*

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<sup>123</sup> <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf>.

<sup>124</sup> <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD630.pdf>.

<sup>125</sup> <https://www.unpri.org/sustainable-markets/briefings-and-consultations>.

Paragraph 302:

“302. There have been many efforts to determine the impact of ESG issues on financial performance of companies. Some recent studies find that ESG investments perform at least as well as others, which has heightened and broadened investor interest.”

*The PRI has developed a summary of top academic research on responsible investment, available on PRI’s website.<sup>126</sup>*

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The PRI has experience in responsible investment policy and is willing to support the OECD in further promoting policies that support responsible investment and business conduct.

Any question or comments can be sent to [policy@unpri.org](mailto:policy@unpri.org).

### 1.19. Andrea Shemberg and Andrea Saldarriaga (SILA, Business & Human Rights Advisory)

Thank you for the opportunity to offer thoughts and comments on the consultation draft paper Business Responsibilities and Investment Treaties.

This submission is offered in the names of Andrea Shemberg and Andrea Saldarriaga<sup>1</sup> who are the founders of Sila Advisory, a mission-driven organisation working to integrate the protection of and respect for human rights across business activities and public policy.

Our submission is divided in two sections. First, we will offer three general comments and then several specific comments regarding particular parts of the paper.

#### **SECTION I: General Comments**

##### **1. The draft should more fully describe global governance gaps in State domestic and international policy**

The consultation draft includes only a partial description of what the UN Special Representative of the Secretary-General for Business and Human Rights (SRSG) calls “global governance gaps.” It is essential to the investment policy discussion that these be more fully described.

The SRSG described different types of governance gaps. One, as mentioned in the consultation draft, is the global governance gap created by the principle of separate legal personality. However, and importantly for the current discussion, the SRSG further elaborated governance gaps related to State policy and structures supporting economic globalisation. These include failures of ‘vertical’ and ‘horizontal’ policy coherence and structural governance gaps. The former refers to States failing to integrate their international human rights law obligations into their domestic policy (vertical), and their failure to integrate these obligations across government departments and policies (horizontal). Structural governance gaps result when commercial interests have stronger institutional and legal protection than do public interests--such as human rights and the environment. Indeed, the SRSG’s work on international investment agreements (led by Andrea Shemberg, co-author of this submission) specifically focused on exploring the

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<sup>126</sup> <https://www.unpri.org/academic-research/top-academic-resources-on-responsible-investment/4417.article>.

horizontal, vertical and structural governance gaps created by International Investment Agreements (IIAs) and Investor-State Dispute Resolution (ISDS) as well as international investment contracts.

During the SRSG mandate, John Ruggie looked very closely at international investment contracts and treaties, as well as ISDS. He was concerned that these powerful economic tools had been created, negotiated and agreed by States in the absence of consideration of their human rights obligations or other public interests. Indeed, the SRSG made two separate submissions to the UNCITRAL Working Group II to call for better transparency in ISDS. He also pursued a four-year project to help States and investors integrate human rights considerations into their investment contract negotiations. Finally, his 2010 report to the Human Rights Council [excerpted below] calls for States to integrate human rights and other public interests into investment treaties.

“20. There is a saying that the first thing to do when you are stuck in a deep hole is to stop digging. Yet countries unwittingly get stuck in metaphorical holes that may constrain their ability to adopt legitimate policy reforms, including for human rights. The prime examples the Special Representative has studied in-depth because their effects can be so far-reaching, are bilateral investment treaties (BITs) and host government agreements (HGAs), the contracts between governments and foreign investors for specific projects.

21. A current BIT case illustrates the problem. European investors have sued South Africa under binding international arbitration, contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation. A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs.” The same is often true for HGAs, which can remain in force a half-century.

22. There is a compelling need to protect foreign investors from unfair and arbitrary treatment by host governments. The more than 1,000 instances of nationalization in the 1970s led to a proliferation of BITs, which now number nearly 3,000. However, in successive BITs negotiations, capital importers that lacked significant market power felt increasingly pressured to compete with one another for investments by accepting ever-more expansive provisions, constraining their policy discretion to pursue legitimate public interest objectives.

23. Several States are currently conducting BIT policy reviews. The Special Representative encourages States to ensure that new model BITs combine robust investor protections with adequate allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner.”

The SRSG’s learning from his study of investment treaties and contracts was then directly carried into the UN Guiding Principles.

Principle 8 calls on States to “ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates...”

Principle 9 describes that States “should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”

Finally, in Guiding Principle 10 States are asked to ensure that in the context of multilateral institutions that deal with business-related issues such institutions “neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights.”

In this way, the SRSG was calling on States to address the horizontal, vertical and structural governance gaps by embedding the duty to protect human rights into their domestic and international policies, including in investment. The consultation draft would greatly benefit from inclusion of this broader description of governance gaps and related calls for integrating human rights concerns into investment policy.

## **2. Narrowing global governance gaps requires embedding markets in shared values and institutional practices – and this includes investment treaty policy**

In the SRSG’s 2006 interim report to the UN Human Rights Council, he described how to narrow the global governance gaps he had observed. He said that the best way forward was to “[e]mbed global markets in shared values and institutional practices” and he said that “contributing to that outcome is the broadest macro objective of this mandate.” Indeed, understanding how investment policy can contribute to embedding global markets in shared values and institutional practices is the task at hand when treaty policymakers discuss investment policy.

So while the draft does offer trade policymakers a broad overview of specific developments in business responsibilities, perhaps the most applicable theme for considering the future of investment treaty policy has been overlooked. The world is looking for how to embed the international investment system with shared values and institutional practices.

Coming to a consensus about what those shared values are should be the first order of business for treaty policymakers. For example, a starting point could be an agreement that investment policymaking should support sustainable development, including the protection of the environment and human rights.

The draft should better reflect the thrust of business responsibility work that pushes for investment policy to aim for more than the narrow goals of facilitating investment and investor protection.

## **3. The business responsibility work over the past decade provides ample evidence that current investment treaties do not protect investors from environmental and human rights risks**

The draft at paragraphs 28 and 441 refers to the current purposes of investment treaties – investor protection and facilitation of investment -- and suggests that certain shifts in investment policy, such as creating policy to facilitate sustainable development, may not conflict with those current purposes.

It is welcome that the draft suggests that new policy goals need not be in opposition to current treaty purposes. It also points out that there is no strong evidence demonstrating that current investment treaties facilitate investment. However, it fails to offer the evidence from the business responsibility work that current investment treaties may also be failing to keep investment safe -- or worse, posing risks to investors.

We know that the stability and sustainability of investments today can be threatened by the adverse environmental and human rights impacts they may cause and their related stakeholder risks. The business responsibility body of work over the past two decades is full of examples of investment project shutdowns, protests and worse based on at least

alleged environmental and human rights infringements by investors. The paper should inform treaty policymakers that environmental and human rights risks must be managed to keep investment safe.

This then begs the question about whether the scope of current investment treaties is helpful on the one hand and whether they might actually create unintended risks for investment on the other. For example, do treaties create obstacles for ensuring the management of human rights risks by threatening the State's ability to protect the public interest? Do treaties and ISDS contribute to animosity against foreign investors by creating at least the perception that the human rights of people adversely impacted by investment are less protected than the rights of foreign investors? Finally, does the lack of transparency in ISDS work against good governance efforts that are meant to improve the investment climate?

Today, investor protection actually depends upon active regulation of market forces, as suggested in the UNGPs and the OECD Policy Framework for Investment (as well as the UNCTAD Investment Policy Framework for Sustainable Development). Gone are the days when regulation was seen at odds with investment. Moreover, given the backlash against investment treaty negotiations in recent years, and rising fears and prejudice against foreign influences domestically, it is worth asking whether foreign investors are helped or hindered by traditional approaches to investor protection.

It would be helpful if the draft could reflect the evidence that calls into question whether current treaty models are fit for the purpose of ensuring investors are safe from environmental and human rights risks.

## **SECTION II: Specific Comments**

1. The draft is somewhat misleading in describing a mandatory business and human rights treaty approach, a voluntary approach and suggesting that the SRSG chose a "middle path". While he did reject the UN Norms, as drafted by the UN Human Rights Commission in 2003, this was not a wholesale rejection of regulation nor rejection of an eventual treaty on business and human rights. Indeed, the UNGPs call for what the SRSG identifies as a "smart mix" of measures, meaning mandatory rules, market forces and other governance structures to push business to respect human rights. The SRSG also, in his last report and presentation to the UN Human Rights Council, suggested what might be a useful scope for a business and human rights treaty.

2. The description of the follow-up work to the UNGPs is missing one of the most important projects of the UN OHCHR, which is the Access to Remedy work. This work is important also because it contains ample evidence of the fact that people who are negatively impacted by foreign investment have a harder time accessing remedy than those where the business entity is purely domestic. The work of ARP I on cross-border cases specifically would be worthy of inclusion.

3. The draft could usefully link to the LSE Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking, which describes the six themes that State investment policy should integrate to implement the UN Guiding Principles. Examples of State practice are provided.

The themes are:

- (a) Managing human rights risks
- (b) Ensuring access to remedy
- (c) Preserving policy space

- (d) Setting and managing expectations
- (e) Improving transparency
- (f) Managing conflict and post-conflict contexts

4. The section on development banks would benefit from the inclusion of references to policies of other development banks that explicitly refer to the corporate responsibility to respect human rights such as the European Bank for Reconstruction and Development 2019 Environmental and Social Policy.

5. At paragraph 168 the work of the OHCHR and the OECD on “direct linkage” is mentioned. It is worth noting that this work clarified that financial institutions can both be “directly linked” and can “contribute” to adverse impacts on people.

6. At paragraph 287 there are interesting initiatives to report at the European level. For example, the French “Loi Pacte” adopted 22 May 2019 requires that the management of French companies takes into consideration social and environmental issues and encourages companies to integrate social objectives into their corporate mission. Importantly, the Loi Pacte modifies the Civil Code to assert the social and environmental role of companies and provide them with a true “raison d’être”.<sup>127</sup>

7. With respect to the fiduciary duty mentioned at paragraph 299, it is important to mention that on March 2019 the EU Parliament and Council achieved political agreement on requiring ESG integration by financial markets. Notably, “[t]he new regulation will provide consistency across EU member states by clarifying that duties require investors to consider financially material environmental, social, and governance (ESG) factors in their investment decision-making.”<sup>128</sup>

8. At paragraph 297, the number is inaccurate. The latest data from the UN Principles for Responsible Investment shows that there are 83 trillion dollars’ worth of assets under management that include Environmental, Social and Governance criteria and that responsible investment covers over 2,500 institutions.

9. The draft is missing the work of UNCITRAL’s Working Group II, which has made some progress on issues of transparency over the last decade both regarding existing treaties and future investment treaties.

10. At paragraph 421 there is an apparent typo. “This is an important extension of human rights provisions that address only the government duty to respect [should be ‘protect’].”

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We wish you great success with the March 16 discussions during the OECD Conference on Business Responsibilities and Investment Treaties.

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<sup>127</sup> <https://www.gouvernement.fr/en/pacte-the-action-plan-for-business-growth-and-transformation>.

<sup>128</sup> UNEP Financial Initiative, <https://www.unepfi.org/news/industries/investment/eu-policy-makers-achieve-political-agreement-on-investor-disclosures-and-esg/>.



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## 1.20. Jose Daniel Amado (Lima, Peru); Jackson Shaw Kern (Washington, DC and Addis Ababa, Ethiopia); Martin Doe Rodriguez (The Hague, Netherlands)

In view of the Organisation's ongoing public consultation on business responsibilities and investment treaties, we wish to draw to your attention a recent study that we the three undersigned have jointly authored.

In addition to illustrating how compliance with established standards of business and human rights (BHR) and other responsible business conduct (RBC) might be established as a condition for access to investment treaty benefits, the study goes one step further. It seeks to set out possible legal bases of claims for injury caused by conduct falling short of such standards, including in key areas such as labour, the environment, anti-corruption and human rights, and shows how such mechanism might be implemented within the investor-State dispute settlement (ISDS) system.<sup>129</sup>

The premise of the study is that where desired, such may serve to restore the reciprocity that is in arbitration's essence and that was indeed envisioned by the framers of ISDS, thereby conferring greater legitimacy upon the institution while concurrently granting greater access to justice for those who may be aggrieved. A further opening of the avenue to international remedies in the event of investment disputes may ensure enhanced respect for BHR and RBC standards by actuating adjudication and enforcement tools in the event that injury does incur, thereby ushering in a new generation of responsible and mutually advantageous international investment.

We briefly here review three of the proffered models.

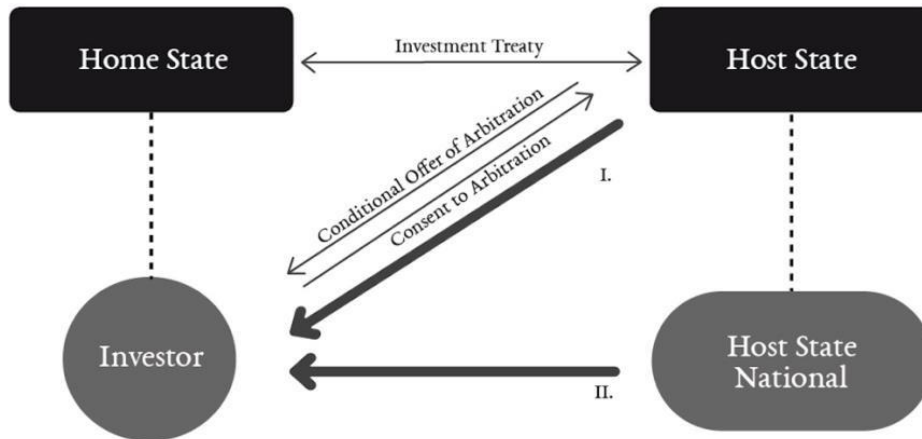
### 1. Host State's Contingent Consent

Under a first model, the standing offer of arbitration that features within contemporary investment treaties and tends to be unconditionally extended to covered investors may be transformed into a conditional offer. The State's offer to arbitrate claims for breach of investment protection guarantees may, by use of a contingent consent clause,<sup>130</sup> be conditioned upon the investor's consent to arbitrate claims brought against it for injury resulting from breach of the specified standards:

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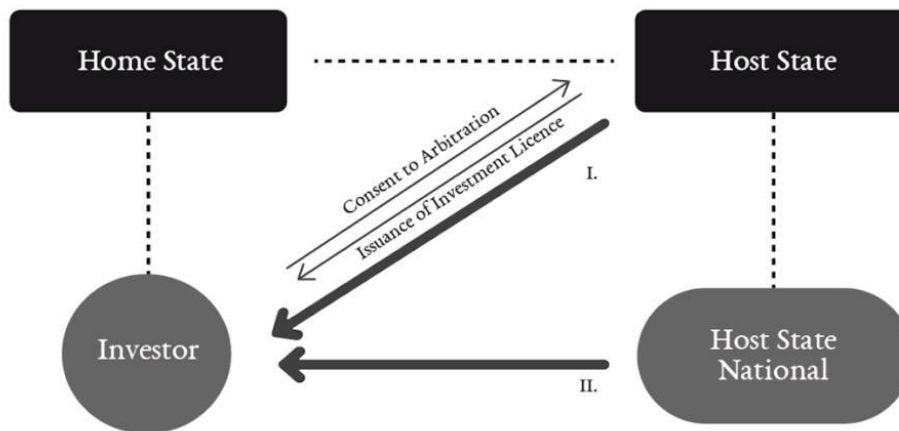
<sup>129</sup> Jose Daniel Amado, Jackson Shaw Kern & Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors* (CAMBRIDGE UNIVERSITY PRESS, 2018).

<sup>130</sup> See Amado et al, *supra*, pp. 87-90 and Annex, Model 6 (Contingent Consent Clause).



