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Jesse Coleman

Columbia Law School, Columbia Center on Sustainable Development, jcoleman@law.columbia.edu

Kaitlin Y. Cordes

Columbia Law School, Columbia Center on Sustainable Development, kaitlin.cordes@law.columbia.edu

Lise Johnson

Columbia Law School, Columbia Center on Sustainable Investment, ljj2107@columbia.edu

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CCSI Working Paper 2019

Human Rights Law and the Investment Treaty Regime¹

Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson*

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*Jesse Coleman is a Legal Researcher at the Columbia Center on Sustainable Investment (CCSI). Kaitlin Y. Cordes is Lead, Human Rights & Investment and Head, Land & Agriculture at CCSI. Lise Johnson is Head, Investment Law & Policy at CCSI.

I. Introduction

By 2011 a Canadian mining company wishing to exploit minerals in Peru had already confronted years of opposition from some local indigenous peoples, who rejected mining projects that stood to affect their territories and resources.³ As indigenous peoples, they had specific human rights protections under international human rights law and domestic Peruvian law. Their relationship with their land and territories meant that mining projects, including the one proposed by the Canadian company, threatened not only their resources, but also their identity and their spiritual-cultural well-being. As one community representative later explained, ‘Can you change your mother? Land for us is our mother, and water is its lifeblood’.⁴ Community members and representatives sought to protect their territories and resources by engaging with administrative and local government authorities and procedures.⁵ These actions ultimately proved unsuccessful, sparking protests that grew in intensity over the course of 2011.⁶ Following weeks of protest and escalation of violence between police and demonstrators, the government of Peru issued a decree that revoked the initial declaration of public necessity authorizing the mining company to hold the concession. The government also undertook additional efforts to address issues related to the social and environmental impacts of extractive projects, including prohibiting mining in nearby areas.⁷

At the time the government took these steps, the company had not secured all government approvals necessary for mineral extraction. It had yet to obtain an approved environmental impact assessment, it had not obtained at least 40 other permits required to construct and operate a mine, and it had not reached agreement with local communities regarding land use rights in the area surrounding the project.⁸ The company nevertheless sued the government of Peru in 2014 under the investment chapter of the Canada-Peru Free Trade Agreement, arguing *inter alia* that the government’s actions constituted an indirect expropriation of its investment. In 2017, the arbitral tribunal tasked with determining the company’s

*Special thanks to Surya Deva and David Birchall for their helpful reviews, and to Emma Leonore A. De Koster for her editorial assistance.

³ See eg, UNGA ‘Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya’, Addendum, ‘The Situation of indigenous peoples’ rights in Peru with regard to the extractive industries’ (2014) UN Doc A/HRC/27/52/Add.3, [25]; Vanessa Baird, ‘Peruvians rise up against the mines’ *New Internationalist* (1 October 2011) <<https://newint.org/features/2011/10/01/peruvians-mines-protests-puno-mining-company>> accessed 12 June 2018.

⁴ Indigenous community representative speaking on a panel at the UN Forum on Business and Human Rights, Geneva, Switzerland (29 November 2017).

⁵ Derechos Humanos y Medio Ambiente Puno (DHUMA) and Mr. Carlos Lopez, Amicus Curiae Brief in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2, <<https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf>> accessed 12 June 2018.

⁶ See eg, Reuters Staff, ‘Peru protests turn deadly as govt halts mine project’ *Reuters* (24 June 2011) <<https://www.reuters.com/article/metals-peru-bearcreek/update-3-peru-protests-turn-deadly-as-govt-halts-mine-project-idUSN1E75NOL220110624>> accessed 12 June 2018.

⁷ Columbia Center on Sustainable Investment (CCSI), Submission as an ‘Other Person’ Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (9 June 2016) in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2, <<http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/>> accessed 12 June 2018, 4 (fn 25) (hereafter CCSI Submission regarding *Bear Creek*). CCSI’s application to file this submission was rejected by the tribunal.

⁸ CCSI Submission regarding *Bear Creek* (n 7) 7-12.

claim agreed.⁹ It ordered the government to pay over US\$18 million in damages and required it to cover its own arbitration costs along with 75 percent of the company's legal expenses. In total, the cost of the claim would amount to over US\$30.5 million, in addition to compound interest on the damages and costs awarded.¹⁰

In a partial dissenting opinion, one arbitrator highlighted the company's contribution to the social unrest that had precipitated the government's decree. The arbitrator noted 'the investor's inability to obtain a "social license"'¹¹ and its 'failure to do all it could have done to engage with all the affected communities, especially after the initial protests in 2008'.¹² He stressed that, just as investors have rights under international law, so too 'local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights'.¹³ The arbitrator thus disagreed with the majority of the tribunal regarding the legal relevance of the company's insufficient engagement with local communities: given the company's contribution to the project's demise, and because its responsibilities with respect to securing a social license were 'no less than those of the government', the arbitrator would have reduced damages by half.¹⁴

The case is emblematic of tensions that arise when the human rights obligations of states and the rights of investment-affected rights holders collide with protections afforded to foreign investors under the international investment regime. This regime is a powerful framework regulating states' treatment of foreign investors. In its current iteration, it may stymie the business and human rights agenda in various ways: by incentivizing governments to favour the protection of investors over the protection of human rights; by adversely affecting access to justice of rights holders; and by creating a system of global economic governance that elevates and rewards investors' actions and expectations, irrespective of whether they have adhered to their responsibilities to respect human rights. Investors who have failed to meaningfully engage communities, and even those who have acted in breach of domestic law, have been awarded considerable sums of money at the expense of states and their taxpayers—while states have been reprimanded for not doing enough to protect investors in the context of citizen protests.¹⁵ These disputes play out against a global backdrop in which rights holders defending their lands and resources are increasingly threatened, repressed, criminalized, and even killed in countries around the world.¹⁶

⁹ *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2, Award (30 November 2017) [415]-[416] (hereafter *Bear Creek*).

¹⁰ *Bear Creek* (n 9) [738].

¹¹ *Bear Creek* (n 9) Partial Dissenting Opinion of Professor Philippe Sands (QC) [6].

¹² *Bear Creek* (n 9) Partial Dissenting Opinion of Professor Philippe Sands (QC) [35].

¹³ *Bear Creek* (n 9) Partial Dissenting Opinion of Professor Philippe Sands (QC) [36].

¹⁴ *Bear Creek* (n 9) Partial Dissenting Opinion of Professor Philippe Sands (QC) [37]-[40].

¹⁵ *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No 2012-2, Award (Redacted) (15 March 2016), [6.83] ('Plainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing.').

¹⁶ Global Witness and the Guardian report that at least 197 environmental defenders were killed in 2017 while seeking to protect their communities' lands and/or natural resources. 'The Defenders' *The Guardian* <<https://www.theguardian.com/environment/ng-interactive/2017/jul/13/the-defenders-tracker>> last accessed 12 June 2018.

This Chapter provides an overview of the interaction between human rights law and the investment treaty regime.¹⁷ Section II discusses the interaction between human rights and investment law, focusing on challenges that arise from the tension between human rights and investment norms. Section III explores how human rights issues have been addressed by the international investment regime to date, and notes the shortcomings of current approaches. Section IV concludes by briefly setting out options for reform.

II. Context: Interaction between Human Rights and Investment Law

International investment law arises from a network of more than 3,300 treaties—generally investment treaties or free trade agreements with investment chapters—concluded between states, of which more than 2,600 were in force at the time of writing.¹⁸ Most treaties allow foreign investors to bring claims directly against host states before international arbitral tribunals. Claims are generally heard by a panel of three arbitrators. Some arbitrators also serve as counsel for disputing parties, raising concerns about how their dual roles may influence their decision-making as arbitrators.¹⁹ This ‘double hatting’ is particularly concerning given the wide latitude that arbitrators have to develop interpretations of treaty provisions. There is no requirement to follow the ‘precedent’ of previous case law. There is also no general appeal process or possibility of rigorous scrutiny. Moreover, although some advances have been made in recent years,²⁰ a lack of transparency continues to permeate the regime.

If an arbitral tribunal finds that the government violated the applicable investment treaty, the tribunal typically orders the government to pay damages to the investor. These damages may cover past expenditures and losses as well as future lost profits. Some awards have been for staggering sums—hundreds of millions of dollars or more.²¹ Determinations made by arbitral tribunals can be readily enforced in the domestic courts of states around the world.²² Even if a respondent state ultimately prevails in an arbitration, it may expend significant resources in defending itself and incur reputational harm.²³

¹⁷ This chapter provides an overview of relevant issues arising at the nexus of human rights and investment law. It does not address each issue in depth. Similarly, examples of treaties and cases are illustrative only, and should not be considered an exhaustive list of investment treaty provisions and cases that refer to human rights issues.

¹⁸ UNCTAD, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA>> accessed 12 June 2018.

¹⁹ See eg, Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20(2) JIEL 301; Philippe Sands, ‘Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel’, in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2012) 28–49.

²⁰ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were adopted at UNCITRAL’s 46th session and came into effect 1 April 2014 (UNCITRAL Transparency Rules). The UN Convention on Transparency in Treaty-based Investor-State Arbitration entered into force 18 October 2017.

²¹ See Lise Johnson and Lise Sachs, ‘The Outsized Costs of Investor-State Dispute Settlement’ AIB Insights 16(1) (2016) <<http://ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf>> accessed 25 June 2016 (hereafter Johnson and Sachs, Outsized Costs). A review of cases concluded by end-2017 found that the average amount awarded to successful investors was US\$504 million (excluding interest and legal costs). UNCTAD, ‘Investor-State Dispute Settlement: Review of Developments in 2017’ (IIA Issues Note, June 2018) <https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf> 5.

²² Enforcement has been particularly strong due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

²³ Johnson and Sachs, Outsized Costs (n 21) 12.

Investor-state disputes have rapidly escalated in the past several decades, with more than 850 known treaty-based cases at the time of writing.²⁴

Governments with legal obligations under investment treaties also have binding legal obligations under international human rights law. Human rights authorities and soft law instruments have sought to clarify how specific state obligations under human rights law apply in the context of international investment. The United Nations (UN) Guiding Principles on Business and Human Rights, for example, recognize the tension between human rights and investment norms, and specifically call on states to ‘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’.²⁵ The UN Special Rapporteur on the right to food, Olivier De Schutter, developed Guiding Principles on Human Rights Impact Assessments (HRIAs) of Trade and Investment Agreements, which explore how states can ensure that such agreements are consistent with their human rights obligations.²⁶

In its General Comments and Concluding Observations, the UN Committee on Economic, Social and Cultural Rights has also elaborated on the human rights obligations of states in the context of international investment. In its General Comment No. 24, for example, the Committee underscored that states ‘should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist’ and ‘cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude’.²⁷ The General Comment also notes that ‘[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State’, and that states should explicitly reference human rights obligations in future investment treaties so that investor-state dispute settlement mechanisms ‘take human rights into account’ when interpreting treaty standards.²⁸

For the most part, regional human rights tribunals have yet to address the interaction between state obligations under human rights treaties and those under investment treaties. One exception is the Inter-American Court of Human Rights’ decision in *Sawhoyamaxa Indigenous Community v. Paraguay*, wherein the Court specifically sought to harmonize human rights and investment treaty obligations.²⁹

²⁴ UNCTAD, *Investment Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 25 June 2018.

²⁵ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) Principle 9 (hereafter UN Guiding Principles). The commentary to Principle 9 notes that investment treaties ‘may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so’. UN Guiding Principles, 11.

²⁶ United Nations, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* (Addendum to the Report of the Special Rapporteur on the Right to Food, Olivier De Schutter) UN Doc A/HRC/19/59/Add.5 (19 December 2011) (hereafter UN Guiding Principles HRIAs).

²⁷ UN Committee on Economic, Social and Cultural Rights ‘General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: restricting marketing and advertising of certain goods to protect public health’ (10 August 2017) UN Doc E/C.12/GC/24 (hereafter CESCR General Comment No 24) [13].

²⁸ CESCR General Comment No 24 (n 27) [13].

²⁹ For a discussion of this case, see Kaitlin Cordes, Lise Johnson and Sam Szoke-Burke, ‘Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections’ (CCSI, March 2016) 542-544 <<http://ccsi.columbia.edu/work/projects/land-grievances/>> accessed 25 June 2018 (hereafter Cordes, Johnson and Szoke-Burke, Land Deal Dilemmas).

Amongst the justifications offered by Paraguay for its failure to enforce petitioners' rights to the lands claimed, Paraguay had argued that restitution was precluded due to the landowner's protection by a bilateral investment treaty.³⁰ After rejecting the argument on procedural grounds,³¹ the Court provided two additional reasons to reject this justification. First, the expropriation provision contained in the investment treaty included a public interest exception; the Court considered that this type of exception 'could justify land restitution to indigenous people'.³² Second, the Court underscored the difference between the nature of state obligations under the investment treaty and under the American Convention on Human Rights, asserting that enforcement of the former should always be compatible with the latter, 'which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States'.³³

In practice, complying with human rights obligations while avoiding liability on the basis of investment treaties can prove difficult for states. As the following sub-sections illustrate, human rights and investment treaty obligations can collide and perhaps even conflict. These interactions can, among other impacts, restrict host state policy space and undermine access to justice for investment-affected rights holders.

a. Colliding Obligations

Conflicts between international legal norms can be construed both narrowly and broadly.³⁴ Although the human rights and investment regimes do not inherently conflict with one another, both narrow and broad conflicts may arise in specific circumstances. A narrow conflict may arise when there is a direct clash or clear incompatibility between a state's obligations under human rights law and under an investment treaty applicable to an investor-state dispute. This may occur, for example, where a state must choose between protecting the rights of indigenous peoples who stand to be affected by an investment and protecting an investor's interests in the same investment. By contrast, a broad conflict may exist when a host state's obligations under an investment treaty restricts or interferes with the requisite policy space needed to comply with its obligations under human rights law. This may occur, for example, where a host state

³⁰ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 146 (29 March 2006) [137] (hereafter *Sawhoyamaya v. Paraguay*).

³¹ The Court stated that it had 'not been furnished with the aforementioned treaty between Germany and Paraguay', but nevertheless relied on what Paraguay had indicated the relevant treaty said. *Sawhoyamaya v. Paraguay* (n 30) [140].

³² *Sawhoyamaya v. Paraguay* (n 30) [140].

³³ *Sawhoyamaya v. Paraguay* (n 30) [140].

³⁴ On narrow and broad norm conflicts, see UNGA, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 25 June 2018 (hereafter UNGA, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'); Erika De Wet and Jure Vidmar, 'Introduction' in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012).

delays or abandons adoption of new regulations designed to protect the health of host state citizens due to the threat of investor-state claims.³⁵

Various mechanisms and techniques have been proposed to address norm collisions.³⁶ States can use specific treaty provisions, for example, to clarify hierarchies of obligations. To date, however, inclusion of ‘specific conflict norms’ establishing the primacy of human rights obligations over those contained in investment treaties has not materialized in investment treaty making.³⁷ Amongst ‘general conflict norms’ that could be used in investor-state disputes,³⁸ one of the more prominent approaches discussed in the discourse on fragmentation of international law is the principle of ‘systemic integration’.³⁹ In short, systemic integration mandates that, ‘although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say “other” international law’.⁴⁰

Some legal scholars have relied upon the principle to argue that no genuine normative conflicts exist between obligations arising from international human rights law and investment law, given that such obligations can be interpreted harmoniously.⁴¹ In the context of investment disputes, however, it appears that investor-state tribunals confronted with collisions between human rights and investment norms have either overlooked systemic integration or applied it in a cursory manner. Some tribunals, after recognizing that human rights and investment obligations are reconcilable, have relied on that recognition to reject

³⁵ New Zealand, for example, reportedly delayed introduction of tobacco plain packaging rules until after the outcome of the *Philip Morris v Australia* case. See Markus Krajewski, ‘Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights’ (CIDSE March 2017) <<https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>> 11 (hereafter Krajewski). See also UNGA ‘Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order’ (2015) UN Doc A/70/285, wherein the Independent Expert notes ‘[i]t is reported that the mere threat of an investor-State dispute settlement case stopped Canada from banning the words “light” and “mild” in tobacco control laws’ (at [44]).

³⁶ See eg, Olivier De Schutter, ‘A Human Rights Approach to Trade and Investment Policies’ (Background Paper for conference on *Confronting the Global Food Challenge: Finding New Approaches to Trade and Investment that Support the Right to Food*, 2008) 15-20.