## 2. Investor Consent as Condition of Entry

In a step further, rather than requiring the investor's consent to arbitration of claims as a condition to the investor's own right of access to arbitration, such might be established as an ex ante condition to admission of the investment.<sup>131</sup> Treaty language may be drafted in a manner such that the investment protection guarantees only attach to properly admitted investments,<sup>132</sup> with the investor's consent to arbitration being a requirement for the issuance of a requisite investment license, concession, project approval, or other authorization, under the host State's municipal laws:



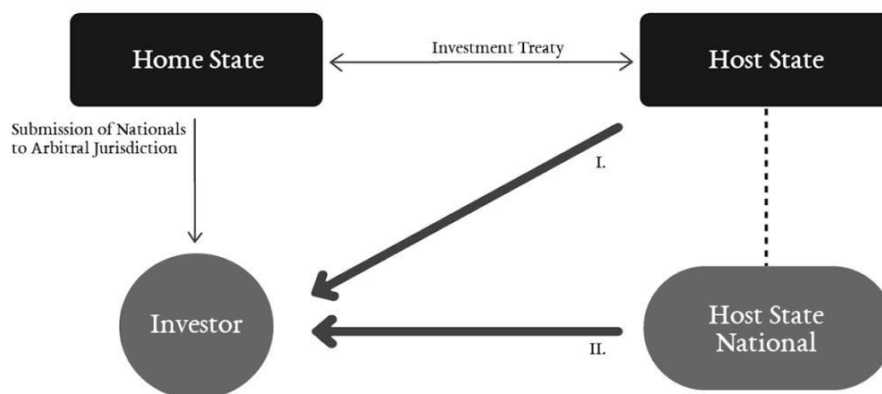
## 3. Jurisdiction Without Privity

In a final option, jurisdiction over claims opposable to the investor may be directly established by treaty:<sup>133</sup>

<sup>131</sup> See Amado et al, supra, pp. 82-85, 90.

<sup>132</sup> See Amado et al, supra, Annex, Model 4 (Investment Licence).

<sup>133</sup> See Amado et al, supra, pp. 90-93 and Annex, Model 7 (Jurisdiction without Privity).



Such a mechanism has been previously employed on various occasions.<sup>134</sup>

Lastly, we have included in the volume a chapter considering the prospective obligations of investors as may arise from various sources of law.<sup>135</sup>

## 1.21. Trade Union Advisory Committee to the OECD (TUAC)

### Key messages

- The positive impact of liberalised trade and investment flows on sustainable development does not materialise automatically. A strong social framework is required, ensuring that workers' fundamental rights to join a trade union and to bargain collectively can be exercised.
- Avenues for more coherent and effective responsible business conduct should be explored. The OECD is in a unique position to produce models that can be used by policy-makers to interpret RBC clauses in existing treaties and to negotiate new ones.
- TUAC emphasises three priorities for future work. 1. Countries should actively be reminded of their duties to regulate. 2. Foreign investors should observe RBC standards in their supply chains in order to benefit from treaty coverage. 3. Every international agreement should contain enforceable provisions guaranteeing the respect of fundamental social rights. Whilst the inclusion of human rights and labour clauses in trade and investment agreements is more accepted, their enforceability remains indeed a major concern.

<sup>134</sup> See, e.g., Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968), signed on 7 July 1968 799, UNTS 13 (entered into force on 17 July 1971), at Art. 11 (“[t]he Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration... any dispute that may arise in connection with the investment”); see also Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, dated 19 January 1981, at Art. II.

<sup>135</sup> See Amado et al, *supra*, Chapter 5 (Jurisdiction Ratione Materiae: The Substantive Rights).

## Introduction

On 15 January 2020, the OECD launched a public consultation on “business responsibilities and investment treaties”. The consultation paper describes developments at national and international level in the area of business responsibilities that may influence trade and investment policies. The OECD seeks public input both on the background information provided in the paper, and how to take this work forward.

The following includes the comments by the TUAC following an internal consultation of its members. A first section summarises TUAC policy objectives on investment agreements. The second section provides specific remarks on the consultation paper. The final section lays down TUAC priorities for future work in this area.

TUAC agrees to the publication of this response.

## General remarks

TUAC welcomes this public consultation and the opportunity to provide input to future OECD activities. TUAC’s policy objective is to ensure that domestic and international investment policies support sustainable development, inclusive growth and enhanced protection for workers’ rights.

The trade union movement has long been expressing strong concerns about the excessive focus of international investment agreements (‘IIAs’) on the protection of private interests of investors, leaving aside the wider public interest and workers’ rights in particular. The positive impact of liberalised trade and investment flows on sustainable development does not materialise automatically.

As an illustration, the OECD has revealed in a recent report that the increased productivity enjoyed by foreign firms do not fully translate into better wages for workers. FDI also tend to be associated with lower job security and greater gender inequalities.<sup>136</sup>

In an earlier analysis of the societal benefits and costs of IIAs,<sup>137</sup> the OECD found little evidence of positive impact of investors’ protection. The paper noted that even if treaties contain language on responsible business conduct, such references are weak and not directed to individual investments themselves. Furthermore, the number of investors’ claims increased over the past decades in particular against countries with a reputation for good governance.

A real challenge is therefore to ensure that benefits for firms go hand-in-hand with decent working conditions and wage growth. For this, a strong social framework is required and it is in particular essential to ensure that workers’ fundamental rights to join a trade union and to bargain collectively can be exercised. As underlined by the OECD in a 2019 report, collective bargaining and workers’ voice are key labour rights which improve labour market performance.<sup>138</sup>

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<sup>136</sup> OECD (2019), FDI Qualities Indicators : measuring the sustainable development impacts of investment.

<sup>137</sup> OECD (2018) “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence”. See also [TUAC evaluation](#).

<sup>138</sup> OECD (2019), Negotiating Our Way Up: Collective Bargaining in a Changing World of Work.

The consultation paper takes a broad approach to the notion of responsible business conduct ('RBC'), having regard to the positive contribution businesses can make to sustainable development and inclusive growth, and avoiding adverse impacts on others and addressing them when they occur.

Among the applicable standards, TUAC wishes to underline the importance of workers' rights enshrined in the ILO Core Conventions, in particular Conventions C98 and C87. Fundamental social rights must be applied by investors and governments alike.

The observance of these fundamental rights is reflected in Chapter V of the OECD Guidelines for Multinational Enterprises. For future work, TUAC encourages the OECD to explore how trade and investment treaties can leverage the implementation of these standards.

### **Specific remarks on the consultation paper**

The consultation paper emphasises in several places the potential role of businesses in making a vital contribution to sustainable development and inclusive growth. The paper could usefully add that trade unions should also play a vital role, as they are instrumental in guaranteeing decent work. This is important as for future work TUAC recommends that particular attention is paid to workers' rights.

The consultation paper assumes that the number of NCP proceedings is increasing (paragraph 24). This only tells part of the story. More than half of the cases in 2018 were rejected and did not proceed. This warrants a reflection on how to link investment treaties and effective RBC procedures.

In the section describing US developments on procurement (section 4.1.5), it would be useful to add references to the practice of local public authorities to incorporate labour peace requirements into public procurement processes at airports and hotels. Such provisions require contractors to mitigate risks of labour disputes and deliver continuous services and revenue to the government authority. The involvement of trade unions is essential in this regard.

### **TUAC recommendations for future work**

The consultation paper lists the numerous RBC initiatives that exist or are about to emerge at national and regional levels. No less than nine OECD countries have introduced in their laws various forms of due diligence requirements. The EU, representing 27 jurisdictions, is currently exploring the possibility of enacting a standard of its own.

This variety of regulations is challenging. Some approaches are horizontal, others issue-specific. The affected business organisations are not the same because thresholds and scopes are so diverse. Various reporting standards are also widespread throughout the OECD.

There is an obvious case for a level playing field: upward convergence between all the applicable standards would guarantee legal certainty and fair competition conditions for all. Above all, TUAC wishes to emphasise the cost of non action. As long as workers do not perceive the economic and social benefits of trade and investment flows, distrust, economic resentment and entrenched policies will continue to grow.

Furthermore, whilst social and sustainability chapters are increasingly included in trade and investment agreements, their enforcement is largely insufficient. Unsurprisingly, the consultation paper notes that whilst most national action plans on business and human

rights address trade and investment treaties, they do so in very general terms, without detailed commitments nor ideas for practical solutions.

In this context, TUAC welcomes the work on business responsibilities in trade and investment treaties, and encourages the OECD to explore further avenues for more coherent and effective responsible business conduct. TUAC recommends that the OECD aims at producing models that can be used by policy-makers to interpret RBC clauses in existing treaties and to negotiate new ones.

TUAC strongly encourages the OECD to reflect in particular on the following three trade unions priorities.

#### *Domestic policy space*

IAs with fair and equitable treatment clauses and other investor protections undermine governments' competence to regulate in the public interest. IAs should no longer expose countries to liabilities for regulating workers' rights, and quality and sustainable public services.

Furthermore, a pitfall to avoid is to consider that corporate social responsibility clauses in IAs can satisfactorily replace governments' regulatory obligations and competence. While corporate self-regulation is welcome, countries should actively regulate and enforce labour protections without limitations from IAs. Such obligations apply equally to home and host countries. Home countries should in particular ensure that the MNEs headquartered in their territory abide by high standards when doing business abroad by requiring due diligence and remedy responsibilities.

#### *Pre-conditions for access trade & investment benefits*

International agreements should ensure that foreign investors do observe RBC standards in their supply chains in order to benefit from treaty coverage. The OECD is in a unique position to offer an effective framework in this regard.

The OECD guidelines for multinational enterprises foresee that enterprises carry out due diligence to "identify, prevent and mitigate actual and potential adverse impacts" on matters covered by the guidelines. Enterprises should also account for how these impacts are addressed.

Trade union engagement in that process is indispensable to guarantee that effective due diligence process is taking place. For companies, trade unions' involvement at the pre-investment stage can also serve to guarantee of social peace and lessened reputational risks.

#### *Enforceable labour rights*

Every international agreement should contain social provisions guaranteeing the respect of fundamental social rights. Employment and Industrial Relations Chapter V of the OECD Guidelines for MNEs, and the references to ILO Conventions, offer good model for doing this.

Whilst the inclusion of human rights and labour clauses in trade and investment agreements is more accepted, their enforceability remains a major concern. As the consultation document rightly underlines, labour provisions are usually not subject to dispute settlement and there are no provision applicable to companies. It should therefore be explored how state-to-state dispute settlements could offer appropriate mechanisms for enforcement.

Sanctions should also be explored as an integral part of complete, dissuasive enforcement mechanisms. As a matter of principle, the sustained violation of fundamental social rights should be considered unfair competition, akin to unlawful state aid.

It is important to simultaneously devise dispute resolution and prevention mechanisms. Pre-conditions for access to treaty benefits, in partnership with trade unions, should be fundamental work.

## **1.22. Paul Bagust (Global Property Standards Director, Royal Institution of Chartered Surveyors)**

RICS delivers confidence through respected global standards, adopted and enforced by over 134,000 qualified and trainee professionals across the built and natural environment.

As a regulator, Our Rules of Conduct are designed to effect positive change in the built and natural environments, through promoting and enforcing the highest ethical standards in the development and management of land, real estate, construction and infrastructure. Professional ethical practice by our members provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact. The Rules of Conduct apply to all members worldwide.

Real estate is an often-overlooked element of a company's responsible business agenda, but with our sector impacting – either directly or indirectly - most of the UN Sustainable Development Goals and with its cross-sectoral reach it can be a powerful driver for making responsible business and the SDGs a reality.

For companies in the sector, successful implementation of the SDGs will strengthen the enabling environment for doing business and building markets around the world because even the most principled and best-managed companies are challenged to thrive in communities marked by instability, to find skilled labour where adequate education is lacking, or to withstand natural disasters stemming from climate change.

RICS has been working with the United Nations Global Compact on identifying the most critical issues facing companies with a stake in land, real estate and construction in relation to the SDGs. The aim is to make the implementation of the SDGs business as usual and to encourage companies to think holistically about the environmental and social impact of their business activities, and strategic investment decisions.

The RICS report 'Advancing Responsible Business in Land, Construction, Real Estate Use and Investment – Making the Sustainable Development Goals a Reality' provides a practice-orientated roadmap for our industry and clients.

RICS has established the Responsible Business Leaders' Forum that aims to guide the property sector's role as a global responsible business leader. It explores how a business and its service providers should act to give social value and navigate its way through the turbulent ESG challenges that manifest themselves today and into the future.

Responsible business is driven and underpinned by ethics. Expectations are shifting and a number of risks, programmes and trends are being considered to create a sustainable future.

RICS is part of the global coalition of organisations which, in 2016, produced the International Ethics standards for anyone working in the land, property, construction, infrastructure and related professions. This standard challenges the industry to deliver services ethically.

In 2018 RICS published reports which identified three main drivers influencing the development of a responsible business: culture, people and technology.

To explore this in more detail RICS convened a series of leaders' forums focused on three key areas, which were seen as potential options for incorporating responsible business standards.

### **1. Embedding responsible corporate values**

With the need to recruit younger, more diverse workers into the property management sector more than ever before, new talent is driven by value. So, responsible corporate values used well, can help businesses look to long-term social value, underpinned by sustainable profit, rather than short-term profit seeking.

### **2. Defining corporate responsibility ambition**

The vast remit of sustainability needs to be defined for the property industry to identify which topics are most applicable. Within these definitions, corporations work well given an ambition to achieve rather than a rigid framework to follow. This is even more important on a global scale as cultural differences and circumstances need to be

considered. Creating an ambition as an end-point allows a business to innovate and collaborate to achieve its target.

### **3. Upskilling personnel for technology disrupters**

Technology is key to mitigating ESG risks, but its speed of development makes it a major disrupter that needs to be managed correctly to prevent further social and governance risks. Adapting to step changes of new technology requires upskilling the workforce and managing more data than ever. Future gazing is difficult but identifying the skills gaps for business will be valuable. A responsible long-term business needs to not only upskill its workforce for the future technological changes, but also gain the trust of its workforce while introducing technology and handling endless streams of data collection.

Responsible business for real estate will require alignment between various parties across the property sector from planning, through design and construction and into operation. This will involve knowledge transfer, accountability and engagement across different groups involved and a move away from the current adversarial culture.

RICS is looking to establish the global context in which corporate responsibility principles apply to managing real estate. This piece of work aims to provide recommendations and key call to actions for the industry, aimed at businesses and the professionals that advise them, with an emphasis on property services.

The role of a responsible business is changing from one that is purely financially driven to a focus on social and environmental responsibility. Responsible business is about ethics and honesty and is demonstrated by:

- strong leadership
- setting the right culture within the organisation through suppliers and clients
- providing disclosure on successes and failures and
- challenging behaviours on discrimination and pay.



The powerful trends we are considering in developing a global approach for real estate, will require organisations to change how they operate and consider what they stand for, resulting in changes occurring at a greater pace. When organisations get it wrong, they will find it more difficult to attract and retain talent and clients, resulting in a less successful business.

It is evident that the approach taken by a business to manage property responsibly through environmental, social and economic challenges is enabled by its corporate culture, including the skills, development and retention of its people and its use of technology. Successful businesses will need to change their structure and position responsible business as a core value.

As an organisation everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

We are supportive of the work OECD is doing and keen to make a positive contribution to this important conversation.

### 1.23. Business at OECD (BIAC)

Business at OECD (BIAC) appreciates the opportunity to submit initial comments on the OECD paper on Business Responsibilities and Investment Treaties, which was developed further to discussions at the OECD March 2019 Roundtable. The paper provides a comprehensive overview of the basic framework as well as the many developments in the field of responsible business conduct (RBC) that have taken place at national, regional and international levels.

Business is actively engaged in the OECD work on responsible business conduct and supports effective implementation and further outreach regarding the OECD Guidelines for Multinational Enterprises (MNE Guidelines). The international business community is fully committed to and underlines the importance of RBC in the framework of their investments.

At the same time, we would like to underline again the importance of the OECD's work on investment. The OECD Freedom of Investment dialogue, which brings together governments from OECD and non-OECD countries to exchange information on investment policies and develop guidance for open, transparent and non-discriminatory investment policies, is particularly important in this respect. We reiterate our long-standing suggestion that FOI roundtable sessions and other substantive discussions of the OECD's Investment Committee, which affect business directly, be opened to the recognized stakeholders, including Business at OECD. We believe business could both contribute to and benefit from participating in these important discussions.

#### **OECD work on investment matters to business**

The paper provides a comprehensive overview of the overall framework for business responsibilities and developments in the area of RBC, including human rights. We recommend, however, that the paper further underlines up-front that the OECD has a fundamental and unique role in supporting a pro-investment policy framework and improving the policy environment for both foreign and domestic investment through

evidence-based analysis and international cooperation. Taking into account current international developments, work on ensuring that companies are able to operate on a level playing field in the global market is extremely important.