³⁷ ‘Specific conflict norms’ are treaty provisions drafted specifically to address the relationship between a treaty and other agreements. Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 136-140 (hereafter Viñuales).

³⁸ ‘General conflict norms’ are defined by Viñuales as ‘approaches in general international law to solving conflicts between two or more international obligations’. Viñuales (n 37) 140.

³⁹ De Wet and Vidmar, for example, note that ‘[a]mong techniques developed for the purpose of conflict avoidance, the one most frequently resorted to is the principle of harmonious interpretation (systemic integration), which also finds resonance in Article 31(3)(c) of the VCLT.’ Erika De Wet and Jure Vidmar, ‘Conclusions’ in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012) 309 (hereafter De Wet and Vidmar (Conclusions)).

⁴⁰ UNGA, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 34) [422]. The technique is arguably codified in art 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). See also Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ *ICLQ* 60 (July 2011) 573, 585 (hereafter Simma) (referencing study concluding that human rights law fulfill the three requirements needed for consideration under article 31(3)(c) of the VCLT)..

⁴¹ See eg, Filip Balcerzak, *Investor-State Arbitration and Human Rights* (Brill Nijhoff 2017) 286-287 (hereafter Balcerzak); Susan Karamanian, ‘Human Rights Dimensions of Investment Law’ in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012) 236-271 (hereafter Karamanian).

arguments based in part on human rights law.⁴² Other tribunals have simply acknowledged that obligations are not mutually exclusive, without further exploring the consequences of that acknowledgment for the underlying obligations.⁴³ Superficial acknowledgments of human rights law in the context of investment disputes are unlikely to produce harmonized obligations.⁴⁴ Experience to date thus suggests that reliance on systemic integration may prove insufficient to harmonize the human rights and international investment regimes, either allowing investment tribunals to ignore norm collisions⁴⁵ or enabling investment tribunals to dilute applicable human rights norms while purporting to apply the principle.⁴⁶

b. Ability to Regulate

In considering the impacts of investment law on human rights obligations, a concern repeatedly underscored by UN human rights experts, scholars, and civil society, and increasingly by policymakers, is the potential for the investment regime to adversely affect states' ability to regulate.⁴⁷ States have duties under human rights law to comply with legally binding obligations. Their compliance with human rights obligations often requires adoption and enforcement of legislation, policies, regulations, and other measures.⁴⁸ While investment treaties do not prohibit the adoption of measures required to comply with

⁴² In *Suez v Argentina*, for example, the tribunal rejected Argentina's arguments regarding its human rights obligations concerning the right to water. It concluded that 'Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive', and that 'Argentina could have respected both types of obligations'. The tribunal did not, however, engage any further in the human rights argumentation advanced by Argentina, nor did it elaborate on how Argentina might in practice be able to respect both types of obligations. See *Suez et al. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010) [262]. See also discussion in Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11 (1) AJWH 65 for discussion of cases where a similar approach has been adopted (hereafter Kube and Petersmann).

⁴³ See eg, *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011).

⁴⁴ A number of legal scholars have raised this issue. See, for example, José E. Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris, forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875089> 93-94 (hereafter Alvarez); Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, 'At the Intersection of Land Grievances and Legal Liability: The Need to Reconsider Contract Rights and Expectations at the Supranational Level' (2017) 49 *Loyola University Chicago Law Journal* 515, 546; Tamar Meshel, 'Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond', (2015) 6 *Journal of International Dispute Settlement* 277; Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 678-707.

⁴⁵ The risk that tribunals will side-step this issue, willingly or accidentally, is amplified by sociological factors. See Moshe Hirsch, 'The Sociology of International Investment Law' in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012) 148-158 (hereafter Hirsch).

⁴⁶ See eg, De Wet and Vidmar (Conclusions) (n 39) 308-309 (noting that conflict avoidance 'can also result in a reduction of the scope of human rights obligations to the point where they merely exist in name').

⁴⁷ See eg, Jesse Coleman, Lise Johnson, Lisa Sachs, and Kanika Gupta, 'International Investment Agreements, 2015-2016: A Review of Trends and New Approaches' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2015-2016* (Oxford University Press 2018) 72-90 (hereafter Coleman, Johnson, Sachs, and Gupta); Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2016); UN Guiding Principles (n 25) 11; UNESC 'Human Rights, Trade and Investment: Report of the High Commissioner for Human Rights' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9.

⁴⁸ See eg, Krajewski (n 35) 11.

human rights obligations, they may restrict or constrain host state policy space by dis-incentivizing, or finding states financially liable for, the adoption or enforcement of such measures.⁴⁹ Investment tribunals may also grant injunctive relief to investor claimants, either as an interim measure or as part of a final award, which can further interfere with or constrain host state policy space.⁵⁰

This restriction of host states' ability to regulate can manifest in various ways. The reputational and material costs associated with investor-state arbitration can be sufficient to 'chill' adoption or enforcement of measures designed to regulate investors and their activities. Such risks may also discourage host states from pursuing other policy agendas that are not focused explicitly on regulating investors, but which may nevertheless affect them. Where the matter proceeds to arbitration, the host state may lose. Even if the state succeeds in defending the challenged measure, the costs associated with the dispute may discourage the state from pursuing similar measures in the future.⁵¹

Relatedly, treaty obligations or the threat of investment disputes may adversely affect the ability or willingness of governments to respond to the grievances or policy demands of investment-affected rights holders, thereby having a 'chilling effect on public action to address community concerns'.⁵² For instance, host states' obligations under investment treaties may limit their responsiveness to the policy demands of domestic constituencies, including investment-affected rights holders, or may reduce their ability to adopt policies corresponding with the preferences of those groups.⁵³

The types of measures that have been challenged by means of investor-state arbitration include measures adopted in the context of local opposition to the activities of foreign investors,⁵⁴ legislation enacted to increase the minimum wage,⁵⁵ an import restriction adopted due to health concerns,⁵⁶ a variety of environmental measures,⁵⁷ plain packaging requirements designed to reduce tobacco use,⁵⁸ measures

⁴⁹ Krajewski (n 35) 9; Simma (n 40) 580; De Schutter (n 36) 14-15.

⁵⁰ While the extent to which investment tribunals can enforce this type of relief is limited, they can penalize non-compliance. *Perenco v. Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014).

⁵¹ Simma (n 40) 580.

⁵² Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-State Arbitration* (International Institute for Environment and Development 2017) <<http://pubs.iied.org/12603IIED/>> 27 (hereafter Cotula and Schröder). See also Cordes, Johnson, and Szoke-Burke, *Land Deal Dilemmas* (n 29).

⁵³ See Zoe Williams, 'Investor-State Arbitration in Domestic Mining Conflicts' (2016) 16(4) *Global Environmental Politics* 32 (hereafter Williams), which explores the impact of the investment regime on anti-mining movements.

⁵⁴ See eg, *Bear Creek* (n 9). For other examples, see Cotula and Schröder (n 52) 15.

⁵⁵ See eg, *Veolia v Egypt*, ICSID Case No ARB/12/15 (not public); Luke Eric Peterson, 'French Company, Veolia, Launches Claim Against Egypt Over Terminated Waste Contract and Labor Wage Stabilization Promises' *Investment Arbitration Reporter* (27 June 2012) <<https://www.iareporter.com/articles/french-company-veolia-launches-claim-against-egypt-over-terminated-waste-contract-and-labor-wage-stabilization-promises/>> accessed 29 June 2015.

⁵⁶ See eg, *Ethyl Corporation v The Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998). See also UNGA 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (2014) UN Doc A/69/299.

⁵⁷ See eg, *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6 (regarding inter alia water quality measures); *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (regarding inter alia the phasing out of nuclear energy in Germany); and *Clayton and Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04 (regarding the environmental impact assessment process).

adopted to set tariffs for essential services,⁵⁹ and judicial invalidations of pharmaceutical patents.⁶⁰ While documenting the impact of regulatory chill presents methodological challenges, a growing body of studies and anecdotal evidence strongly suggest that concerns about regulatory chill are well-founded.⁶¹ The high costs associated with investor-state arbitration have also given rise to concerns regarding expenditure of public resources on litigation, settlement, and fulfilment of awards, and related implications for funds available for fulfilment of human rights obligations and public interest objectives.⁶²

c. Access to Justice

Ensuring access to justice forms a critical component of state obligations under human rights law.⁶³ In the context of human rights abuses or violations linked to international investments, states must provide access to effective judicial and non-judicial grievance mechanisms,⁶⁴ and should also facilitate access to effective non-state-based grievance mechanisms established to complement state-based mechanisms.⁶⁵ Despite these obligations, a range of legal and practical barriers can undermine access to justice for investment-affected rights holders. The investment regime risks exacerbating these barriers, and may also create new difficulties for rights holders, including human rights defenders,⁶⁶ seeking justice for investment-related human rights abuses or violations.