In addition to a number of dedicated instruments on responsible business conduct, we recommend further highlighting the OECD's unique legal instruments in the field of investment, the OECD's analysis on the importance of an open investment environment, as well as the role the OECD plays by providing a platform to promote openness, transparency and non-discrimination in investment.

We underline the importance of responsible conduct by both governments and investors, which needs to be approached in a balanced manner. A more direct linkage to the OECD's Policy Framework for Investment, where we played a major role in the development, would also be appropriate. A clear delineation of the responsibilities of governments (both recipient and home country), business and other stakeholders, building on the UN Guiding Principles and the OECD Guidelines for MNEs, would further strengthen the paper.

### **The fundamental role of international investment treaties**

Investment treaties and protection play a fundamental role in fostering a pro-investment policy environment. We recommend that the section starts with an overview of the role investment treaties have played for many years in contributing to a pro-investment policy environment. From a state point of view, they have contributed to promote and attract investments, which are important ingredients for sustained economic growth. For enterprises, they have helped ensure that their investments are protected from arbitrary government action, such as discrimination, expropriation, denial of justice, etc.

In the context of a deteriorating international investment climate and decreasing trade and investment flows, it is more important than ever to recall and highlight to policy makers, and the public at large, why international investment agreements matter, and how they contribute to economic development worldwide. Our paper on 'why international investment agreements matter', which provides further details, is available on our [website](#).

### **The importance of well-designed investment protection mechanisms**

The protection part of investment treaty policy has been subject to multiple discussions on reform. We have consistently underlined the importance of investment protection mechanisms to ensure that foreign investments do not experience loss derived from discriminatory or unfair measures without compensation. Companies must therefore be able to address these matters through a well-designed investment protection mechanism, which is free from government interference and appropriately compensates them for their loss.

While not commenting on specific proposals that are being discussed, we developed a paper on '[the importance of well-designed investment protection mechanisms](#)', which includes key principles that should be in place for any investment resolution system. These principles should also be duly highlighted in the paper.

### **Investment treaties and responsible business conduct**

As mentioned above, investment treaties (as well as free trade agreements which include investment chapters) are a key component of a pro-growth policy environment, protecting investment against political risk, providing investors with an additional layer of security and constituting an important mechanism to address investor uncertainty. This makes them an important factor for host countries to incentivize foreign direct investment (FDI), which,

in turn, is contributing to higher levels of economic development. Moreover, investment treaties can help to promote fair competition between foreign and domestic business.

The incorporation of RBC issues in investment treaties discussed in the paper, should be approached with care in order to avoid duplication with other standards and keep a clear scope. We caution not to overload investment treaties with too many detailed provisions and underline the need to ensure the right balance with the treaties' aim of guaranteeing a level-playing field between domestic and foreign companies.

At the same time, RBC chapters in investment treaties can be useful to encourage states and investors to observe not only domestic law, but also internationally recognized standards, such as the UN Guiding Principles, the ILO MNE Declaration and the OECD MNE Guidelines thus encouraging their further uptake. However, duplication with existing initiatives and addition of too much complexity should generally be avoided. Most importantly, RBC clauses that would establish extended corporate liabilities concerning RBC should not be added to investment treaties.

As noted in the paper, the interaction between business responsibilities and investment treaties has to date been subject to limited consideration. Additional discussion is needed before drawing conclusions in this important field. Business remains committed to engage constructively in discussions on how to ensure that an open investment environment and RBC remain mutually supportive and asks to be included in future discussions in this area.

### **Highlighting the different roles of business and governments**

When discussing the interface between human rights, responsible business conduct and investment treaties, the different roles of governments and business must be duly highlighted up front, recognizing that business cannot take over the role of governments. The respective roles of governments and business have been clarified by the “protect, respect, remedy” framework in the UN Guiding Principles, which also inspired the OECD MNE Guidelines. While businesses have the responsibility to respect human rights, governments have a duty to protect their citizens from human rights abuses by establishing appropriate policies and regulation.

Respecting human rights is also a priority for the business community, which actively supports the implementation of the UN Guiding Principles. It is important to note that private sector best practices often go “beyond the law” involving complex and comprehensive processes going far beyond the verification of financial reliability and involving supply chains, third parties and authorization processes. Business also carries out numerous activities to make a positive contribution to the Sustainable Development Goals (SDGs) at the international, regional, national and local level. Companies have made significant efforts in conducting due diligence related to their investments and in many cases have acted as ‘agents of change’ in the countries in which they invest.

Nonetheless, business efforts can only be effective if governments ensure the rule of law and establish and enforce a stable and predictable policy environment as well as consistent regulatory and legal frameworks. To advance progress, all states must address economic, environmental and social (including human rights) challenges in their own jurisdictions, by implementing and enforcing national and international standards both at the national and local levels.

### **Effective implementation of OECD instruments**

The OECD has been at the forefront of developing internationally recognized RBC standards, most notably, the MNE Guidelines, which business actively supports and

promotes. It should be underlined, however, that the MNE Guidelines should not be considered in isolation. They are part of the broader OECD Investment Declaration, which constitutes a policy commitment by adhering governments to provide an open and transparent environment for international investment while encouraging the positive contribution multinational enterprises can make to economic and social progress.

We also recommend to further highlight the importance of effective implementation by investment host countries of the OECD Policy Framework for Investment, which provides a comprehensive checklist of key policy issues to be considered for creating an enabling environment for investment, thereby also advancing the implementation of the SDGs and helping to mobilize financing for development.

### **The need for international policy coherence on business responsibilities**

We have consistently underlined our strong support for key government-backed frameworks, such as the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD MNE Guidelines and the ILO MNE Declaration. Our members and their member companies have demonstrated this support through concrete actions. The international coherence provided by these instruments is of crucial importance to business and must be preserved. Moreover, they were established through extensive, global dialogue and multi-stakeholder engagement and have articulated a clear sense of roles and responsibilities. They have been integrated into a wide array of voluntary and regulatory measures, standards, principles, and rules and have prompted significant investment in policies and procedures to drive action.

Yet, business today is also confronted with an increasing number of new national and international standards, legislation, guidelines, and other measures on RBC that compete with these long-established and widely used instruments. Sometimes, these initiatives contain ‘hardening’ soft law commitments through the establishment of legal obligations in domestic jurisdictions. A proliferation of measures creates challenges for business operating globally, in particular if these initiatives are not aligned with or diverge from the UNGPs, the OECD MNE Guidelines, and the ILO MNE Declaration (see our [2019 comments on the Future OECD work on Responsible Business Conduct](#)). When designing policies, it is further crucial to avoid extensive bureaucratic burdens for companies, especially SMEs, and to prevent unintended consequences for investment in certain countries. In the absence of a comprehensive compliance structure, "compliance check-lists" tailored to the needs of SMEs could be a helpful tool.

### **Binding Instrument on Business and Human Rights**

As the paper includes a section on current discussions regarding a binding instrument on business and human rights, we would like to highlight the comments we submitted jointly with the IOE and BusinessEurope in October 2019. Among others, we underlined that the draft treaty contains many vague, far-reaching and legally imprecise provisions. The unclear scope and punitive approach risks jeopardising the crucial consensus achieved by the UNGPs. Furthermore, the proposed approach does not offer solutions to encourage States to meet their existing human rights obligations and address human rights challenges in their own jurisdictions. The concerns expressed by the business community should be reflected in the paper. To read the full joint business response, click [here](#).

## 1.24. Martins Paporinskis (Reader in Public International Law, UCL Faculty of Laws, University College London)

Many thanks for inviting me to comment on your consultation paper of 15 January 2020 on ‘Business Responsibilities and Investment Treaties’.

The challenge of squaring a mechanism of implementing State responsibility through formalised investor-State arbitration, with its focus on binding rules, and the generally not binding instruments directed at business is both important and not straightforward. Indeed, the one decision in investor-State arbitration that goes furthest in that direction by accepting, in principle, human rights counterclaims against investors, *Urbaser SA and Or v Argentina*, achieves that result by essentially sidestepping most hard questions about the legal source and personal scope of binding international obligations, ICSID Case no ARB/07/26, Award, 8 December 2016 [1194]-[1199]. Overall, at least in my reading of the consultation paper, the efforts of addressing business responsibilities in investment treaty law tend to be somewhat on the unimpressive side: binding human rights obligations do not easily map on to rules addressed at actors engaged in investor-State arbitration, non-binding norms will not always be an appealing basis of decision-making for arbitrators subject to review for failure to apply proper law, and binding treaty rules directly addressed at investors are either modest in effect or lacking in overwhelming political support.

The key point I want to make in my response is that general international law provides more solutions to this challenge than immediately catches the eye. Such rules, particularly when related to treaty interpretation and content of State responsibility, provide considerable scope for giving appropriate effect to business responsibilities, even without taking excessively creative steps regarding sources and personal scope of international law. Four examples in particular may be relevant:

- First, States have international human rights obligations in the context of business activities, e.g. UN Committee on Economic, Social and Cultural Rights General Comment no 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural rights in the context of business activities, UN Doc E/C.12/GC/24. An investor-State tribunal engaged in the exercise of interpretation and application of an investment protection law must take into account, in line with the custom-reflecting Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), other relevant rules applicable between the parties, which may include human rights obligations. That may sound like a trivial point but when such obligations are ‘taken into account, together with the context’, as prescribed by the custom-reflecting chapeau of VCLT Article 31(3), they may end up having considerable interpretative weight, particularly regarding those rules that are in the technical sense vague. Such an impact is particularly likely when human rights obligations are reflective of or contiguous to jus cogens. The challenge of Black Economic Empowerment in the *Foresti and Ors v South Africa* case is a pertinent example: while the tribunal never reached the merits stage of the investor’s challenge, it is hard to see how interpretation and application of the relevant treaties could have been carried out without taking into account the International Convention on the Elimination of All Forms of Racial Discrimination, ICSID Case no AB(AF)/07/01. I do not want to overstate my point: VCLT Article 31(3)(c) provides a tool for interpretation and not a mandate to replace applicable law. Nevertheless, when competently argued and applied, it can be a powerful argument in disputes raising business responsibilities -- particularly since human rights obligations’ focus on States,

rather than investors, does not preclude taking them into account in interpreting other obligations of States.

- Secondly, the consultation paper's valuable discussion of the effects of hortatory clauses (Section 8.3.2) may be understating the effect that such clauses play for the purposes of interpretation as context within the meaning of VCLT Article 31(2) as well as a means for identifying the relevant considerations in the application of the treaty. A good example of how such clauses operate, from the (in relevant respects) comparable field of environmental protection, is provided by the award in *Al Tamimi v Oman* dispute. In that case, various treaty rules were drawn upon to identify 'the importance attached by the US and Oman to the enforcement of their respective environmental laws', which in turn informed identification and application of the international minimum standard, even though none of the rules explicitly referred to it, ICSID Case no ARB/11/33, Award, 3 November 2015 [387]-[390]. There is no obvious reason why treaty language addressed at human rights in a similar manner could not be given similar legal effect.
- Thirdly, the consultation paper does not directly engage with the topic of counterclaims against investors (except noting as part of its discussion of the Dutch Model Treaty that it does not provide for them, fn 261). If the omission signifies the paper's uncertainty about following the approach of the *Urbaser* tribunal, I have some sympathy: certain elements in that award's legal reasoning will not persuade everybody, whatever one's views regarding the normative desirability of its conclusion. But more persuasive authority can be found, again, in recent decisions on environmental matters, which show how public policy issues can be properly articulated in the technical terms of counterclaims, *Burlington Resources Inc. v Ecuador*, ICSID Case no ARB/08/5, Decision on Counterclaims, 7 February 2017; *Perenco Ecuador Limited v Ecuador*, ICSID Case no ARB/08/6, Award, 27 September 2019 Section IV.
- Fourthly, it may be helpful to also engage with the customary law of State responsibility, particularly regarding content of responsibility. Two principles are of particular relevance here: contribution to injury and mitigation of loss. In his dissenting opinion in the *Bear Creek Mining Corporation v Peru* case, Arbitrator Sands relied on the standards of the ILO Convention 169 (Indigenous and Tribal Peoples Convention) to apply the customary rule on contribution to injury so as to diminish the damages by one half, ICSID Case no ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017. The important difference between this argument and the route taken in *Urbaser* is that the former does not hinge upon legal creativity, and proceeds in the most orthodox blackletter terms of applicable customary law (2001 International Law Commission's Articles on responsibility of States for internationally wrongful acts, Article 39). Mitigation of loss has not, to my knowledge, been applied in cases raising business responsibilities, but is also an orthodox blackletter principle of international law, *Clayton and Ors v Canada*, PCA Case no 2009-04, Award on Damages, 10 January 2019 [195]-[205], and as such could be applied in appropriate circumstances.

My overall conclusion, perhaps a somewhat unexciting one, is that there is quite a lot in the broader system of international law and international investment law that permits the articulation of concerns about business responsibilities, even without exercising excessive

legal or political creativity. Treaty interpretation by reference to context and to other relevant rules, counterclaims for important public policy issues related to investment projects and expressed in domestic law, and calculation of compensation by reference to principles that are given content by human rights obligations can be very effective tools. They also have the not inconsiderable advantage of fitting easily within the four corners of law applicable by tribunals, and therefore not raising concerns for parties and tribunals that excessive creativity otherwise might.

### 1.25. Eric Teynier, Pierre Pic, Arianna Rafiq (Teynier Pic)

We are pleased to submit our comments on the consultation paper circulated ahead of the OECD Conference taking place on March 16, 2020.

After a very brief presentation of our firm and interest in the conference subject matter (1), we will set forth a few points drawn from our practice that we believe could usefully inform the roundtable discussions (2).

#### 1. Teynier Pic

TEYNIER PIC is a Paris-based boutique law firm specializing primarily in dispute resolution and investment treaty arbitration. To date, we have acted as counsel and/or arbitrator in over 300 international arbitration proceedings, involving more than 50 countries. We have also advised governments on arbitration issues, whether as part of legislative reforms or to prevent and anticipate potential disputes.

TEYNIER PIC has consistently been ranked among the best international arbitration law firms by legal directories such as Legal 500, Who's Who Legal, Chambers & Partners, Global Arbitration Review, Option Droit & Affaires and Décideurs Magazine.

The founding partners, Eric Teynier and Pierre Pic, are recognized experts in the field of international arbitration and regularly publish in peer-reviewed journals. Recent contributions focused on investors' accountability and the dialogue between different international law regimes, especially with regards to environmental law<sup>139</sup> and the laws of armed conflict.<sup>140</sup>

#### 2. Business responsibilities: reflections on the state "toolkit"

TEYNIER PIC advises both States and private investors and we see first-hand the advantages and limitations of bilateral investment treaties, especially when trying to hold investors accountable for human rights violations. States do have a 'toolkit' however, made of existing and new devices, that can be used to ensure balance between the investor and

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<sup>139</sup> "L'affaire Chevron ou l'arbitrage d'investissement à la croisée des chemins", Cahiers de l'arbitrage, 2019, No. 3 (E. Teynier and A. Rafiq) ; "L'office de l'arbitre d'investissement : le cas particulier de l'investissement illicite", Revue de l'arbitrage, 2019, No. 1 (E. Teynier); "Les études d'impact sur les droits de l'homme et l'arbitrage d'investissement", in: Catherine TITI (dir.), Droits de l'homme et droit international économique, Bruylant, 2019 (E. Teynier et A. Rafiq).

<sup>140</sup> On 4 April 2019, Teynier Pic organised a panel conference on the protection of investment in times of armed conflict organised in April 2009. See Global Arbitration Review, "Defending investments in times of armed conflicts", 21 May 2019 (<https://globalarbitrationreview.com/article/1192861/defending-investments-in-times-of-armed-conflicts>).



the respondent state's respective interests. It is on three of these "tools" that we would like to make a few brief comments, in the hope that it can assist in the roundtable discussions.

### 2.1. Existing tools: systemic integration

Being asymmetrical in nature, traditional bilateral investment treaties ("BITs"), do not provide for any investor obligations. Although this is changing, many investor-state disputes that are currently pending are based on such instruments. It may therefore be interesting to reflect upon the tools arbitrators *already* have to deal with issues of investor's responsibility.

We believe that one device that should be relied on is the systemic integration approach.<sup>141</sup> As the Tribunal in *Urbaser v. Argentina* stated, BITs should not be interpreted in a vacuum but in accordance with general international law and, more specifically, with international human rights and humanitarian law.<sup>142</sup>

This has two consequences: *first*, in terms of counterclaims, by allowing a State to bring a counterclaim based on customary international law, regardless of the terms of the BIT;<sup>143</sup> and *second*, by solving the conflict States may face between their duty to protect and their obligations under the BIT.

For example, in the *Chevron* case, Ecuador had signed a settlement agreement with the investor whereby the State waived its right to claim for reparation in relation to the environmental damage caused by Chevron. The terms of the settlement agreement were very broad and also precluded collective environmental claims brought by local groups. It could have been argued that, by signing such an agreement and extinguishing the rights of its population to seek reparation for very serious environmental damage, the State had violated Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which entails a positive obligation for States to take all appropriate measures to protect their people from any threat that is "reasonably foreseeable".<sup>144</sup> The settlement agreement being as a consequence, unlawful under international law, the Arbitral Tribunal could have ruled that any objections based on such instrument should be held inadmissible. That of course, did not happen and, although the *Chevron* decision was not the one-sided decision it was said to be, considerable backlash ensued, with international arbitration being once again portrayed as a forum partial to private interests.

Pleading for a more systemic approach - one that would take States' obligations under Article 6 into account for example - is one way to ensure that States' duty to protect their people and their obligations towards investors are interpreted in a way that is harmonious. In other words, in the absence of express provisions that address investors' obligations,

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<sup>141</sup> First developed by Professor McLachlan.

<sup>142</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. Argentine Republic*, ICSID Case n° ARB/07/26, Award, 8 December 2016, para. 1200.

<sup>143</sup> The issue then becomes: does customary law impose obligations on the investor? (See for a recent decision addressing this issue and the question of the investor as "subject" of international law: *David Aven c. The Republic of Costa Rica*, Case No. UNCT/15/3, Final Award, 18 September 2018).

<sup>144</sup> Human Rights Committee, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, UN Doc. CCPR/C/126/D/2751/2016.



additional spaces should be carved out for competing claims to be made - interpretation techniques such as systemic integration allow for it.

## 2.2. Existing tools: the legality requirement

On the nature and scope of the legality requirement, which is mentioned at paras. 411 et seq of the Consultation Paper, we refer to our 2019 publication that aimed at providing an overview of how investment law currently stands on this issue (see Annex A).<sup>145</sup> Although useful as a tool, the main issue with the legality objection is that it is limited both in time (to the making of the investment) and in nature (only serious breaches of domestic law are taken into account).<sup>146</sup> Subsequent illegalities are addressed at the merits stage but only partially (for example through the notion of contributory fault of the investor). Despite some creative interpretation on the part of arbitral tribunals, there is, therefore, a “gap” in accountability.

## 2.3. New tools: human rights impact assessments

Human rights impact assessments (“HRIA”) are drawing increasing interest. As an example, it may be required for EU institutions, as a matter of EU law, to conduct sustainability and human rights impact assessments before concluding trade agreements. HRIAs are also frequently used by civil society and a strong body of practice has developed.

This growing popularity is due, among other things, to a rising concern for the protection and promotion of economic and social rights.

HRIAs are directly relevant to investment treaty drafters and negotiators. As pointed out by eminent authors “*When entering into and subsequently managing privatization agreements, the host State has a duty to ascertain that there is no conflict arises between investment disciplines and other international obligations, including those arising from human rights law*”.<sup>147</sup> This general rule of international law could be said to call for an HRIA to be undertaken prior to concluding BITs. Besides, the duty to carry out an HRIA could also be derived from the overarching obligation to respect, protect and fulfil human rights obligations, which also apply when negotiating international agreements.<sup>148</sup>

HRIAs are pertinent in that they would help assess whether the protection given to the investor in a specific BIT risks impinging upon the State’s normative power, especially with regard to economic and social rights. They would also encourage States to “map” their normative framework and see what steps they still need to take to meet their international human rights obligations.

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<sup>145</sup> Secretariat note: Annex A is not reproduced in this compilation. The citation for the document in Annex A is as follows: Teynier, E. (2019), “L’office de l’arbitre d’investissement: le cas particulier de l’investissement illicite”, *Revue de l’arbitrage: Bulletin du Comité français de l’arbitrage*, No. 1, 2019, pp. 117-172.

<sup>146</sup> Breach of *jus cogens* norms or acts of corruption will in any case fall within the ambit of the international public order objections.

<sup>147</sup> Dupuy, P.-M. and J. E. Viñuales, ‘Human Rights and Investment Disciplines: Integration in Progress’, in M. Bungenberg, J. Griebel, S. Hobe, A., Reinisch (eds), *International Investment Law* (Baden Baden: Nomos, 2012).

<sup>148</sup> See, UN Guiding Principles on Business and Human Rights, Principle 9.

HRIAs could therefore have very practical consequences for investor-state dispute settlement: 1) they could be taken into account as preparatory works; 2) they could be used to redefine investors' legitimate expectations (HRIAs indeed shed light on the States' human rights concerns and therefore give investors a 'warning' as to changes in the legal framework that may be detrimental to their economic interests); 3) they could be used, in some circumstances, to assess the proportionality of the State's actions in the context of an expropriation claim, among other uses.

### 1.26. Gaëlle Dusepulchre (Permanent representative to the EU, on behalf of International Federation for Human Rights)

FIDH praises the important discussions occurring in OECD on how to better include human rights considerations in investment agreements and find interesting the mapping made on what exist at this stage. In that regard, focusing on the approach taken by the EU, FIDH would like to raise some issues.

#### **The human rights clause**

It should be added that the EU itself has the obligation to monitor the implementation of the human rights clause (§355).

It is also important to underline that if the clause bears obligations to the Parties, it is an obligation to respect the relevant human rights conventions. For example the clause in the EU-Vietnam PCA states: "the Parties confirm their commitment to the [...] the respect for democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments to which the Parties are Contracting Parties, which underpin the internal and international policies of both Parties and which constitute an essential element of this Agreement". In consequence, the clause may perfectly be interpreted as covering not only the obligation to respect (as stated in § 357) but also the State's obligation to protect. This obligation to protect could cover not only its citizens and residents but also the populations in the partner country on the extraterritorial effect of its own activities and the ones of its own companies (see for example General comment No. 24(2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, §§ 14, 29, 30 to 37; A/HRC/19/59/Add.5, Guiding principles on human rights impact assessments of trade and investment agreements, 2011, pt. 2.3 & 2.6.)

The Clause is however to be improved. The discretionary power the EU retains to activate the clause and the assessment of EU practice in this matter must necessarily lead to the conclusion that the human rights clause, in its current form, does not offer any guarantees. It has not applied to trade agreements. We can doubt that the EU will apply it in order to react to the lack of regulation taken by Vietnam to regulate EU investors. The European Parliament regularly regrets the lack of enforcement and efficacy of the HR clause. The Parliament attributes its shortcomings both to the reluctance of the Commission to activate the clause and to "the generic nature of its wording, since this does not spell out detailed procedures for 'positive' and 'negative' interventions under EU/third country

cooperation”;<sup>149</sup> It “advocates the drafting of a new ‘model clause’ [...]”<sup>150</sup> to establish a procedure for effective implementation of these clauses in the spirit of Articles 8, 9 and 96 of the Cotonou Agreement”;<sup>151</sup> It recommends “a procedure for consultation between the parties, detailing the political and legal mechanisms to be used in the event of a request for bilateral cooperation to be suspended”, but also a “warning mechanism”<sup>152</sup> and “human rights and democracy benchmarks for descriptive and evaluation purposes”.<sup>153</sup> All this is aimed at enhancing the consistency and effectiveness of the clause.<sup>154</sup> Finally, the Parliament stresses that the use of the human rights clause should go hand in hand with the development of dedicated monitoring mechanisms.<sup>155</sup> The necessity to reinforce the usefulness of the HR clauses is not only called for by observers and the European Parliament, the Commission itself agreed it. The EU strategic framework on human rights and democracy adopted in 2012 states that “The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries” and its

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<sup>149</sup> European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements (2005/2057(INI)) ; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)), considering L and §§54-55.

<sup>150</sup> European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, § 7

European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter (2012/2145(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0503%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>151</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), §110 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>152</sup> European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, §7.

<sup>153</sup> European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, *op.cit.*, The Parliament calls for “clear criteria for when these are to be applied and what type of sanctions should be applied, and including transparent benchmarks for their lifting” European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter, *op.cit.*, §78.

<sup>154</sup> European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter, *op.cit.*, §§78, 76; European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, §7.

<sup>155</sup> European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter, *op.cit.*, §77.

action plan adds the commitment of the EU to “develop criteria for application of the human rights clause”.<sup>156</sup>

The human rights clause to which the FTA/IPA are linked enables a Party to take appropriate measures only if the other party violates its obligations under the agreement. *It does not allow a Party to depart from its obligations under the agreement (whatever impact they may have on human rights)*. The human rights clause in consequence does not allow the State Parties to suspend the provisions which oblige them to adopt measures that may infringe human rights (for example, as result of lowering a tariff or strengthening intellectual property rights), that may prevent the State Party from controlling private stakeholders whose conduct may lead the violation of others’ human rights (for example, as a result of an excessively high level of protection for foreign investors operating in their territory), or that would prevent the State Party from adopting policies that move towards the full realization of human rights (as result of fiscal and economic impacts of trade and investment agreements for example).<sup>157</sup>

### **Trade and Sustainability (TSD) Chapter, monitoring, complaint and enforcement mechanisms**

The TSD chapter focusing on labour rights does not encompass all human rights. Commenting on this, the European Parliament adopted a resolution that “reaffirms the principle of the indivisibility of human rights, and condemns attempts to consider any right or ground of discrimination less important than others; calls on the Commission and Council to respect the principle of indivisibility when negotiating human rights clauses with non-EU countries”.<sup>158</sup>

The T&SD Chapter is at any rate criticised for focusing on a limited range of rights, mainly the core ILO conventions, and for being conceived in a way that make labour standards a second-class commitment, expressly excluded from the enforcement mechanisms applying to the other provisions of the FTAs. In April 2012, the European Parliament was still calling for the “inclusion of a *complaints procedure* open to the social partners and civil society, the establishment of an independent body to settle pertinent disputes and the possibility of recourse to a *dispute settlement mechanism with provision for fines and the suspension of trade benefits* [...] equivalent to mechanisms for market access provisions”. It demanded that the objectives of Corporate Social Responsibility (CSR) “should be binding on European companies operating in countries with institutional weaknesses”.<sup>159</sup> The

<sup>156</sup> EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, point 33.b), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf).

<sup>157</sup> On the conclusion that it would lead to incompatibilities with human rights obligations requiring adapting of the trade and investment agreements see /HRC/19/59/&dd.5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements, December 2011, pp. 6-7.

<sup>158</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>159</sup> European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI))

Parliament “emphasises the importance and indispensability of human rights and democracy clauses and *effective dispute mechanisms in trade agreements*.”<sup>160</sup>

A few days ago, on 12 February 2020, the European parliament, when giving consent to the EU-Vietnam FTA (EVFTA) reiterated its concerns and stated inter alia it:

“Underlines that the EVFTA includes a comprehensive and binding chapter on Trade and Sustainable Development (TSD), dealing with labour and environmental matters based on widely accepted multilateral conventions and norms; *points out that the enforceability of the TSD chapter could be significantly improved, in the first place through consideration of, among various enforcement methods, a sanction-based mechanism as a last resort, and secondly through a reform of the Domestic Advisory Group (DAG) system*, as repeatedly called for by Parliament and also mentioned in the mission letter for the new EU Trade Commissioner; stresses that the TSD chapter is designed to contribute to broader EU policy objectives, notably on inclusive growth, the fight against climate change, the promotion of human rights, including workers’ rights, and, more generally, the upholding of EU values; emphasises that the agreement is also an instrument for development and social progress in Vietnam, supporting the country in its efforts to improve labour rights and enhance protection at work and protection of the environment; calls for the swift *establishment and operability of broad and independent DAGs*, and calls on the Commission to cooperate intensively with the Vietnamese authorities and provide them with the necessary support; *calls on the Joint Committee to immediately begin work on strengthening the enforcement of the TSD provisions*;”<sup>161</sup>

Stresses that the involvement of independent civil society and social partners in monitoring the implementation of the agreement is crucial, and calls for the preparation and swift establishment of DAGs following the entry into force of the agreement, as well as for a *broad and balanced representation of independent, free and diverse civil society organisations within those groups, including independent Vietnamese organisations from the labour and environmental sectors as well as human rights defenders*; <sup>162</sup>

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<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0126%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>160</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>161</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)), §20 [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html).

<sup>162</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)), §37 [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html).

“Having regard to the decision of the European Ombudsman of 26 February 2016 in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam Free Trade Agreement”,<sup>163</sup> ***Regrets that the Commission has failed to undertake a comprehensive human rights impact assessment of the FTA; calls on the Commission to carry out such an assessment***; asks it to systematically include human rights in its impact assessments as and when they are carried out, including for trade agreements that have significant economic, social and environmental impacts; ***points out that the Commission has also committed to carrying out an ex post economic, social and environmental impact assessment***;<sup>164</sup>

“Calls for the EU and Vietnam to set up an ***independent monitoring mechanism on human rights and an independent complaints mechanism***, providing affected citizens and local stakeholders with ***effective recourse to remedy, and a tool to address potential negative impacts on human rights***, notably through the application of the state-to-state dispute settlement mechanism to the TSD chapter”;<sup>165</sup>

The same day, about the investment protection agreement (IPA) with Vietnam (EVIPA), the EP said it:

“1 Welcomes the EU’s new approach to investment protection and its enforcement mechanism (ICS), which has reformed the ISDS [but] expresses concern that the scope of application extends slightly beyond mere non- discrimination between foreign and domestic investors; [...]

4. [...] points out that one of the objectives of the IPA is to strengthen the economic, trade and investment relationship between the EU and Vietnam ***in accordance with the objective of sustainable development, and to promote trade and investment in full compliance with internationally recognised human rights***, environmental and labour standards and agreements; [...]

12. Notes that the EU-Vietnam Investment Protection Agreement (EVIPA) does not contain a separate trade and sustainable development (TSD) chapter, as the latter applies to investment market access under the EU-Vietnam Free Trade Agreement (EUVFTA); stresses that the EVIPA also contains a provision establishing an institutional and legal link to the Framework Agreement on Comprehensive Partnership and Cooperation (PCA), as well as specific references

<sup>163</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)), preamble <https://www.ombudsman.europa.eu/en/decision/en/64308>.  
[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html).

<sup>164</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)), §40. [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html).

<sup>165</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)), §41 [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html).



in its preamble to the TSD values and principles, as enshrined in the EUVFTA, and to the Universal Declaration of Human Rights, thereby ensuring that human rights are placed at the core of the EU-Vietnam relationship; *underlines that the Parties and investors must respect all the relevant international human rights standards and obligations; stresses the responsibilities of investors as outlined in the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights; points out, in addition, that the provisions of the EVIPA and the EUVFTA must be implemented in a complementary manner, especially with regard to human, environmental and social rights and sustainable development when these are applied under the Parties' right to regulate*; stresses the need, moreover, to ensure consistency with development cooperation objectives under Article 208 of the Treaty on the Functioning of the European Union (TFEU);

13. [...] points out that Article 1 of the PCA contains a standard human rights clause which can trigger appropriate measures including, as a last resort, the immediate suspension of the PCA and, by extension, the IPA or elements thereof;

14. *Reiterates that Article 35 of the PCA and Article 13 of the FTA, in conjunction with a system of periodic evaluation, provide tools to address human rights concerns related to the implementation of the IPA, but must be accompanied by scrutiny by the EU and its Member States, and by an independent monitoring and complaints mechanism, providing affected citizens and stakeholders with effective recourse to remedy and a tool to address potential negative impacts on human rights;*<sup>166</sup>

The European Parliament has then provided its consent to the agreements but made clear that it is not convinced regarding human rights safeguards. Indeed and in line with FIDH demands, the EP strongly request immediate improvements, *namely conduct impact assessments, strengthening the enforcement of the TSD chapter, an independent monitoring mechanism on human rights and an independent complaints mechanism providing effective recourse to remedy, and a tool to address potential negative impacts on human rights*. It recalls also that despite the vagueness of the clauses *the Parties and investors must respect all the relevant international human rights standards and obligations and refer to the OECD guidelines*.