⁵⁸ See eg, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7; *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

⁵⁹ See eg, *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No ARB/10/23; *Iberdrola Energía, SA v Republic of Guatemala*, ICSID Case No ARB/09/5.

⁶⁰ See eg, *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

⁶¹ For commentary on the impact of the international investment regime on regulatory chill, see for example: Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: Further Findings from a Case Study from Canada' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2015-2016* (Oxford University Press 2018) 412-444; Williams (n 53); Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011).

⁶² See eg, UNGA 'Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order' (2015) UN Doc A/70/285, [42]; UNGA 'Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, particularly Economic, Social and Cultural Rights' (2017) UN Doc A/72/153.

⁶³ In this Chapter, 'access to justice' is understood as encompassing access and the right to effective remedy. 'Access to justice' and 'access/the right to (effective) remedy' are concepts that have been used interchangeably. For further commentary on terminology, see UNGA 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162 [13]-[17].

⁶⁴ Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, with case studies by Andie Lambe 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (ICAR, CORE, ECCJ 2013) <<https://www.icar.ngo/publications/2017/1/4/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business>> 12-13. See also UN Guiding Principles (n 25) Principles 25-31.

⁶⁵ UN Guiding Principles (n 25) Principles 28, 31.

⁶⁶ Columbia Center on Sustainable Investment, 'Input to the UN Working Group on Business and Human Rights regarding guidance on human rights defenders and the role of business' (15 March 2018) <<http://ccsi.columbia.edu/work/projects/investor-protections-and-human-rights-defenders/>>; Columbia Center on Sustainable Investment, 'Submission Re: Criminalization and attacks against indigenous peoples defending their rights: proposals for action to prevent and protect' (16 March 2018) <<http://ccsi.columbia.edu/work/projects/investor-protections-and-human-rights-defenders/>>.

The threat of investor-state arbitration may affect the ability or willingness of host states to address the grievances that investment-affected rights holders raise through judicial or non-judicial means. Where rights holders obtain favourable determinations from domestic courts or regional human rights tribunals, the investment regime may interfere – either directly or indirectly – with the enforcement of those determinations. In Guatemala, for example, a domestic court’s suspension of a hydroelectric dam project for the company’s failure to consult an affected community was reportedly lifted following the company’s threat to file an investor-state claim.⁶⁷ The case of *Chevron Corporation and Texaco Petroleum Company (II) v Ecuador* provides an example of more direct interference, where the investor initiated investor-state proceedings against the state in an attempt to insulate itself from domestic judicial proceedings brought by local communities negatively affected by the investor’s operations.⁶⁸ Affected communities eventually obtained a judgment, upheld by the highest court in the country,⁶⁹ against the investor. Yet in a series of awards granting interim measures, the investment tribunal ordered Ecuador to suspend enforcement and recognition of the judgment ‘both within and without Ecuador’.⁷⁰

Aside from exacerbating obstacles for rights holders, the investment regime also fails to provide investment-affected individuals and communities with a meaningful mechanism for remedying investment-related human rights abuses or violations. This failure occurs even when actions taken by rights holders form part of the ‘factual fabric’ of – or one of the triggers for – investor-state claims, and even when rights holders are asked to participate as witnesses in a dispute that stands to affect their own rights and interests.⁷¹ Although individuals and communities affected by investments at the heart of a dispute can request to participate in proceedings as *amicus curiae* (friend of the court), this form of participation aims primarily to assist the tribunal,⁷² rather than to provide an effective remedial mechanism. Arbitral tribunals, which have significant discretion in granting requests to participate, have not developed a clear and transparent methodology for assessing applications from prospective *amici*.⁷³ As discussed in Section III.c, even where investment-affected rights holders have been granted permission to participate as *amicus curiae*, tribunals have generally given limited consideration to their

⁶⁷ Lorena Álvarez el Periódico, ‘Hidroeléctrica Oxec podría recurrir a arbitraje internacional’, *El Periódico* (28 April 2017) <<https://elperiodico.com.gt/inversion/2017/04/28/hidroelectrica-oxec-podria-recurrir-a-arbitraje-internacional/>>; ‘La Corte de Constitucionalidad de Guatemala le permite a la hidroeléctrica Oxec seguir trabajando’, *El Economista* (27 May 2017) <<http://www.economista.es/energia/noticias/8388042/05/17/La-Corte-de-Constitucionalidad-de-Guatemala-le-permite-a-la-hidroelectrica-Oxec-seguir-trabajando.html>>. See also, Columbia Center on Sustainable Investment and UN Working Group on Business and Human Rights, ‘Outcome Report: Roundtable on Impacts of the International Investment Regime on Access to Justice’ (forthcoming).

⁶⁸ *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (II)*, PCA Case No. 2009-23 (hereafter *Chevron v Ecuador II*).

⁶⁹ The judgment was upheld for the most part by the highest court; damages were reduced.

⁷⁰ See eg, *Chevron v Ecuador II* (n 68) Order for Interim Measures (9 February 2011) 3-4; *Chevron v Ecuador II* (n 68) First Interim Award on Interim Measures (25 January 2012); *Chevron v Ecuador II* (n 68) Second Interim Award on Interim Measures (16 February 2012); *Chevron v Ecuador II* (n 68) Fourth Interim Award on Interim Measures (7 February 2013) [79].

⁷¹ On actions of affected rights holders forming the ‘factual fabric’ or trigger of disputes, see Cotula and Schröder (n 52).

⁷² James Harrison, ‘Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009), 405-6. See also Kube and Petersmann (n 43) 88-89; Lorenzo Cotula, ‘Democracy and International Investment Law’ (2017) 30 *Leiden Journal of International Law* 351, 377-380 (hereafter Cotula); see eg, ICSID Arbitration Rule 37(2).

⁷³ Kube and Petersmann (n 42) 90.

arguments. Moreover, the resources and expertise required to make *amicus* submissions may dissuade or prevent many individuals and groups from seeking to participate in this limited manner.⁷⁴

Given the limited nature of *amicus* participation, investment-affected rights holders are primarily dependent on host states to represent their interests in investor-state proceedings. Yet reliance on host state representation will not guarantee effective access to justice, as respondent states may be unwilling or unable to advance arguments based on the rights or interests of investment-affected rights holders.⁷⁵

III. Human Rights in the Investment Regime

Having explored some of the systemic challenges arising from the tensions between human rights and investment norms, this Section provides an overview of how human rights issues have been addressed by the investment regime to date. It outlines whether and to what extent human rights issues have been considered in the context of investment treaty making, explores developments in investment treaty drafting that purport to better address human rights, and briefly considers how investment tribunals have addressed human rights issues.

a. Investment Treaty Making

Investment treaty negotiations are often not transparent, and neglect meaningful dialogue with rights holders. These characteristics have been criticized by several UN Independent Experts and Special Rapporteurs. The UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, for example, noted in her 2015 report to the UN General Assembly that ‘[i]ndigenous peoples and formal representatives are not commonly, if ever, included in the negotiation and drafting processes despite the fact that the resulting agreements are legally binding upon their jurisdictions’.⁷⁶ In her 2016 report to the Human Rights Council, the Special Rapporteur highlighted the ‘exclusion of indigenous peoples from the drafting, negotiation and approval processes’ of investment treaties as one of the three primary ways in which these treaties affect the rights of indigenous peoples.⁷⁷ In this context, the Special Rapporteur referred to the negotiation of the Trans-Pacific Partnership, criticizing ‘the absence of consultation in the negotiation of the Partnership and the lack of any human rights impact assessments’.⁷⁸

⁷⁴ Cotula and Schröder (n 52) 17; Ibironke T. Odumosu, ‘The Law and Politics of Engaging Resistance in Investment Dispute Settlement’ (2007) 26(2) *Penn State International Law Review* 251, 265.