**On the improvement needed in regard to these EU agreements, FIDH recommends inter-alia:**

Investment protection agreements should contain clear, detailed and enforceable obligations to both home and host States to protect human rights and a mandatory and enforceable binding clause for investors to comply with the principles of CSR as defined at international level, including the 2010 update of the OECD Guidelines, and with the standards defined by the UN, such as the UN Guiding Principles on Business and Human Rights. It is essential that the investment protected by the treaty is the one that respects international human rights Bill and not only the domestic law as it is the case now. Investors should respect international human rights Bill during all the duration of the operations and

<sup>166</sup> European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (05931/2019 – C9-0020/2019 – 2018/0358M(NLE)), §§ 1, 4, 12-14 [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0029\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0029_EN.html).

not only at the time of investment. Clauses should also allow deducting from the compensation potentially awarded to the investors, the amounts that the investors have been ordered to pay in related cases to compensate for human rights harm caused by its activities.

There is a need to develop a new model of human rights clauses which allow a State party to depart from the obligation when it considers that a provision of the Agreement restricts its own ability to meet its human rights obligations. The Agreement should also make clear that good faith measures to protect the fundamental rights are not subject to compensation, regardless of the impact they may have on the investment.

A human rights monitoring and complaints mechanism should be established before the treaty enters into force to monitor the impact of the agreement on human rights, facilitate access to appropriate remedies for populations, and offer guarantees of non-repetition. Under the guarantees of non-repetition, the monitoring and complaint mechanism will be empowered to make recommendations to the various committees established by the agreements, and more specifically the Committee established by the investment protection agreement, for the adoption of useful interpretations binding on the arbitration tribunals and which may effectively influence the implementation of the agreement. To this end, the mechanism must be able to be seized directly by the populations and individuals whose human rights are affected or are likely to be affected by the investment treaty, as well as by their representative(s) and organisations whose purpose is to protect human rights. The monitoring and complaints mechanism must provide procedural guarantees for its effectiveness and for the proper administration of any problems encountered. It must effectively decide on requests submitted to it and give reasons for its decisions.

Disputes should be ruled by State-to-State dispute settlements mechanism instead of investor-State dispute settlement mechanisms.

More in FIDH's contribution to the European Ombudsman in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam FTA. <https://www.ombudsman.europa.eu/en/correspondence/en/61416>.

## 1.27. Michela Cocchi (Founder and CEO, Lady Lawyer Foundation)

### **Introduction**

The paper provides background information on the developments in the field of BHR/RBC in order to give investment treaty policy makers a broader basis of consideration of policy options. These comments explore the linkages of sustainable development and international investment law.

### **Sustainable Development**

The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future.

At its heart are the 17 Sustainable Development Goals (SDGs),(1) which are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth - all while tackling climate change and working to preserve our oceans and forests.(2)

The SDGs build on decades of work by countries and the UN, including the UN Department of Economic and Social Affairs (UNDESA).(3)



In June 1992, at the Earth Summit(4) in Rio de Janeiro, Brazil, more than 178 countries adopted Agenda 21,(5) a comprehensive plan of action to build a global partnership for sustainable development to improve human lives and protect the environment.

Member States unanimously adopted the Millennium Declaration at the Millennium Summit in September 2000 at UN Headquarters in New York.(6) The Summit led to the elaboration of eight Millennium Development Goals (MDGs) to reduce extreme poverty by 2015.(7) The Johannesburg Declaration on Sustainable Development and the Plan of Implementation, adopted at the World Summit on Sustainable Development in South Africa in 2002,(8) reaffirmed the global community's commitments to poverty eradication and the environment, and built on Agenda 21 and the Millennium Declaration by including more emphasis on multilateral partnerships.

At the United Nations Conference on Sustainable Development (Rio+20)(9) in Rio de Janeiro, Brazil, in June 2012, Member States adopted the outcome document "The Future We Want"(10) in which they decided, inter alia, to launch a process to develop a set of SDGs to build upon the MDGs and to establish the UN High-Level Political Forum on Sustainable Development. The Rio +20 outcome also contained other measures for implementing sustainable development, including mandates for future programmes of work in development financing, small island developing states and more.

In 2013, the General Assembly set up a 30-member Open Working Group to develop a proposal on the SDGs.(11)

In January 2015, the UN General Assembly began the negotiation process on the post-2015 development agenda. The process culminated in the subsequent adoption of the 2030 Agenda for Sustainable Development, with 17 SDGs at its core, at the UN Sustainable Development Summit in September 2015.(12)

2015 was a landmark year for multilateralism and international policy shaping, with the adoption of other several major agreements:

- Sendai Framework for Disaster Risk Reduction (March 2015);(13)
- Addis Ababa Action Agenda on Financing for Development (July 2015)(14)
- Paris Agreement on Climate Change (December 2015).(15)

Now, the annual High-Level Political Forum on Sustainable Development (HLPF)(16) serves as the central UN platform for the follow-up and review of the SDGs.

### **Sustainable Development and Human Rights**

It is increasingly recognized that human rights are essential to achieve sustainable development. The Millennium Development Goals (MDGs) served as a proxy for certain economic and social rights but ignored other important human rights linkages. By contrast, human rights principles and standards are now strongly reflected in the ambitious 2030 Agenda for Sustainable Development.

Grounded in international human rights law, the Agenda offers critical opportunities to further advance the realization of human rights for all people everywhere, without discrimination.(17)

The Ps - People, Planet, Prosperity, Peace, Partnership - perspective of the SDGs plan of action implies to go to first principles and consider whether the norms, rules, or laws are fair, pushing us all to commence to harmonize findings with understanding of the problems and opportunities posed by current and future trends in the system of law.(18)

Each legal system has become intertwined with the others and intersected by supranational rules. Unravelling this is a complex task, potentially resulting in significant changes to the freedoms and accountabilities of people.(19)

The SDGs are universal, transformative, comprehensive, and inclusive. While the MDGs applied only to the so-called developing countries, the SDGs are a truly universal framework, offering a paradigm shift from the traditional model of development. The SDGs vision aims to more peaceful, just and inclusive societies which are free from fear and violence with attention to democratic governance, rule of law, access to justice and personal security (in Goal 16), as well as an enabling international environment (in Goal 17 and throughout the framework), covering issues related to all human rights - economic, civil, cultural, political, social rights and the right to development – and envisaging a world of universal respect for equality and non-discrimination between and within countries, by reaffirming the responsibilities of all States to respect, protect and promote human rights, without distinction of any kind.(20)

### **Human Rights, Property, International Investment Law, and Sustainable Development**

“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.” So declares article 17 of the 1948 Universal Declaration of Human Rights (UDHR).(21)

Whereas the legally non-binding UDHR protects private property, the legally binding 1966 International Covenant on Civil and Political Rights does not recognise it.(22)

A number of subsequent international human rights conventions include clauses that prohibit discrimination on the basis of property or in relation to property based on a person’s sex, race, religion, or similar categories.

The International Convention on the Elimination of All Forms of Racial Discrimination states in Article 5 that everyone has the right to equality before the law without distinction as to race, colour and national or ethnic origin, including the right to own property alone as well as in association with others and the right to inherit.(23) The Convention on the Elimination of All Forms of Discrimination against Women recognises the property rights in Article 16, which establishes the same right for both spouses to ownership, acquisition, management, administration, enjoyment and disposition of property and Article 15, which establishes women’s right to conclude contracts.(24)

The Convention relating to the Status of Refugees(25) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families(26) prohibit discrimination in relation to property rights where such rights are guaranteed although do not establish a separate right to property.

None of these conventions include a free-standing right to private property.(27)

Rather, the protection of foreign property is at the core of the international investment law within which the basic premise is that investments abroad need to be protected against unfair and discriminatory treatment.

The attainable economic progress for both investors and host states is the objective both sustainable development - characterized as maintained in the long run - and international investment law aim to achieve.(28) In this sense, sustainable development and international investment law do not inherently conflict, highlighting the perspective of non-economic interests. It is interesting to mention the Public Statement on the International Investment

Regime that, on 31 August 2010 - years before the launch of the SDGs at the 2012 UN Conference on Sustainable Development in Rio de Janeiro - a group of academics published, expressing the concern that the international investment regime, as it is structured, hampers the ability of governments to act in the interest of their people in response to the concerns of human development and environmental sustainability.(29)

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- (1) United Nations (UN) Sustainable Development Goals Knowledge Platform, “Sustainable Development Goals”, <https://sustainabledevelopment.un.org/?menu=1300>
- (2) UN Sustainable Development Goals Knowledge Platform quoted, “Transforming our world: the 2030 Agenda for Sustainable Development”, <https://sustainabledevelopment.un.org/post2015/transformingourworld>
- (3) UN Department of Economic and Social Affairs (UNDESA) at <https://www.un.org/development/desa/en/>
- (4) UN Sustainable Development Goals Knowledge Platform quoted, “United Nations Conference on Environment and Development (UNCED), Earth Summit”, <https://sustainabledevelopment.un.org/milestones/unced>
- (5) UN Sustainable Development Goals Knowledge Platform quoted, “Agenda 21”, <https://sustainabledevelopment.un.org/index.php?page=view&nr=23&type=400&menu=35>
- (6) [https://www.un.org/en/events/pastevents/millennium\\_summit.shtml](https://www.un.org/en/events/pastevents/millennium_summit.shtml)
- (7) <https://www.un.org/millenniumgoals/>
- (8) UN Sustainable Development Goals Knowledge Platform quoted, “World Summit on Sustainable Development (WSSD), Johannesburg Summit”, <https://sustainabledevelopment.un.org/milestones/wssd>
- (9) UN Sustainable Development Goals Knowledge Platform quoted, “United Nations Conference on Sustainable Development, Rio+20”, <https://sustainabledevelopment.un.org/rio20>
- (10) UN Sustainable Development Goals Knowledge Platform quoted, “Future We Want – Outcome document”, <https://sustainabledevelopment.un.org/index.php?menu=1298>
- (11) UN Sustainable Development Goals Knowledge Platform quoted, “Open Working Group on Sustainable Development Goals”, <https://sustainabledevelopment.un.org/post2015/owg>
- (12) UN Sustainable Development Goals Knowledge Platform quoted, “Transforming our world: the 2030 Agenda for Sustainable Development”, <https://sustainabledevelopment.un.org/post2015/transformingourworld>
- (13) UN Sustainable Development Goals Knowledge Platform quoted, “Sendai Framework for Disaster Risk Reduction 2015–2030”, <https://sustainabledevelopment.un.org/frameworks/sendaiframework>
- (14) UN Sustainable Development Goals Knowledge Platform quoted, “Addis Ababa Action Agenda of the Third International Conference on Financing for Development”, <https://sustainabledevelopment.un.org/frameworks/addisababaactionagenda>
- (15) UN Sustainable Development Goals Knowledge Platform quoted, “Paris Agreement”, <https://sustainabledevelopment.un.org/frameworks/parisagreement>

(16) UN Sustainable Development Goals Knowledge Platform quoted, “High-Level Political Forum on Sustainable Development”, <https://sustainabledevelopment.un.org/hlpf>

(17) UN Human Rights Office of the High Commissioner (OHCHR), “Transforming Our World: Human Rights in the 2030 Agenda for Sustainable Development”, downloadable from <https://www.ohchr.org/Documents/Issues/MDGs/Post2015/HRAndPost2015.pdf>

(18) 2018 Michela Cocchi - Studio Legale Communication On Progress (COP) to United Nations Global Compact (UNGC), “Pinking is (Not) Unusual”, downloadable from [https://s3-us-west-2.amazonaws.com/ungc-production/attachments/cop\\_2018/466876/original/Michela\\_Cocchi\\_-\\_SL\\_UNGC-COP\\_2017-2018.pdf?1536031323](https://s3-us-west-2.amazonaws.com/ungc-production/attachments/cop_2018/466876/original/Michela_Cocchi_-_SL_UNGC-COP_2017-2018.pdf?1536031323)

(19) Ibidem

(20) OHCHR, “Human Rights and the 2030 Agenda for Sustainable Development”, <https://www.ohchr.org/EN/Issues/SDGS/Pages/The2030Agenda.aspx>

(21) The 1948 UDHR is downloadable from <https://www.un.org/en/universal-declaration-humanrights/>

(22) The International Covenant on Civil and Political Rights is downloadable from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

(23) The International Convention on the Elimination of All Forms of Racial Discrimination is downloadable from <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

(24) The Convention on the Elimination of All Forms of Discrimination against Women is downloadable from <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

(25) The Convention relating to the Status of Refugees is downloadable from <https://www.unhcr.org/3b66c2aa10>

(26) The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is downloadable from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>

(27) See Jacob Mchangama, “The Right to Property in Global Human Rights Law”, Cato Institute, Policy Report, 2011, May 30th, <https://www.cato.org/policy-report/mayjune-2011/right-property-globalhuman-rights-law>

(28) See Yulia Levashova, “Role of sustainable development in Bilateral Investment Treaties: recent trends and developments”, Journal of Sustainable Finance and Investment, 2012, available at <https://www.researchgate.net/publication/254317188>

(29) The Public Statement on the International Investment Regime - 31 August 2010 is available at <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>

## **1.28. Marc Proksch (Chief, Investment and Enterprise Development Trade, Investment and Innovation Division, on behalf of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP))**

This is a very comprehensive and informative paper.

The principal purpose of investment treaties is providing investor protection with the aim to attract high quality investment. However, as the paper notes, the effectiveness of BITs in attracting investments is increasingly questioned. Instead, the litigation risks posed by these agreements have come to the fore, leading to discussions on how to rebalance the rights and obligations of states and investors.

While the principal obligation of investors is to adhere to national laws of the countries where they operate, as noted by the paper there are currently important governance gaps with regards to addressing potential harms generated by companies. The complexity of supply chains and related lack of transparency can increase risks of harm going unnoticed. And the complexity of corporate structuring can mean that even an issue such as nationality of the investor can be difficult to establish, facilitating treaty shopping and tax evasion.

One way to address the governance gaps would be to establish a strong multilateral agreement on responsible and sustainable investment with an independent international investment court and appeals court. A multilateral treaty would provide much more transparency and predictability to investors while at the same time ensuring the rights of government to regulate and ensure sustainability. However, such a treaty would be very difficult to establish, as efforts to negotiate one has failed in the past.

Thus, for now the world is grappling with outdated BITs which in many cases give investors too much flexibility to sue host governments. This can be addressed by limiting the scope for interpretation and providing more precise definitions of well-known open legal clauses such as FET, by including BHR/RBC related text in preambles, clauses on the responsibilities of investors, on the legality of investments, by addressing how arbitrators are appointed, and other options identified in the paper and by others.

Future papers on this issue need to identify, discuss and propose the parameters that would constitute a good balance. As noted in the paper, some new model BITs provide ideas for useful ways options in this regard. Further developing a “menu of options” for rebalancing investment agreements, including language relating to responsibilities of investors, would be particularly useful for policy makers from developing countries. As the paper notes, making due diligence a condition for investment treaty coverage could be an interesting way of rebalancing rights and obligations, linking the BHR/RBC agendas with conditionality for protection under treaties, thus warranting further consideration.

The paper would also benefit from addressing the issue of coherence in national frameworks vs investment treaties at regional/international level with a focus on business and human rights provisions.

With the overall slowdown globally in IIA treaty making, Asia and the Pacific is now responsible for the largest number of new IIAs over the past three years. However, as shown by ESCAP research,<sup>167</sup> developing countries in Asia and the Pacific are lagging when it comes to incorporating sustainability related provisions in their IIAs. Also, when incorporated, they have normally focused on environmental dimensions. More attention thus needs to be given to how BHR/RBC provisions could be encouraged also in treaties concluded between developing countries.

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<sup>167</sup> <https://www.unescap.org/sites/default/files/publications/STII%20No.90%20version%204-final.pdf> shows

## 1.29. Matthew Stephenson (Policy and Community Lead, International Trade & Investment, on behalf of the World Economic Forum)

Many thanks for the opportunity to provide contributions or comments to the Business Responsibilities and Investment Treaties consultation paper, dated 15 January 2020, as part of a public consultation in advance of the 16 March 2020 OECD Investment Treaty Conference on Business Responsibilities and Investment Treaties.