⁷⁵ As noted in CCSI’s response to rejection of its request to file a submission as *amicus curiae* in *Bear Creek v Peru*, ‘the legal representatives of the disputing Parties have a vested interest in presenting the perspectives of the Parties themselves, which likely do not cover the full breadth of perspectives regarding the facts or legal issues in dispute’. Columbia Center on Sustainable Investment, ‘CCSI Response to Procedural Order No 6’ <<http://ccsi.columbia.edu/files/2016/08/CCSI-Response-to-Procedural-Order-No.-6.pdf>> accessed 30 June 2018. See also Cotula and Schröder (n 52); *Chevron v Ecuador II* (n 68) Second Partial Award on Track II (30 August 2018) [7.39]-[7.44] (stating that Ecuador lacked standing to bring environmental ‘cross-claims’ against Chevron for harms caused to individual citizens).

⁷⁶ UNGA ‘Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples’ (2015) UN Doc A/70/301 [53].

⁷⁷ UNHRC ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz’ (2016) UN Doc A/HRC/33/42 [31].

⁷⁸ *ibid.*

Similarly, the UN Special Rapporteur on the right to health, Anand Grover, noted that the rights to information and to participate in decision-making processes, protected under Article 25(a) of the ICCPR and essential for enjoyment of the right to health, ‘are undermined when international investment agreements are negotiated and concluded in secrecy’.⁷⁹ The UN Independent Expert on a democratic and equitable international order, Alfred-Maurice de Zayas, reiterated the link between exclusion from investment treaty negotiations and Article 25 ICCPR in his report to the Human Rights Council in 2015, wherein he underscored that ‘[t]he process of elaboration, negotiation and adoption of bilateral investment treaties and free trade agreements must conform with the requirement of article 25 (a) of the International Covenant on Civil and Political Rights to ensure participation by all stakeholders’.⁸⁰ He further noted that this ‘entails a proactive obligation on the part of Governments to disclose the necessary information and facilitate public participation’.⁸¹

Although limited options for rights holders’ engagement remain the default, some small improvements have been made in recent years regarding access to information and public scrutiny.⁸² In 2016, for example, the European Commission launched a public consultation,⁸³ conducted primarily through a questionnaire, regarding its proposal for a ‘multilateral investment court’ (MIC) and ‘multilateral appeal tribunal’ (MIT). On the basis of the consultation, the Commission concluded that there was ‘overall broad support for a multilateral reform of investment dispute settlement’ as described by the MIC initiative.⁸⁴ The questionnaire used for the consultation was limited, however, focusing in large part on a near-binary choice between investor-state arbitration in its current form and the proposed MIC/MIT as the only alternative.⁸⁵ This framing restricted the questionnaire’s ability to capture a spectrum of views regarding additional alternatives and was critiqued as not enabling meaningful participation.⁸⁶

⁷⁹ UNGA ‘Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ (2014) UN Doc A/69/299 [50].

⁸⁰ UNHRC ‘Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas’ (2015) UN Doc A/HRC/30/44 [36].

⁸¹ *ibid.*

⁸² Cotula notes that some national and regional parliaments have, in recent years, sought to have a greater say in trade and investment treaty making. Civil society organizations have also increased pressure on parliamentarians, with some success, and public scrutiny of these agreements has more generally increased. See Cotula (n 72) 371-375.

⁸³ This reflects the European Union’s general commitment to open public consultations and impact assessments regarding ‘initiatives expected to have significant economic, social or environmental impacts’. European Commission, Impact Assessments <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en>.

⁸⁴ European Commission, ‘Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes’ (13 September 2017) COM(2017) 493 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:493:FIN>>.

⁸⁵ Columbia Center on Sustainable Investment, ‘Position Paper in Support of Opinions Expressed in Response to the European Commission’s “Public Consultation on a Multilateral Reform of Investment Dispute Resolution”’ (15 March 2017) <<http://ccsi.columbia.edu/2017/03/17/public-consultation-on-a-multilateral-reform-of-investment-dispute-settlement/>> 1.

⁸⁶ See also Layla Hughes, ‘The European Commission Consultation on the Multilateral Investment Court: A Breach of the Fundamental Purpose of Public Participation in Decision-Making’ (21 November 2017) *Center for International Environmental Law* <<http://www.ciel.org/european-commission-consultation-multilateral-investment-court/>>.

Addressing the deficit in democratic scrutiny of treaty negotiations is not a straightforward exercise.⁸⁷ Greater participation of investment-affected rights holders is needed. Yet ensuring that such participation is informed and that it is meaningfully incorporated into treaty making processes will require political shifts at national and international levels, as well as creative legal solutions.⁸⁸

b. Investment Treaties

References to ‘human rights’ within the texts of investment treaties are exceedingly rare, with the vast majority containing no explicit reference to states’ human rights obligations or investors’ human rights responsibilities.⁸⁹ Indeed, one of the most comprehensive studies to date found that only 0.5 per cent of the 2,107 investment treaties reviewed in 2014 contained references to human rights, with a majority of these references falling within the preambles of the relevant agreements.⁹⁰ As discussed in Section IV, addressing the dearth of human rights language in the existing stock of investment treaties is a significant challenge.

Modest improvements are evident in several recently negotiated or published investment treaties and model texts. Explicit references to ‘human rights’ obligations and responsibilities have been included within the following sections or provisions of more recent texts: (1) preambles; (2) ‘right to regulate’ provisions; (3) provisions establishing investor ‘obligations’ that are voluntary or, very rarely, mandatory in nature, and that in some cases allow for denial of treaty benefits; (4) non-lowering of standards provisions; and (5) general exceptions. Implicit references to human rights can also be found in other types of treaty provisions, and have provided entry points for human rights arguments in the context of investor-state disputes.

This section focuses on explicit references to the human rights obligations of states and responsibilities of investors found within investment treaty texts and models that have been recently negotiated or published. As noted above, these agreements continue to represent the exception rather than the rule in the

⁸⁷ For further discussion, see Cotula (n 72).

⁸⁸ For a more general discussion of this issue area, see eg Nahuel Maisley, ‘The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making’ (2017) 28(1) *The European Journal of International Law* 89 (hereafter Maisley).

⁸⁹ See eg, OECD, ‘International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues’ (2008) <<http://www.oecd.org/daf/inv/investment-policy/40471550.pdf>> 147 (finding only one example of an explicit acknowledgment of the human rights obligations of states in an existing investment treaty; a second example mentioned in the document is not considered an investment treaty); Howard Mann, ‘International Investment Agreements, Business and Human Rights: Key Issues and Opportunities’ (International Institute for Sustainable Development 2008) <https://www.iisd.org/pdf/2008/iiia_business_human_rights.pdf> 10; J Anthony Van Duzer, Penelope Simons, and Graham Mayeda, ‘Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries’ (Commonwealth Secretariat 2012) 296 (finding that no existing investment treaty included an explicit binding obligation on investors to respect human rights).

⁹⁰ Kathryn Gordon, Joachim Pohl and Marie Bouchard, ‘Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey’ (OECD Working Papers on International Investment, 2014/01) <<http://dx.doi.org/10.1787/5jz0xvvgx1zlt-en>> 18. The sample included ‘all of the investment treaties that countries invited to participate in OECD-hosted investment dialogue – that is, 54 countries plus the European Commission – have concluded with any other country, provided that the full text of the treaty was electronically available in early 2014. This sample of 2,107 treaties covers more than 70% of the global investment treaty population’ (10).

investment treaty regime. This section covers select developments in texts published as of December 2017.

Preambles

The preambles of investment treaties sketch out the treaty parties' objectives. While they are not operative provisions, they can help to inform interpretation of the object and purpose of the treaty.⁹¹ Examples of treaties and models with preambular references to human rights include the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA)⁹² and Norway's recently published draft revised model BIT.⁹³

Right to Regulate

Provisions that recognize and seek to protect the inherent right of states to regulate in the public interest have appeared with increasing frequency in recent models and negotiated treaties.⁹⁴ 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.⁹⁵ 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.⁹⁶ 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.

Investor Obligations and Denial of Benefits

In a small number of newer treaties, references to human rights can also be found in provisions concerning investor obligations and the denial of treaty benefits to investors. Article 8.16 of CETA's Investment Chapter, for example, includes a cryptic reference to the protection of human rights: it provides that a state party may deny the benefits of the Investment Chapter to an investor of the other state party under certain cumulative circumstances, including where the denying party 'adopts or maintains a measure... that... relates to the maintenance of international peace and security'.⁹⁷ A Joint

⁹¹ Barnali Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2016-2017) 38(2) *University of Pennsylvania Journal of International Law* 425, 465-467.

⁹² Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (signed 30 October 2016, provisionally entered into force 21 September 2017) (hereafter CETA) preamble.

⁹³ Norway Draft Model Agreement for the Promotion and Protection of Investments (2015) art 14.5 (hereafter Norway draft model BIT). At the time of writing, the model remained a draft text.

⁹⁴ Coleman, Johnson, Sachs, and Gupta (n 47) 72-90.

⁹⁵ *ibid.*

⁹⁶ Norway draft model BIT (n 93) art 12 (refers to regulation of investment activity); Colombia 2017 model BIT, Chapeau on Investment and Regulatory Measures (refers to regulation within the territories of the contracting parties more generally).

⁹⁷ CETA (n 92) art 8.16 (Investment Chapter). However, the structure of Article 8.16 may make it difficult for states to rely on the provision. See Lise Johnson, Lisa Sachs, and Jesse Coleman, 'International Investment Agreements,

Declaration applicable to Article 8.16 indicates that the parties understand such to ‘include the protection of human rights’.⁹⁸

Colombia’s 2017 model BIT includes two relevant provisions, providing *inter alia* that states parties may: (1) condition or prevent the transfer of funds in order to enforce an investor’s compliance with decisions concerning human rights obligations;⁹⁹ and (2) deny the benefits of the treaty to an investor where a relevant authority has determined that the investor, directly or indirectly, ‘committed serious human rights violations’, ‘sponsored persons or organisations sentenced because of serious human rights violations or violations against International Humanitarian Law or sponsors internationally-listed terrorist organisations’, or ‘engaged in money laundering activities’.¹⁰⁰ Notably, this enables the host state to, in certain circumstances, deny benefits to the investor on the basis of the investor’s conduct irrespective of whether that conduct relates to the investment in the host country.

Several treaties and models include provisions regarding investor responsibilities vis-a-vis corruption and corporate social responsibility (CSR), with some of these provisions explicitly referencing ‘human rights’. Although these provisions are often described as investor ‘obligations’, most are in fact voluntary: they encourage compliance with certain standards and best practices, but do not condition receipt of treaty benefits on compliance. Other provisions framed as ‘investor obligations’ actually focus on state action, requiring, for example, that states encourage investors to voluntarily comply with standards and best practices. Examples of the first type of provision can be found in some of the agreements negotiated on the basis of Brazil’s model Cooperation and Facilitation Investment Agreement (CFIA),¹⁰¹ while examples of the second type of provision can be found in several more recent treaties to which Canada is a party.¹⁰² The MERCOSUR Investment Protocol,¹⁰³ Argentina-Chile FTA,¹⁰⁴ and PACER Plus¹⁰⁵ include CSR provisions similar to those found in Brazil’s CFIA.

One notable exception is the Morocco-Nigeria BIT. The treaty explicitly provides, in binding language, for investor obligations concerning *inter alia* environmental and social impact assessments,¹⁰⁶ labor

2014: A Review of Trends and New Approaches’ in Andrea K. Bjorklund (ed) *Yearbook on International Investment Law & Policy 2014-2015* (Oxford University Press 2016) 58-59.

⁹⁸ CETA (n 92) annex 8-E (Joint Declaration on Articles 8.16, 9.8 and 28.6).

⁹⁹ Colombia 2017 model BIT, Freedom of Transfers.

¹⁰⁰ Colombia 2017 model BIT, Denial of Benefits.

¹⁰¹ Of six publicly available CFIA’s concluded by Brazil during the course of 2015-2016, five include provisions that frame the obligation (or commitment) as belonging to investors, rather than to a state. See Brazil-Angola CFIA art 10; Brazil-Chile CFIA art 15; Brazil-Malawi CFIA art 9; Brazil-Mexico CFIA art 13; and Brazil-Mozambique CFIA art 12. The Brazil-Colombia CFIA also contains a corporate social responsibility provision (art 13) that applies to states parties.

¹⁰² See eg, Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (signed 20 April 2015) art 16; Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (signed 27 May 2015) art 16; Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (entered into force 24 February 2017) art 14. The Canada-Peru FTA at issue in *Bear Creek* (n 9) contained such a CSR provision; it was treated as not relevant by the tribunal.

¹⁰³ Protocol for Cooperation and Investment Facilitation between the Members of MERCOSUR (signed 7 April 2017) (MERCOSUR Investment Protocol) art 14(2).

¹⁰⁴ Free Trade Agreement between Argentina and Chile (signed 2 November 2017) (Argentina– Chile FTA) art 8.17.

¹⁰⁵ Pacific Agreement on Closer Economic Relations Plus (signed 14 June 2017) (PACER Plus) ch 9 (Investment) art 5(2).

¹⁰⁶ Morocco-Nigeria BIT art 14.

standards, and human rights.¹⁰⁷ Article 20 also requires states parties to allow for civil claims in the home state of the investor for ‘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’,¹⁰⁸ providing a means of action against the investor in the home state for those harmed by its actions in the host state.¹⁰⁹

Non-Lowering of Standards

Treaties increasingly include acknowledgments that states parties should not seek to encourage investment by lowering regulatory standards. In most cases, these provisions refer to non-lowering of health, safety, and/ or environmental standards or measures. The model BITs of Norway and Colombia extend these provisions to cover human rights standards,¹¹⁰ with Colombia’s using stronger language.¹¹¹ The Morocco-Nigeria BIT contains a more progressive provision, which provides that ‘all parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party’.¹¹²

General Exceptions

More recently concluded treaties tend to include ‘general exception’ provisions that exempt qualifying measures from breaching host state treaty obligations. While these provisions generally do not explicitly list human rights measures amongst those qualifying for exemption, Colombia’s 2017 model BIT includes an exception that is self-judging and explicitly covers measures necessary for protection of human rights.¹¹³ Other recently concluded agreements have included specific exceptions relevant to the rights of indigenous peoples,¹¹⁴ such as those designed to carve out host state measures undertaken to comply with domestic protections for indigenous populations. Even in cases where human rights measures are not explicitly addressed by exception provisions, some legal scholars have argued that both general and ‘national security’ exceptions can be used to shield a state’s adoption or enforcement of measures necessary to respect, protect, or fulfil human rights.¹¹⁵

¹⁰⁷ Morocco-Nigeria BIT art 18. See also art 17, which includes an obligation regarding corruption.

¹⁰⁸ Morocco-Nigeria BIT art 20.

¹⁰⁹ *ibid.*

¹¹⁰ Norway draft model BIT art 11; Colombia 2017 model BIT, Non-Detract from Environmental, Human Rights, and Labour Standards.

¹¹¹ Colombia’s 2017 model BIT provides that parties ‘shall not modify or derogate’ from human rights or labour laws and regulations ‘to promote the establishment, maintenance or expansion’ of investment; Norway’s draft model BIT provides that parties ‘should not’ waive or derogate from relevant standards.

¹¹² Morocco-Nigeria BIT art 15(6).

¹¹³ Colombia 2017 model BIT, General Exceptions.

¹¹⁴ See eg, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018) (hereafter CPTPP) art 29.6 (ch 29) regarding the Treaty of Waitangi, which provides that nothing in the agreement ‘shall preclude the adoption by New Zealand of measures it seems necessary to accord more favourable treatment to Maori in respect of matters covered by [the Treaty of Waitangi]’, and that ‘the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement’. See also agreements to which Canada is a party (including Canada-Senegal BIT 2016, Annex I; Canada-Serbia BIT 2015, Annex II; Canada-Peru FTA 2009, Annex II).