3.6

We would like to share an update of the World Economic Forum's (Forum) work in this area, which could be added under section 3.6 'Other initiatives by international organisations addressing BHR/RBC'; since 2015 the Forum has been officially recognized as the International Organization for Public-Private Cooperation.<sup>168</sup>

The Forum brings together the foremost political, business, cultural and other leaders of society to shape global, regional and industry agendas. It helps develop policy options to inform such collaboration, and then facilitates initiatives to develop and implement solutions using a multi-stakeholder process. As such, the Forum is not engaged in the development of binding investment treaties, but rather in the process of developing the concepts and cooperation that can inform and underpin the contents of investment initiatives, including treaties.

To this end, the Forum launched the Investment for Sustainable Development Trajectory in 2016, initially with the financial support of the Netherlands and with Denmark joining in 2018. The aim was to re-orient investment policymaking efforts towards the achievement of the SDGs. The Trajectory conceived of responsible business conduct as a key element within sustainable investment policies and measures. To inform sustainable investment efforts, the Trajectory helped produce a 2017 study that examined 150 instruments (including investment treaties) to identify the common sustainability characteristics being sought from foreign direct investment (FDI).<sup>169</sup>

In 2019, the Trajectory moved to piloting these concepts in key developing countries, initially in Cambodia and Ghana, and in 2020 the work will expand to India and an additional African country. Pilots involve in-depth interviews – with firms, policymakers, civil society, experts and other relevant actors – to identify important sustainable investment policies and measures, validating these through multi-stakeholder workshops, and then supporting implementation of select measures.

Through these pilots, the Forum has identified a number of concrete, actionable sustainable investment measures that can promote RBC, and that could potentially be considered for inclusion within investment instruments, including treaties. The Forum presented the most important of these measures to WTO Members negotiating a multilateral framework on investment facilitation for development in October and December 2019,<sup>170</sup> and plans to continue providing input to the WTO process through workshops in March and May 2020.

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<sup>168</sup> World Economic Forum, "History", <https://www.weforum.org/about/history>.

<sup>169</sup> Karl P. Sauvart and Howard Mann, "Toward an Indicative List of FDI Sustainability Characteristics", October 2017, <http://e15initiative.org/publications/towards-an-indicative-list-of-fdi-sustainability-characteristics/>.

<sup>170</sup> See Ahmed Omic and Matthew Stephenson, "What can governments do to facilitate investment? Important measures identified through surveys",

The Forum would be pleased to present these measures to relevant OECD Investment Committee initiatives, for example within the context of the FDI Qualities Network, for consideration as useful elements to help leverage investment in support of RBC.

Finally, the Forum launched in October 2019 a new *Platform for the Future of Trade and Global Economic Interdependence*,<sup>171</sup> which provides a mechanism for coordination and cooperation between institutions interested in advancing these and other policy objectives. The OECD is a member of this platform, and on the advisory committee of the Trajectory, and we welcome continued opportunities for collaboration in this area.

8.

We would also like to suggest an additional element under section 8 on ‘The role of investment treaties’, perhaps towards the end of the section.

WTO Members have been holding Structured Discussions on Investment Facilitation for Development since 2017, and in January 2020 produced a Streamlined Text that will be the basis of negotiations on a multilateral framework starting in March 2020, as announced at the World Economic Forum’s Annual Meeting in Davos in January 2020.<sup>172</sup>

The Streamlined Text includes mention RBC elements, such as the UN, ILO, and OECD guidelines that guide responsible business practices. As such, it would be a good opportunity to mention the potential that this incipient framework may have to acknowledge, articulate, and advance RBC through a new instrument. The Conference on business responsibilities and investment treaties on 16 March 2020 could also be an opportunity for actors to discuss how RBC could potentially be furthered through the WTO framework.

### 1.30. Brooke Güven and Jesse Coleman (on behalf of the Columbia Center on Sustainable Investment)

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide comments on the consultation paper, “Business Responsibilities and Investment Treaties.”

CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment and the impacts that such investment, and the international legal frameworks governing such investment, can have on inclusive, human rights-compliant sustainable development. Our work also focuses on the impacts

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[http://www3.weforum.org/docs/WEF\\_Investment\\_Facilitation\\_2019.pdf](http://www3.weforum.org/docs/WEF_Investment_Facilitation_2019.pdf), and Karl P. Sauvant and Matthew Stephenson, “Concrete Measures for a Framework on Investment Facilitation for Development: Report”, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3529530](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529530). These and additional resources can be found on the Forum’s Global Investment Policy website, <https://www.weforum.org/projects/investment>.

<sup>171</sup> World Economic Forum, “Platform for the Future of Trade and Global Economic Interdependence”, [https://weforum.ent.box.com/s/wubvunj85nwbfoj40mpljd6bidetrqbd0?utm\\_source=sfmc&utm\\_medium=email&utm\\_campaign=2711443\\_Post-davos20InstitutionalNetworkCommunique&utm\\_term=&emailType=](https://weforum.ent.box.com/s/wubvunj85nwbfoj40mpljd6bidetrqbd0?utm_source=sfmc&utm_medium=email&utm_campaign=2711443_Post-davos20InstitutionalNetworkCommunique&utm_term=&emailType=).

<sup>172</sup> WEF, “Negotiations on Investment Facilitation at the WTO gain support at Davos”, 24 January 2020, <https://www.weforum.org/agenda/2020/01/talks-on-investment-for-development-move-ahead/>.



that cross-border investment, and the legal regimes that govern it, can have on the ability of project-impacted individuals and groups to access justice.

Our comments below seek to inform and support further work undertaken by the OECD and other stakeholders at the intersection of business and human rights, responsible business conduct, and investment governance.

We welcome the OECD's work at this intersection, and appreciate the opportunity to comment on the consultation paper.

## **I. Introduction**<sup>173</sup>

CCSI warmly welcomes the Consultation Paper by the OECD Secretariat on “Business Responsibilities and Investment Treaties” (“OECD Draft BHR Paper”), which comes at a critical time for engagement in this issue area by the Freedom of Investment Roundtable. The OECD Draft BHR Paper provides an excellent overview of the legal and policy frameworks applicable to the intersection of business and human rights (BHR), responsible business conduct (RBC), and international investment governance, and of the major developments at this intersection in recent years. For policymakers and other stakeholders engaged in dialogue on reform of investment treaties and investor-state dispute settlement (ISDS), this Paper provides crucial input for consideration of the merits and limitations of current approaches, issues that require further research and consideration, and potential paths forward.

More broadly, engagement by the OECD and the Freedom of Investment Roundtable in this field is of paramount importance. OECD members are, at various levels, seeking to address existing gaps in domestic, regional, and international frameworks that govern the conduct of companies and impacts of investment. Some advances in domestic legislation have been made of late, and are noted in this Paper. Recent initiatives have also been launched, sparked in many cases by civil society, and also discussed in this Paper. Yet international investment frameworks are falling behind the pack, with recent treaties and models often failing to address BHR/ RBC in meaningful ways, or indeed continuing to include provisions that risk undermining advances obtained in the BHR/ RBC fields. In aligning international investment frameworks with sustainable development objectives, there are critical opportunities to design agreements, and amend existing agreements, to be aligned with human rights obligations and promote investment that is responsible. The OECD Draft BHR Paper lays the groundwork for this discussion and is well-placed to inform future thinking by policymakers and other stakeholders in the field.

## **II. Divergence between BHR/RBC developments in national/regional legal frameworks and policy and developments in international investment law**

The OECD Draft BHR Paper provides an extremely useful overview of the principal responsibility that States bear in protecting human rights from impacts by third parties. Section 4 details various efforts at national and regional levels that states are taking in order to realize these obligations. Section 4.1, in particular, surveys national and regional regulations and policies, in particular on the part of many capital-exporting countries, including Switzerland, France, Germany, and the United States, that are being implemented to advance these states' human rights obligations.

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<sup>173</sup> This text was drafted by Brooke Güven and Jesse Coleman (CCSI). The authors are grateful for input provided by Ludovica Chiussi.



The OECD Draft BHR Paper notes the steps such states are taking at the domestic level to, for example, ensure that corporations do not engage in modern slavery, bribery, child labor, conflict minerals. It highlights the very specific conditions that are placed on companies to qualify for export credit or other state-sponsored financial or trade support.

In this light, the importance of Section 7's focus on the need for policy coherence cannot be understated. There is currently a glaring and unmistakable disconnect between the actions states are taking at domestic and regional levels to ensure that their obligations to protect human rights from infringement by third parties are realized, and actions that states are (not) taking in the international investment law context. [See e.g. Annex A and paras. 335-337.]

At the very least, this lack of action at the treaty level is, conceptually, a missed opportunity to communicate directly to companies on BHR/RBC expectations.<sup>174</sup> However, in light of state human rights obligations to protect against infringement by third parties, and in comparison with the more concrete steps being taken at domestic and regional levels, inaction sends the wrong signals to investors by condoning behavior under investment law that states condemn, and are obligated to protect against and remedy, in other contexts. For example, unlike requirements applied in the context of political risk insurance and export credit (such as by the World Bank's Multilateral Investment Guarantee Agency ("MIGA"), the United States' Overseas Private Investment Corporation ("OPIC", now International Development Finance Corporation, "DFC"), Switzerland's Export Risk Insurance ("SERV"), and set forth in the OECD's Common Approaches) including ex ante screens and ex post exclusions to ensure that governments are not subsidizing investments that cause environmental, social or human rights harms, minimal steps are being taken at the international investment treaty level to exclude state support for investors and investments that do not comply with recognized standards.

More specifically, the substantive benefits and protections offered in investment treaties, as they have been negotiated, interpreted, and applied to date, are additional to and go further than protections offered by analogous areas of domestic and international law. The procedural privileges offered through international investment agreements (IIAs), namely the ability to sue states directly through ISDS for IIA breaches, similarly exceed those available under domestic and other areas of international law. The OECD Draft BHR Paper highlights the role that investment law plays in granting preferential rights to foreign investors [paras 375-376]. These benefits act as regulatory incentives that are effectively state subsidization of foreign investments, benefiting foreign investors. Framed in this manner, it is uncontroversial to suggest that in order to comply with their duty to protect, states should evaluate which types of investments, investors and activities are deserving of such subsidies, and ensure that the protections and benefits afforded under IIAs do not support investments that may undermine state obligations.<sup>175</sup>

Moreover, the privileged substantive standards (with corresponding benefits for breach) and procedural avenues afforded foreign investors under investment treaties may also serve to undermine the very domestic and regional BHR/RBC efforts that are being advanced. ISDS claims often involve highly complex questions of public policies, preferences and

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<sup>174</sup> As emphasized in the OECD's 2014 study [at para 363-364].

<sup>175</sup> See Lise Johnson, Lisa Sachs, and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' <http://ccsi.columbia.edu/files/2016/08/SSRN-id3452070-2.pdf> at p. 10-11.

competing (and shifting) rights and obligations, rather than cases in which the government was acting in bad faith or for discriminatory purposes to directly exploit foreign investors. As Krzysztof Pelc recently found:

[T]he investment regime has shifted in its primary purpose since its origins. Most disputes today are not over “sovereign theft” or direct takings, but over indirect expropriation. And most respondent countries are not rent-seeking regimes with low rule of law, but stable democracies with independent judiciaries. To put it in stark terms, the greatest portion of legal challenges in the investment regime today seeks monetary compensation for regulatory measures implemented by democracies.<sup>176</sup>

To the extent treaties continue to provide substantive and procedural preferences to foreign investors, the very state, local and federal requirements that states are imposing on investors could be challenged, and investors may prevail, at the treaty level (see related comments on “Right to regulate” below).

While the OECD Draft BHR Paper (and other OECD work) catalogues techniques that are being used to “re-balance” treaties [see para 379], the Paper could go further in noting the lack of any real effort, in practice [e.g. para 387], by capital-exporting states to amend or terminate existing treaties (under which the vast majority of claims are brought),<sup>177</sup> and to take real steps in new models and treaties to ensure that states are not subsidizing harmful investments (and investors).<sup>178</sup> While steps such as permitting adjustment of damages to account for investor misbehavior are a step in the right direction (though see discussion in “Investor obligations,” below), there should be a serious question why, for example, an ex ante screen to treaty protection in such circumstances (as applied in the political risk context) is not the more appropriate policy tool. The Paper could, in this way, be more specific on the ways in which the policy disconnect between domestic and regional actions and (in)action at the investment treaty level undermine states’ duty to protect. Without rigorous analysis of this disconnect, there is a real risk that important advances gained at the national and regional level (including through mandatory due diligence legislation) may be undermined by continuation of the status quo in international investment governance. The OECD Draft BHR Paper could play a fundamental role in informing this analysis and discussion of optimal legal and policy solutions.

A critical, and related, issue for the OECD Draft BHR Paper to address is the need for rigorous and robust human rights impact assessments, pursuant to the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, to be conducted by states in the context of investment treaties.<sup>179</sup> While in recent years, some governments have recognized the need to conduct sustainability and human rights impact assessments (referred to jointly as “SIAs”) of their investment treaties (e.g. the European

<sup>176</sup> Krzysztof J. Pelc, ‘What Explains the Low Success Rate of Investor-State Disputes?’ (2017) 71 Int’l Org. 559.

<sup>177</sup> See CCSI’s work on termination and withdrawal of consent, available at: <http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/>.

<sup>178</sup> Johnson, Sachs, and Lobel (above), at p. 15-17.

<sup>179</sup> UN Special Rapporteur on the Right to Food, ‘Guiding principles on human rights impact assessments of trade and investment agreements’ (UN Doc A/HRC/19/59/Add.5) [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/19/59/Add.5](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/59/Add.5).

Union,<sup>180</sup> and also, as noted in the OECD Draft BHR Paper, Finland and France (and potentially others)) it appears that the practice of conducting SIAs for investment treaties remains relatively limited, and that even where SIAs are conducted there has been little done in terms of monitoring and evaluating those impact assessments to (1) test their theoretical bases, (2) monitor and evaluate the soundness of their predictions, (3) assess whether recommendations have been adopted by relevant negotiating or contracting parties, and (4) monitor and evaluate, on an ongoing basis, the actual effects of the agreements (as opposed to only producing ex ante hypotheses about impacts). This kind of empirical foundation would provide governments with the information that they need to assess the extent to which their approaches to investment law are consistent with other policy objectives and legal obligations.

### III. Right to regulate

Highly correlated with the previous section is the OECD Draft BHR Paper discussion of the “right to regulate” [addressed in detail starting at Section 8.3.1]. The Paper focuses in several areas on the right that states have to regulate, and the ways in which international investment law (and its enforcement through the ISDS mechanism) may impact that right.

It considers developing treaty provisions, incorporated in certain newer treaties, expressly recognizing this right. These provisions tend to refer either to: (1) a state’s right or ability to regulate generally in the public interest, or (2) a state’s right or ability to regulate investment in the public interest. Most of these provisions refer to measures concerning health, safety, environmental, or other public welfare issues; however, both Norway’s 2015 draft model BIT and Colombia’s 2017 model BIT explicitly reference human rights in their ‘right to regulate’ provisions.<sup>181</sup> While affirmation of the sovereign right of states to regulate within treaty texts has yet to prove sufficient to actually protect that right in a meaningful way in practice against challenge of certain public interest measures in the context of investor-state claims, the discourse on this issue area has highlighted that the framing of these provisions and inclusion in treaty texts risks creating confusion regarding the nature of the right (and the separate, though related, duty to regulate) itself. The OECD Draft BHR Paper could note that, while including a reaffirmation of this right within treaty texts may be worthwhile, such provisions should be framed as reaffirmations of existing rights (and duties) rather than treaty-based obligations that can be balanced against other treaty-based investor protections.

In this context, the OECD Draft BHR Paper should elaborate further not only on the right that states have to regulate to protect the infringement of rights, but on the fact that states also have a duty to regulate to ensure the protection and realization of rights. For example, these duties may include: legislating to ensure that rights are recognized in law; legislating to ensure that rights are protected (including by placing obligations on third parties, such as human rights due diligence or other requirements); allocating budgetary and other

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<sup>180</sup> See generally European Commission, Sustainability Impact Assessments [http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index\\_en.htm](http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm).

<sup>181</sup> See e.g., Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, ‘Human Rights Law and the Investment Treaty Regime’ (CCSI Working Paper June 2019) <http://ccsi.columbia.edu/files/2019/06/Coleman-Cordes-and-Johnson-Human-Rights-Law-and-the-Investment-Treaty-Regime.pdf> at p. 15 [The language used in Colombia’s model provision is more specific and not constrained by ‘otherwise consistent with’ language contained in Norway’s Article 12, which may be interpreted to narrowly restrict the types of measures shielded by this provision.]

resources, including through taxation and re-prioritization of public spending necessary for the realization of rights; ensuring that services are available, accessible, and affordable; ensuring meaningful consultation with or consent by relevant rights-holders.<sup>182</sup>

It is unclear (at best), in the context of the broad substantive standards contained in most investment treaties, coupled with the inconsistent interpretations given to them by tribunals, whether these “right to regulate” provisions would address concerns around “regulatory chill” that manifest in several distinct ways, including (1) the discouragement of adopting or enforcing regulatory or other measures in the public interest (2) the adoption or enforcement of measures designed to advance a state’s human rights obligations, and (3) the willingness of states to respond to the grievances or policy demands of investment-affected rights holders by adopting or enforcing legislative or other measures in favor of such individuals or groups. It is thus incumbent upon states to ensure that substantive and procedural elements of investment law are consistent with and support their right and duty to regulate.

As noted above, a rigorous and robust SIA would be a useful mechanism for governments to assess the consistency of the substance, interpretation, and application of their investment treaties with their right and duty to regulate.

In light of both of the above sections (“Divergences with domestic and regional laws and policies” and “Right to regulate”), the OECD Draft BHR Paper could note [e.g. at para 381] that SSDS should be given greater prominence. The Paper could make a more general comment with respect to these issues and solutions that governments are considering and implementing (e.g. South Africa, Brazil) to address some of the concerns about investor protection and dispute settlement.

#### **IV. Investor obligations**

The issue of whether and to what extent IIAs can and should provide legal grounds and procedural mechanisms to challenge corporations when they violate laws and/or cause harms, or to limit the benefits they would otherwise get from the treaty, is, as noted in Section 8.3.2 of the OECD Draft BHR Paper, increasingly discussed.

In the context of “hortatory clauses” encouraging RBC or corporate social responsibility, states are likely not fulfilling their duty to protect. In the absence of more rigorous drafting, filters or exclusions, treaties containing these kinds of clauses are still drafted to permit state-subsidized protection of investors and investments that undermine or violate certain norms [as discussed above in these comments].

The OECD Draft BHR Paper notes that clauses that expressly set out legality requirements for treaty coverage of investments appear to be rare. The Paper could usefully link to its earlier discussion of how states incorporate ex ante screens and ex post restrictions on state-subsidized investor benefits in the context of political risk insurance and export and trade assistance to demonstrate that conditionality is not only possible but that the lack of conditionality in this context is glaring.

In both cases (hortatory clauses or legality requirements), however, investment law is clearly diverging from, and less ambitious than, domestic, regional, and even other international efforts described in the OECD Draft BHR Paper. And while incorporation of

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<sup>182</sup> E.g. OHCHR “The Other Infrastructure Gap: Sustainability” [https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap\\_FullLength.pdf](https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap_FullLength.pdf) at p. 54.

investor obligations into treaties may be desirable, for all of the reasons set forth in Section 8.3.2 (e.g. investor misconduct resulting in loss of IIA protection and/or access to ISDS in the narrow cases in which the investor has clearly engaged in fraud or corruption in the making of the investment; reducing the damages awarded to an investor if and when the tribunal deems that the misconduct has contributed to the investor's losses; reflective loss claims resulting in a mismatch for counterclaim purposes) today's IIAs and ISDS are currently not well-structured to be, nor are being interpreted and used as, tools for affirmatively enforcing corporate obligations (as well as securing recourse for harms suffered by investment-affected rights-holders [see comments on Access to Justice below]).<sup>183</sup>

Regarding the nature and content of investor obligations included in recent treaties and models, the OECD Draft BHR Paper highlights that the Dutch Model BIT includes some innovations that are noteworthy. The Paper correctly notes that Article 23 regarding the impact of investor conduct on determination of the quantum of damages raises interesting questions. Amongst those questions is whether conduct that does not align with the UNGPs or OECD Guidelines should be assessed at the damages phase of a dispute, and assessed in terms of a reduction in damages, or earlier in the process (for example, as an issue going to the admissibility of the claim). Investor claimants in past disputes have recovered a majority – or all – of their sunk costs despite tribunals recognizing misconduct on the part of claimants and/or their affiliates. New provisions of this nature should be assessed against this context and past experience.

As noted earlier in discussing divergences between investment law and other domestic and regional efforts, ISDS cases are rarely about unremedied corruption or discrimination at the domestic level. More commonly, these claims are corporate efforts to use international law to shape how public and private rights and interests are balanced, and how economies and societies are regulated, and to do so in a forum where the participation, power and voices of other stakeholders are marginalized or non-existent. The focus on investor obligations is thus broader than issues of discrete investor wrongdoing. It is about attempting to address abusive and extortionary uses of investment treaties, and the failure, to date, of actors within the ISDS system to rein in such practices. While some recent treaty innovations are noteworthy, existing efforts do not adequately prevent treaties from being used as tools for rent extraction, or as instruments for international asset holders, law firms, and claim funders to distort the law in their favor.

In this light, a “solution” with an outsized focus on investor obligations may be a case of not seeing the forest for the trees. It may be of great use for states to consider “investor obligations” in the context of their broader approach to investment law and treaty reform. For example, meaningful assessment and articulation of the precise problems treaties are meant to address (bias, discrimination and lack of due process), and the grievances they are not intended to address but are currently being used by corporations to advance, would be of tremendous value.

## **V. Access to justice**

The OECD Draft BHR Paper makes clear the impact of international investment and related dispute settlement mechanisms on affected rights-holders. It also highlights the challenges that rights-holders face in accessing effective remedies for business-related human rights

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<sup>183</sup> For further discussion, see Lise Johnson, ‘IIAs and Investor (Mis)Conduct’ (January 14, 2019) <http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/>.



harms. Section 2.3 of the Paper reiterates the stark and persistent contrast between affected rights-holders and investor claimants with access to ISDS with regard to access to remedy:<sup>184</sup> while the former often remain uncompensated for harms caused, the latter have direct access to a unique form of remedy at the international level through investor-state arbitration.<sup>185</sup> Moreover, affected rights-holders are excluded from meaningfully participating in ISDS, which is particularly problematic when their rights may be impacted by the proceedings or underlying investment. The effects of this exclusion have been raised as a concern by delegates participating in UNCITRAL’s Working Group III on ISDS Reform, who noted during the 37th Session that:<sup>186</sup>

- Participation by third parties, including affected rights-holders, would enable relevant interests to be represented and considered during investor-state disputes; and
- Such participation could support consideration of other relevant issues, including investor obligations and protection of human rights.

Important links between these concerns regarding remedy for investment-affected rights-holders and the issues raised in the OECD Draft BHR Paper, and previous OECD work, regarding reflective loss can also be drawn. As highlighted by the OECD Draft BHR Paper in Section 4.2.2, “ISDS is unique amongst legal systems in generally overriding the legal separation principle to allow covered shareholders (but only them) to ignore “their” company as a separate entity and claim for reflective loss in ISDS...Covered shareholders can thus have the extraordinary benefit of benefitting from limited liability while ignoring the corporate entity in claims in ISDS.”<sup>187</sup> By enabling shareholders to recover, and at the same time failing to address corporate accountability for harms caused to third parties, the approach adopted in the current stock of treaties – including recently negotiated treaties and published models – grates against and undermines the principle that businesses be held accountable for the effects of their operations. ISDS provides a one-way street for recovery, benefitting companies and shareholders to the exclusion of affected rights-holders. Investment tribunals have at times awarded damages to investors despite such claimants ignoring potential or actual risks associated with their business conduct, failing to conduct “due diligence” surrounding such risks, or engaging in actual misconduct. Providing state-subsidized protection to companies and their shareholders for this type of conduct undermines potential progress on implementation of the UNGPs and OECD Guidelines and states’ obligation to protect against the infringements of rights by businesses. The OECD Draft BHR Paper could further examine the links between structures that enable

<sup>184</sup> OECD Draft BHR Paper, Section 2.3. See e.g., [56]-[58]. The Paper notes that this reiterates a previous finding of a 2012 Scoping Paper and 2020 Progress Report, namely: David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A scoping paper for the investment policy community*, OECD Working Paper on International Investment 2012/03; OECD, *Government perspectives on investor-state dispute settlement: a progress report* (14 December 2012).

<sup>185</sup> See generally CCSI’s work on investment governance and access to justice, available at: <http://ccsi.columbia.edu/work/projects/access-to-justice/>.

<sup>186</sup> United Nations Commission on International Trade Law (UNCITRAL), ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th Session (New York, 1–5 April 2019) [31], [39]. See also, CCSI, IIED, IISD, *Submission to UNCITRAL Working Group III on ISDS Reform: Third Party Rights in Investor-State Dispute Settlement – Options for Reform* <http://ccsi.columbia.edu/files/2016/05/uncitral-submission-third-party-participation-en.pdf> at p. 1.

<sup>187</sup> OECD Draft BHR Paper [268].

recovery in these circumstances while undermining access to justice for victims of business-related human rights harms (and state obligations to provide effective remedy for those victims).

Irrespective of the path or paths pursued on the basis of ongoing reform discussions at UNCITRAL's Working Group III and elsewhere, providing and protecting effective access to remedy for investment affected rights-holders must be amongst the core objectives of IIA and ISDS reform going forward.<sup>188</sup> The OECD Draft BHR Paper could explore proposed options to address the failure to include investment-affected rights-holders in investment dispute settlement mechanisms, including by considering whether and how to incorporate: (i) intervention by third parties in investment disputes, going beyond *amicus curiae* submissions; (ii) dismissal of claims where third parties are unable or unwilling to participate; and (iii) reframing of claims where third parties are unable or unwilling to participate.<sup>189</sup> Building on existing work in this field,<sup>190</sup> the Paper could usefully include a comparative review of the approaches to these mechanisms (intervention; dismissal; reframing) adopted in domestic jurisdictions relevant to OECD member countries, which could usefully inform further thinking and reform discussions relevant to this issue area. Other models, including SSDS and ombuds mechanisms accessible to all affected stakeholders, could also be explored.

The OECD Draft BHR Paper highlights some steps that international trade and investment agreements have sought to take to address access to remedy gaps. The Paper notes in particular in Section 8.3.3 that the recently adopted Dutch Model BIT includes an explicit acknowledgment of state obligations in this regard, with Article 5(3) mirroring the language of UNGP 25 regarding access to remedy.<sup>191</sup> While UNGP 25 reflects state obligations that are otherwise enshrined in binding international and regional human rights treaties, explicitly including this type of provision in an investment treaty may help to clarify links between those obligations concerning remedy and investment-related human rights violations. Nevertheless, the Model does not include provisions for monitoring implementation of, and compliance with, this provision. The OECD Draft BHR Paper could further explore this issue area, given the extensive and well-documented barriers to remedy faced by investment-affected rights-holders.

On the nature of broader state obligations and responsibilities to provide access to remedy, the OECD Draft BHR Paper in general focuses primarily on the UNGPs and OECD Guidelines. The OECD Draft BHR Paper could include, in Section 3.2.4(c), a note that the obligations concerning remedy in the UNGPs mirror obligations that exist under

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<sup>188</sup> Jesse Coleman, 'Access to Justice and Corporate Accountability for Investment-Related Harms: Opportunities and Limitations of the International Investment Regime' (January 14, 2019) <http://ccsi.columbia.edu/2020/01/21/access-to-justice-and-corporate-accountability-for-investment-related-harms-opportunities-and-limitations-of-the-international-investment-regime/>.

<sup>189</sup> CCSI, IIED, IISD, Submission to UNCITRAL Working Group III on ISDS Reform: Third Party Rights in Investor-State Dispute Settlement – Options for Reform <http://ccsi.columbia.edu/files/2016/05/uncitral-submission-third-party-participation-en.pdf> at pp. 7-12.

<sup>190</sup> CCSI, IIED, IISD, Submission to UNCITRAL Working Group III on ISDS Reform: Third Party Rights in Investor-State Dispute Settlement – Options for Reform <http://ccsi.columbia.edu/files/2016/05/uncitral-submission-third-party-participation-en.pdf> at pp. 13-18.

<sup>191</sup> OECD Draft BHR Paper, Section 8.3.3., [420].

international human rights treaties, which enshrine the right to an effective remedy for human rights violations and abuses by third parties. This right, which protects both access to effective remedial mechanisms and availability of appropriate remedies at the end of the remedial process, is enshrined in a number of binding international and regional instruments.<sup>192</sup> With respect to businesses, the responsibilities enshrined in the UNGPs may mirror obligations that exist in domestic and transnational instruments. The responsibility of businesses to respect human rights also requires that businesses not undermine the ability of states to meet their human rights obligations, including by taking actions that might undermine domestic judicial processes,<sup>193</sup> or other processes related to the realization of the right to effective remedy.

Lastly, regarding calls from relevant stakeholders for policy coherence and reform in this area, it may also be useful for the OECD Draft BHR Paper to include (perhaps in Section 8.3.4) additional recent calls from relevant stakeholders specifically regarding remedy and affected rights-holders, including the following:

- In its report on to the UN General Assembly in 2017, the UN Working Group on Business and Human Rights recommended that steps be taken to specifically address the impacts of the investment regime on access to effective remedy for business-related human rights harms.<sup>194</sup>
- In 2019, UN special procedures mandate holders wrote to states participating in UNCITRAL's Working Group III to draw states' attention to: (1) the need for systemic reform of ISDS that would go beyond procedural reforms and would actually address the entrenched power imbalance between investors and States, taking into account the rights and obligations of states in line with international laws and standards concerning human rights; and (2) concerns identified as desirable for reform within the existing Working Group framework, noting that this narrow focus on procedural reform is a missed opportunity to address policy coherence, predictability, legitimacy and effectiveness that underlie deep-rooted deficiencies of the ISDS system.<sup>195</sup>

## VI. The Hague BHR Arbitration Rules

The description of The Hague Rules on Business and Arbitration may be updated to note that the Hague Rules were officially launched on 12 December 2019. While the OECD Draft BHR Paper rightly notes that this effort is aimed at creating a private judicial dispute resolution avenue that would be available to parties involved in BHR issues, and thereby

<sup>192</sup> See e.g., International Covenant on Civil and Political Rights (ICCPR), art. 2; European Convention on Human Rights, art. 13; American Convention on Human Rights, art. 25; African Charter on Human and Peoples' Rights, art. 7.

<sup>193</sup> UNGPs Commentary to Principle 11 at p. 13.

<sup>194</sup> UN Working Group on Business and Human Rights, Report to the UNGA (A/72/162) <https://undocs.org/A/72/162> [78], [85], [86(i)].

<sup>195</sup> Letter dated March 7 2019, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/public\\_-\\_ol\\_arm\\_07.03.19\\_1.2019\\_0.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf).



seeks to contribute to fill the judicial remedy gap, this section could also usefully include published criticisms of the Hague Rules on Business and Human Rights Arbitration.<sup>196</sup>

From a process perspective, it remains unclear the extent to which the Hague Rules Drafting Team engaged with representatives of rights-holders and potential claimants in drafting and finalizing the Hague Rules. This approach contradicts the UN Working Group on Business and Human Rights' assertion that rights holders must not be treated merely as recipients of a remedy, but "should be consulted meaningfully in creating, designing, reforming, and operating such mechanisms."<sup>197</sup>

From a substance perspective, the Hague Rules appear to be attempting to do two very different things. The first is to provide a set of rules for corporate-corporate BHR Arbitration claims, potentially in the context of supply chains or other business relationships, and at the same time purport to provide rules tailored to support individuals or groups whose rights have allegedly been violated by corporate actors. As such, the rules are not clearly and consistently focused on the needs of individual and collective rights-holders and the access-to-remedy problems that the Hague Rules purport to solve, and thus in some cases may ultimately undermine the objectives they seek to address.<sup>198</sup>

Access to effective remedy is a multi-faceted problem that in some contexts may be a result of practical and legal hurdles to accessing courts in the jurisdiction in which the harm occurred. However, a core part of the access-to-remedy problem is also the desire, on the part of corporations, to avoid being sued by rights-holders, and challenges that victims experience in accessing effective remedy derive, in no small part, from barriers that companies themselves have fought for and defended (some of which are elaborated upon in Section 4.2 of the OECD Draft BHR Paper).<sup>199</sup> These include those arising from doctrines of *forum non conveniens*; legal rules restricting which entities in the corporate group can be sued, for which harms and where; norms shielding parent companies from liability of their subsidiaries; and legal tools to move assets across borders and thus shield them from execution.<sup>200</sup> The reasons for which corporations would build walls to certain venues but agree to arbitrate pursuant to the Hague Rules should be considered further such that unintended consequences do not result.