¹¹⁵ See eg, CCSI Submission regarding *Bear Creek* (n 7). See also Barnali Choudhury, ‘Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements’ (Society of International Economic Law, Working Paper No. 2010/3) <<http://www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html>>.

c. Investor-State Arbitration

Multiple ‘entry points’ provide avenues for human rights issues to become legally applicable in the context of investor-state arbitrations.¹¹⁶ Investors have invoked human rights norms in investor-state arbitration by relying on human rights law to support the establishment of an investment treaty breach; some have also sought to ground specific claims directly in human rights law.¹¹⁷ Investor claims have been advanced regarding, for example: arbitrary detention and deportation;¹¹⁸ denial of justice;¹¹⁹ denial of the right to a fair and public hearing;¹²⁰ and breaches of the right to property protected by regional human rights treaties.¹²¹

In certain cases, host states have invoked human rights law to defend the measures complained of by an investor, or more recently as the basis for submitting a counterclaim regarding investor misconduct. For example, Argentina advanced arguments based on human rights law as it sought to defend itself against a series of claims arising from measures undertaken by the government to safeguard sufficient water supply for the public following an economic crisis.¹²² Argentina also sought to rely on human rights law to advance a counterclaim arguing that the investor had violated its obligations regarding the human right to water.¹²³ Although the counterclaim was ultimately rejected, the case marked the first instance where jurisdiction over a counterclaim grounded in human rights law was accepted,¹²⁴ and prompted a noteworthy discussion regarding the nature of investor obligations under international investment and human rights law.¹²⁵

Participation in investor-state arbitrations by non-disputing parties, namely *amicus curiae* and non-disputing state parties, can provide a further entry point for human rights issues in investor-state disputes. Investment-affected rights holders, civil society organizations, and academics have in some cases

¹¹⁶ Kube and Petersmann (n 42) 94-104. See also Filip Balcerzak, *Investor-State Arbitration and Human Rights* (Brill Nijhoff 2017); Karamanian (n 41).

¹¹⁷ Kube and Petersmann (n 42) 73.

¹¹⁸ See eg, *Biloune v Ghana*, UNCITRAL; *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, UNCITRAL.

¹¹⁹ See eg, *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (I)*, PCA Case No 34877 (hereafter *Chevron v Ecuador I*); *Chevron v Ecuador II* (n 68).

¹²⁰ See eg, *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, UNCITRAL; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12.

¹²¹ See eg, *The Rompetrol Group NV v Romania*, ICSID Case No. ARB/06/3; *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1.

¹²² See eg, *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12; *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4.

¹²³ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26 (hereafter *Urbaser v Argentina*).

¹²⁴ Edward Guntrip, ‘Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?’ (10 February 2017) *EJIL Talk!* <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>>.

¹²⁵ *Urbaser v Argentina* (n 123) [1193]-[1210] regarding the relationship between the applicable investment treaty and human rights law, and [1211]-[1221] regarding the right to water in the framework of the relevant concession.

highlighted human rights issues that may otherwise have been ignored by the disputing parties and the tribunal.¹²⁶

Although human rights issues are often relevant in the context of investment disputes, and while the entry points above may enable these issues to become legally relevant during arbitration,¹²⁷ explicit human rights arguments are rarely made before investment tribunals.¹²⁸ Where human rights issues have been raised, investment tribunals have responded inconsistently to human rights argumentation. In most cases, tribunals have declined to engage with human rights norms or arguments raised by host state respondents.¹²⁹ They have also given limited consideration to human rights issues raised by *amicus curiae* submissions. At best, *amicus curiae* submissions have created marginal space for consideration of human rights issues during the course of investor-state proceedings;¹³⁰ in most cases, these submissions, even when accepted, have not been given adequate consideration by arbitral tribunals, despite their legal or factual relevance to the dispute or underlying investment.¹³¹ By contrast, recent studies have found that tribunals have been more accepting of, or at least more open to considering, human rights arguments advanced by investor claimants.¹³² This selective approach conflicts with the indivisible and interdependent nature of human rights law, and may lead to a prioritization of investor interests over government obligations to a broader set of stakeholders under human rights law.¹³³

In addition to adopting inconsistent responses to human rights arguments, arbitral tribunals have also diverged on the relevance and applicability of international rights treaties. For example, while some investment tribunals have accepted arguments grounded in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),¹³⁴ as well as the means of analysis employed by the

¹²⁶ See eg *Bear Creek v Peru* (n 9) and examples cited in Cotula and Schröder (n 52) 18.

¹²⁷ For further discussion of ‘entry points’, see eg Kube and Petersmann (n 42) 94-104.

¹²⁸ A recent explorative (non-exhaustive) study of explicit references to human rights instruments in investment arbitration found ‘specific and direct references to human rights in a broad sense’ in 42 awards and 4 procedural rulings, i.e. ‘in approximately 9 percent of all concluded cases of investment arbitration an explicit human rights reference was found’. Silvia Steininger, ‘What’s Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration’ (2018) 31 *Leiden Journal of International Law* 33, 37 (hereafter Steininger).

¹²⁹ See eg, Karamanian (n 41) 261; Kube and Petersmann (n 42) 86. See also Hirsch (n 45).

¹³⁰ See eg Cotula and Schröder (n 52) 24 (‘[i]n effect, the main contribution of cumulative [amicus] submissions over the years has been to formally document the existence of community dimensions in arbitral proceedings’).

¹³¹ In several cases, *amicus curiae* submissions have been accepted but given little or no consideration. See eg, *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) [3.30], where the tribunal found it ‘unnecessary’ and ‘inappropriate’ to consider arguments advanced in an *amicus* submission by CIEL. See also *United Parcel Service of America Inc v Government of Canada*, ICSID Case No UNCT/02/1; Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill Nijhoff 2018) 178.

¹³² Kube and Petersmann (n 42) 94; Steininger (n 128) 37-55. In assessing responses by investment tribunals to human rights references raised by respondent states and investor claimants, Steininger notes that ‘in 21 cases, the tribunal felt the need to respond to [human rights] references first introduced or discussed by the claimant. This is a very significant distribution, which strongly suggests a correlation between the human rights argumentation and discussion of the claimant and the tribunal’ (Steininger (n 128) 43). Steininger also notes that the ratio indicates ‘human rights arguments introduced by the claimant supposedly have a stronger impact than those introduced by the respondent’ (Steininger (n 128) 43).

¹³³ Kube and Petersmann (n 42) 93-94. See also Steininger’s discussion of the ‘pick and choose’ approach (Steininger (n 128) 55).

¹³⁴ The study refers to ‘European human rights law’ as ‘the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the caselaw interpreting it by the European Court of

European Court of Human Rights (ECtHR), others have strongly questioned the relevance of the ECHR and related analyses in the context of investment disputes.¹³⁵ Moreover, party-appointed arbitrators selected to determine disputes often do not have expertise in human rights law. It is therefore possible that their consideration of human rights issues, and any interpretation of human rights norms, is or could be inaccurate.¹³⁶

While increased references to ‘human rights’ in investment disputes may be lauded as a step toward harmonization, it is critical to also assess their impacts on the dispute and the extent to which they reflect accurate interpretations of human rights law. Perfunctory references to ‘human rights’ risk being used to lend legitimacy to ill-founded arguments or to problematic awards, rather than providing a thorough harmonization of human rights and investment norms.¹³⁷ Perhaps most critically, the apparent favoring by investment tribunals of human rights argumentation advanced by investor claimants over other stakeholders may ultimately create further imbalance in a regime already criticized for protecting the interests of investors at the expense of rights holders.

IV. Moving Forward

The preceding sections provided an overview of challenges arising from the interaction between human rights and investment treaty norms, as well as of the ways in which both regimes have, or have not, addressed these challenges to date. This Section looks ahead and outlines steps to help align the investment treaty regime with human rights law and to strengthen the human rights narrative on international investment.

a. Revising and Reshaping the Investment Regime

For future investment treaties to effectively address tensions between human rights and investment norms, creative options for reform of procedural and substantive standards must be explored. Solutions advanced by legal scholars, civil society organizations, and UN mandate holders have included: incorporating recognitions of host state human rights obligations into the texts of investment treaties; integrating binding investor obligations into investment treaties; expanding general exception provisions to explicitly recognize measures adopted in pursuit of host state human rights obligations; and requiring states parties to allow civil claims to be brought against investors in the home state for impacts of investments in the host state. For these treaty provisions to be effective, ‘traditional’ investor protections must at the same time be refined and narrowed.¹³⁸

Human Rights’. Alvarez (n 44) 2.

¹³⁵ See the analysis in Alvarez (n 44) generally and conclusion at 94.