## VII. Conclusion

As the OECD advances work in this field, it may be useful to consider other models and approaches that could better advance BHR/RBC obligations and sustainable development

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<sup>196</sup> For example, CCSI made two submissions to the Drafting Committee and also published a blog summarizing certain concerns (all available here: <http://ccsi.columbia.edu/2019/02/21/business-and-human-rights-arbitration/>).

<sup>197</sup> UN Working Group on Business and Human Rights, Report to the UNGA (A/72/162) <https://undocs.org/A/72/162> [21].

<sup>198</sup> Lisa Sachs, Lise Johnson, Kaitlin Cordes, Jesse Coleman, and Brooke Guven, 'The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives' (September 2019) <http://ccsi.columbia.edu/files/2019/09/CCSI-BHR-Arb-Long-version-FINAL.pdf>.

<sup>199</sup> Sachs et al, *ibid.*, fn 4.

<sup>200</sup> Sachs et al, *ibid.*, p. 2.

objectives.<sup>201</sup> A number of different options are being explored by states at the national, plurilateral, and multilateral levels. The OECD Draft BHR Paper could further explore whether and how these alternative approaches, including those that exclude ISDS, can better support alignment of investment frameworks with BHR/RBC obligations and objectives.

### 1.31. Gisèle Stephens-Chu and Amanda Neil (Freshfields Bruckhaus Deringer LLP, Paris and Vienna)

**Note:** The following comments reflect my personal views, not those of my firm or the firm's clients.

On reflective loss (paras 266-269):

It is important to recall the rationale underlying the prohibition against claiming for reflective loss in common law systems. This is designed to ensure that (a) there is no double recovery by a company and its shareholder against a defendant, and (b) that the company, as the injured party, bring the claim, not its shareholder. However, in circumstances where the company is unable to act, then the shareholder is entitled to bring a claim.

In an investment treaty context, the ability to claim for reflective loss reflects the reality that foreign investors typically invest through domestically-incorporated vehicles. The investor is the claimant, and, therefore the injured party. The domestic company is the local investment, and, in many cases, has no ability to bring a claim (save in some investment treaties).

On the right to regulate (paras 378 and following):

Investment treaty case law does not recognize any general obligation on states to provide a stable regulatory framework.

The core features of the fair and equitable treatment standard as reflected in investment treaty awards can be summarised as follows:

- (a) a requirement not to enact measures that are arbitrary, in that they advance no legitimate purpose or are disproportionate to a legitimate purpose;
- (b) the State should act consistently and transparently with respect to rules and regulations, their goals and policies, and the application of administrative practices;
- (c) a prohibition against the complete alteration of the legal framework on which an investment depends, particularly if that alteration entirely destroys the economic justification for the investment; and
- (d) protection of qualifying investors' expectation that pre-existing State decisions or authorisations upon which the investor reasonably relied to plan its business will not be revoked.

In order to establish a "legitimate expectation" protected under the last of these elements, tribunals will typically require proof of a *corresponding specific assurance or promise* from the State. Thus, tribunals have considered that a host State's obligations with respect to the legal framework include an obligation not to renege on a *specific promise or representation* that legislation will not be amended.

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<sup>201</sup> See e.g., Johnson, Sachs, and Lobel, above.

This is what underpins investment treaty tribunal's findings of liability in many of the cases involving claims by investors in renewable energy projects against Spain and other States. In these case tribunals found that the respondent States had established attractive regulatory regimes for investments in their renewable energy sectors and had also provided specific assurances of the regimes' long-term stability, which gave rise to investors' legitimate expectations.

Absent such specific assurance, the State's right to regulate is unfettered (subject to requirements of proportionality, fairness etc that are no more onerous than those applicable under domestic public law rules in most jurisdictions).

On business responsibilities in investment treaties (paras 395 and following):

It may be helpful in this context to recall investment treaty cases in which States have sought to invoke human rights as a sword (ie as a basis for a counterclaim, as in *Urbaser v Argentina*, or as contributory fault that reduces the amount of damages dues, as in *Bear Creek v Peru*). While these cases signal a willingness by some tribunals to entertain claims based on human rights, they illustrate the pitfalls in seeking to establish such claims. In particular, it is questionable whether international human rights norms, which impose obligations on States, can be enforced against investors under the applicable investment treaty (unless such norms also form part of the host state's law and such law is applicable under the terms of the BIT).

Thus, passing references to international human rights norms in the new generation of investment treaties are not sufficient, in and of themselves, to create an obligation on investors who are not party to the instrument by which those norms were established.

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**Note:** The following comments reflect my personal views, not those of my firm or the firm's clients.

### **General comments**

A number of recent developments have thrown the investment treaty regime into the spotlight, highlighting the need for reform. On a social level, these include a general rejection of globalisation, an increased focus on corporate social responsibility and the climate crisis. On a legal and political level, these include the Achmea decision and Brexit. There is a general consensus that the investment treaty regime is struggling to meet 21st century demands and that it must reform if it is to survive. The OECD's report on "Business Responsibilities and Investment Treaties" (the *Report*) is a welcome attempt to address some of the issues facing the investment treaty regime, which will assist in ensuring that it remains relevant and useful in the future.

### **The need for policy coherence**

The Report highlights the Dutch Model BIT as the yardstick for the recognition of BHR and RBC in investment treaties and emphasises the need for policy coherence (see paras 4 to 5; section 8.3.3). It is useful to consider the Dutch Model BIT against the background of other recent developments such as the Achmea decision and Brexit. The need for policy coherence is all the more pressing considering that these developments could theoretically give rise to a situation in which non-EU governments compete with EU governments to attract business by providing a more "favourable" investment regime, for example by failing to incorporate BHR and RBC responsibilities into investment treaties. The potential for the efforts of BHR and RBC-aware governments to be undermined by these

developments should be borne in mind and attempts should be made to prevent BHR and RBC obligations from becoming a political pawn in investment policy.

### **The purpose of investment treaties**

The Report discusses the purpose of investment treaties (see section 2.1). The investment treaty regime is largely a product of the social and historical context in which it emerged. Many investment treaties were negotiated in the second half of the 20th century and the focus was primarily on the use of foreign direct investment as a tool to promote economic development in poorer countries, while protecting investors from wealthier countries. The goal of these investment treaties was to encourage investment by investors from capital exporting countries into capital importing countries by providing legal protections for investors under international law which were not available under local law. Investment treaties were considered to be mutually beneficial because they increased investment opportunities for investors from capital exporting countries, while providing economic benefits to capital importing countries.

This rationale for the investment treaty regime is outdated for several reasons. First, it is no longer the case that foreign direct investment takes place only (or even mostly) along north-south lines. North-north investment, south-south investment and even south-north investment is increasingly common. Many of the recipients of foreign direct investment are already developed economies with robust legal protections for domestic and foreign investors alike. Investment treaties can therefore no longer be justified on the grounds that they promote economic development alone.

Second, it is in any event questionable that the investment treaties of the 20th century have delivered on their promise of promoting economic development in developing countries. While life has improved in many traditional capital importing countries, the extent to which these developments can be attributed wholly or even partly to the rights given to investors in investment treaties has not been convincingly demonstrated.

Third, the dominant liberal, free-market paradigm of the late 20th century has given way to a more nuanced view, in which it is recognised that economic development is not an unqualified good but that it must be tempered by social and environmental responsibility. It is now recognised that the pursuit of wealth must be carried out in accordance with overriding values such as respect for human dignity and the natural world.

Against this background, the investment treaty regime must adapt to stay relevant. Although some progress has been made by arbitral tribunals that have interpreted investment treaties in a manner more in keeping with the expectations of modern society, it is unrealistic to expect that the answer to the problems with investment treaties will be able to be addressed by tools such as treaty interpretation. Arbitral tribunals are traditionally conservative and are unlikely to take too progressive an approach due to legitimate concerns that they lack the democratic mandate to interpret a treaty beyond the meaning given by the words of the treaty, in light of its object and purpose. Arbitral tribunals are also concerned that, by taking a progressive approach, they risk jeopardising their chances of receiving repeat appointments.

The task of maintaining the relevance and usefulness of the investment treaty regime must therefore be taken up by policy and investment treaty makers, who must draft and negotiate investment treaties that are fit for purpose in the 21st century.

### **International law as a tool to avoid “weaknesses” in domestic law in BHR and RBC regulation**

The Report discusses the fact that one of the major criticisms of investor state dispute settlement is that it permits the circumvention of basic legal principles that are almost universally recognised in domestic legal systems, such as the legal separation principle and the prohibition on shareholder claims for reflective loss. As a result, shareholders generally have much broader rights under investment treaties than they have under domestic law (see section 4.2.2.a).

The Report could highlight the fact that international law is not bound by domestic legal principles and, as a result, it may actually provide a more useful and flexible framework for the regulation of BHR and RBC issues. This is because it could be used to avoid some of the “weaknesses” of domestic law for the effective regulation of these issues. For example, the Report references the problems created by the concept of beneficial ownership under domestic law (see section 3.5). Investment treaties could avoid such issues by making the enjoyment of the rights they provide contingent upon transparency of ownership in appropriate cases. The Report describes the Vedanta case and shows how parent companies may be held liable for the human rights violations of their foreign subsidiaries under domestic legal principles (see section 4.2.2.b). Investment treaties could develop novel legal concepts that enable the ultimate investor to be held responsible for the activities of their investment vehicles in appropriate circumstances. Finally, the Report refers to the manner in which directors’ duties stifle the focus of companies on BHR and RBC issues (see section 4.3.3). Investment treaties could be used to require corporate investors to have due regard to factors other than the interests of their shareholders, such as BHR and RBC concerns.

Using international law and investment treaties to reinforce BHR and RBC obligations could also promote the development of universally accepted standards, which would increase certainty for multinational businesses and improve the regulation of these issues under domestic law.

### **1.32. Robert Howse (Professor of International Law, New York University Law School)**

- A major strength of the paper is to illustrate an evolving international consensus around a core group of norms and standards for responsible business conduct. This strengthens the case that business responsibilities could be brought into investment treaties and dispute settlement in a legitimate and legally rigorous way.
- As I already mentioned *Bear Creek v. Peru*, both the majority but especially the separate opinion of Philippe Sands illustrates how lack of diligence of the investor with respect to relevant human rights norms may have an effect of both qualifying the liability of the state and reducing damages. In the case of Fair & Equitable Treatment and Full Protection & Security, any assessment of the conduct of the state should arguably be matched with an assessment of the behaviour of the investor in an overall determination of whether the state acted fairly and equitably. In my experience, ISDS tribunals very often ignore aspects of the investor's behaviour that have set the scene for the state's response, or aggravated the risks of a dispute, or some kind of political or regulatory event that leads to a claim. Bringing in business responsibilities helps us to focus on

this blind spot that is frequently exhibited in the awards. Irresponsible business conduct could be called in fact a “moral hazard” problem for the state as an insurer of political risk in effect under the treaty.

- Especially because business responsibilities have been developed particularly far in the extractive industries context, and the risks there are also large, the revision of the Energy Charter seems like a lost opportunity to bring in business responsibilities-I have not followed the process as closely as I ought, but worth checking on this.
- As you know, I have argued that multilateral ISDS reform (UNCITRAL) should result in a judicial system where claims or counter-claims can be brought for violations of certain human rights and related norms or standards that have been accepted by the investor voluntarily, and also that access to the court should depend on the investor agreeing to such jurisdiction. You have probably seen my short essay on this, but if not, happy to send it to you.
- On clean hands as a jurisdiction requirement, it is worth analysing the approach of the tribunal in *Fraport*.
- MIGA the political risk operation of the World Bank has been very successful at insuring against political risk while avoiding payout of claims. One reason may be that insured projects have to meet the social and environmental safeguards of the World Bank, and are assessed ex ante and then monitored for this. Bruno Simma has suggested bringing into the investment regime ex ante social assessment of proposed investments. This could be a requirement for the investor receiving protection under the BIT (it would actually help also with the reflective loss/non-transparent corporate structure problem as the state would be alerted that an investor/investment might be making a claim under the treaty). Alternately, ex ante assessment from a business responsibilities perspective, could be a matter for investment facilitation, which is now as you know being worked on at the WTO (plurilaterally I believe).

### **1.33. Raymond Saner (Director of Diplomacy Dialogue, Centre for Socio-Economic Development (CSEND), Geneva; co-chair, Academic Friends of the OECD Guidelines network)**

Many thanks for your paper titled “Business Responsibilities and Investment Treaties” which I received from the OECD secretariat accompanied with information giving context and purpose of the consultation process.

I was impressed by your comprehensive analysis describing the wider field of international investment treaties and the related ways countries and businesses structure the balancing act between protecting investment versus ensuring the rights of governments to regulate investment in order to safeguard their rights and political obligations to ensure adequate protection of social, economic and environmental rights.

I also appreciated the summary of the status of government National Action Plans (NAPs) on BHR and RBC and their attention to policies on trade and investment agreements (Annex A, pp 107-128).

My comments and questions are mostly focusing on the larger implications of your paper and address more the contextual comments made by the secretariat in the introductory statement.

1. It would be good to add trade data in the introductory part of your paper to put an external frame around your subsequent discussions of legal aspects of the Investment versus regulation issues. International Investment Agreements have dropped off consistently since 1997. What are the reasons for the decrease in BITS and TIPS? Does the balancing process between investor and protection of right of governments no longer work? What lessons should we learn from this trend? [https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d8\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d8_en.pdf) (figure 2, page 6).
2. What are the consequences if governments pass new laws to for instance to strengthen CSR, reduce environmental pollution, protect human rights or in general wanting to implement the SDGs – will this automatically be considered retroactive regulatory measures which can lead to an ISDS court case?
3. How should investors, governments and civil society understand the potential conflicts between treaties? Which treaty takes prominence in case of an investment dispute case, e.g., relating to clauses of IIAs, Kyoto Protocol, Biodiversity, WTO?
4. In case of conflicts between treaty regimes, could the principle of Mutual Supportiveness” be applied and if considered too weak, be strengthened? For reference, see my discussion of Mutual Supportiveness applied to WTO and MEAs (R. Saner, “Greening the WTO, pp 80-86; <http://www.diplomacydialogue.org/publications/environmental-diplomacy/147-greening-the-world-trade-organization.html>).
5. FTAs and BHRs can lead to domestic policy conflicts between e.g. the Ministry of Trade/or Economic Affairs and the Ministry of Foreign Affairs the first covering bilateral investment & trade and increasingly also social and environmental clauses versus the latter observing and complying with HRs convention (UPR). We studied such potential policy contradiction and wonder how such potential domestic policy contradictions impact investor-government relations and what legal consequences this might have for stakeholders. How to reconcile such potential policy contradiction? <http://www.diplomacydialogue.org/images/files/243-729-1-PB.PDF>.
6. Cross-border investments can be structured in different ways ranging from traditional investment, to non-equity investment and to Public-Private Partnerships (PPP) type investment. In case of a dispute between the PPP investor and the host government, which party of a PPP should be held responsible?
7. The secretariat’s introduction mentions increasing convergence between the OECD GLS for MNEs, the UNGP and the ILO MNE Declaration. It would be very useful for all stakeholders concerned (investors, government and CSOs) if the three approaches would be analysed in depth to reduce confusion of legal consequences of these three approaches and ideally lead in the future to a harmonization of all three approaches. A study similar to the one done by E. Groux Diggs, M. Regan and B. Parance titled Business and HRs as a Galaxy of Norms” could be very useful for all stakeholders. <https://scholarship.law.georgetown.edu/facpub/2198/>.
8. Lastly, vulture investors can destabilize trust between the investment community and creditor and debtor countries and make it more difficult for parties to negotiate mutually beneficial investment agreements. In view of the important number of developing and least

developed countries struggling with indebtedness and financial illiquidity, it would be welcome if the international community with IMF leadership finds a solution to stop vulture investors from undermining debt forgiveness agreements. For instance, if 80% of the creditors signed a debt relief agreement, vulture investors should no longer be able to drag the indebted party to further litigation.

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