¹³⁶ Alvarez (n 44) notes ‘[i]t is not clear that those who are selected to serve as ISDS arbitrators are experts in human rights law and it is possible that they may get it wrong – and not only if their expertise rests on commercial law’ (94, internal citations omitted). See also Hirsch (n 45) and Steininger (n 128).

¹³⁷ See Alvarez (n 44) 51 (internal citations omitted); Steininger (n 128) 55.

¹³⁸ Options for refining treaty standards include: explicitly excluding investments that violate domestic or international human rights law from coming within the scope of treaty protection (see Cotula and Schröder (n 52) 4); narrowing substantive standards to denials of justice; choosing not to provide access to investor-state arbitration, and instead providing access to alternative forms of dispute settlement if deemed appropriate; placing appropriate procedural limitations on dispute settlement, including a requirement to exhaust domestic remedies; including filter

An additional option that has attracted less attention is including a specific conflict provision in investment treaties that clearly establishes the primacy of human rights obligations over those contained in the respective investment treaty. Certain trade agreements with investment provisions have already included similar provisions to address conflicts between environmental and investment obligations. These provisions, and lessons learned from their application in the context of disputes brought on the basis of those treaties, could be used to craft effective specific conflict provisions that address tensions between host state human rights and investment obligations.¹³⁹

Requiring *ex ante* human rights impact assessments (HRIAs) of investment treaties and trade agreements with investment provisions may help to identify and remove inconsistencies between human rights and investment norms prior to the conclusion of new investment treaties.¹⁴⁰ While such assessments can be difficult to carry out in practice, undertaking them in a participatory manner could at the very least improve access to information and public participation regarding the conclusion of the respective treaty.¹⁴¹ Where investment treaties have already been concluded, HRIAs also can be carried out retrospectively to determine whether inconsistencies between human rights and investment obligations exist, and to identify options for addressing those inconsistencies.¹⁴² Similarly, investment treaty provisions requiring continuous assessment of the human rights impacts of measures adopted pursuant to investment treaties, and review of the treaty on that basis, could also help to limit future restrictions of state policy space and related infringements of human rights.¹⁴³ Such assessments might miss government inaction linked to the treaty, however, such as decisions to not pursue certain legislative or policy options that would better protect human rights out of fear that those options might result in investor claims under the treaty.

With respect to procedural reforms, the impacts of investor-state arbitration (and the impacts of the investments underlying these disputes) on the rights and interests of affected third parties must inform development of alternatives to investor-state arbitration. Although discussions on reform of the investment regime are ongoing in several multilateral fora, these impacts and the tensions outlined in Section II.c of this Chapter have received insufficient consideration in these discussions. In particular, options for providing third parties with meaningful rights to intervene and participate have not been sufficiently explored.

mechanisms that enable party-designated entities to provide binding determinations regarding the legitimacy of certain measures (including measures adopted to comply with a state's human rights obligations) or investor claims; including a mechanism that enables states parties to issue binding interpretations of treaty standards.

¹³⁹ See Viñuales (n 37) 136. Viñuales notes that some free trade agreements contain a provision on the 'relationship to environmental agreements'. See eg, NAFTA art 104.

¹⁴⁰ UN Guiding Principles HRIAs (n 25) [1.1].

¹⁴¹ UN Guiding Principles HRIAs (n 26) [1.2].

¹⁴² UN Guiding Principles HRIAs (n 26) [3.1]-[3.3].

¹⁴³ See eg, Lorand Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements' (German Institute for Human Rights 2014) <https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf> 31 and draft recommendations X5 regarding HRIA review clause (37-38). The Canada-Colombia FTA requires both states parties to report annually 'on the effect of the measures taken under the Free Trade Agreement between Canada and the Republic of Colombia on human rights in the territories of both Canada and the Republic of Colombia'. Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia (signed 27 May 2010, entered into force 15 August 2011) art 1(1).

Where states parties choose to retain investor-state arbitration as the dispute settlement mechanism applicable to investment disputes, reforms that could help to address the exclusion of third parties include: establishing meaningful rights to intervene as third parties in investment disputes; ensuring that third parties, and the public more generally, are provided with full access to all non-confidential case materials; requiring that case materials be translated into the language of the host state (and language(s) of affected rights holders, if different); requiring that arbitrators determining investment disputes have the requisite expertise and experience in public interest and human rights law; and establishing more effective rules to govern the conduct of these decision-makers.

The steps outlined above must be explored alongside more general reform of investor-state arbitration to better protect state policy space. General reforms include: narrowing substantive protections; requiring exhaustion of domestic remedies; conditioning investor access to dispute settlement on compliance with host and home state laws (whichever establish a higher standard of conduct) and investor obligations established by the treaty, including respect of human rights; allowing counterclaims by states regarding human rights and other issues; and strengthening provisions that protect host state policy space and carve out certain legal and policy measures from challenge, including human rights measures.

While some states may continue to conclude agreements that provide access to investor-state arbitration, there is increasing recognition of the outsized costs of the mechanism,¹⁴⁴ and its failure to deliver on its purported objectives.¹⁴⁵ Finding effective and balanced alternatives for addressing the purported objectives of investor-state arbitration would also help to address some of the tensions outlined in this Chapter.

Lastly, as noted in Section III.a above, reform of the investment regime should encompass broader efforts to address the exclusionary nature of the present system. An inclusive approach to investment treaty making requires much more than releasing treaty texts once effectively finalized. Guidance regarding rights to public participation and access to information should be used by states to craft mechanisms that promote greater transparency around the conclusion of investment treaties and that enable effective multi-stakeholder participation from all relevant groups,¹⁴⁶ including civil society organizations.¹⁴⁷

The options discussed above are forward-looking, and recourse for revising the more than 2,600 investment treaties (including treaties with investment provisions) in force at the time of writing is more limited. States parties concerned by tensions between human rights norms and specific standards in

¹⁴⁴ On the societal and other costs of the investment regime, see Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, ‘Costs and Benefits of Investment Treaties: Practical Considerations for States’ (CCSI Policy Paper, March 2018) <<http://ccsi.columbia.edu/2018/04/20/costs-benefits-iias/>>; Joachim Pohl, ‘Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence’ (OECD Working Papers on International Investment, 2018/01) <<http://dx.doi.org/10.1787/e5f85c3d-en>>.

¹⁴⁵ See Lise Johnson, Brooke Skartvedt Güven, and Jesse Coleman, ‘Investor-State Dispute Settlement: What are We Trying to Achieve? Does ISDS Get Us There?’ (11 December 2017) *Columbia Center on Sustainable Investment* <<http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/>>.

¹⁴⁶ UNHRC ‘Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas’ (2015) UN Doc A/HRC/30/ [36].

¹⁴⁷ For examples of steps that could be taken, see e.g. Maisley (n 88) 107-113; Cotula (n 72) 365-382.

existing investment treaties can seek to clarify the content of investment treaty standards, and can provide guidance to investment tribunals regarding the primacy of human rights obligations. They can do this on a unilateral or joint basis through subsequent agreement or practice, although the effectiveness of this approach is not certain.¹⁴⁸ Other generally applicable options include amendment, replacement, consolidation, or termination of existing treaties.¹⁴⁹

One of the hurdles that undermines timely and meaningful reform of existing agreements is the sheer number of treaties that are in force. Amending or interpreting each agreement on a treaty-by-treaty basis is time-consuming, and to date has not yielded effective reform.¹⁵⁰ While reform-minded governments engage in broader efforts to adopt substantive and procedural reform of the regime, they could seek to protect policy space from the costs of investor-state arbitration in the near term by: (1) withdrawing consent to investor-state arbitration, or (2) terminating existing investment treaties on the basis of bi-, pluri- or multilateral agreements.¹⁵¹

b. Expanding and Enforcing Human Rights Obligations

Realization of human rights in the context of international investment requires both a rights-compliant international investment regime and a strong, enforceable human rights regime. States and human rights authorities could strengthen jurisprudence and interpretive guidance on human rights law in the context of international investment by further elaborating on the content and application of state and non-state obligations in the context of international investment, and on the interaction between human rights obligations and investment treaty standards. Moreover, the legal and technical barriers that undermine access to justice for investment-affected rights holders must be addressed.

Host states should assess and, as needed, modify their domestic legal systems to strengthen human rights protections and redress mechanisms. At the same time, host states can also adjust their legal regimes and policies to encourage rights-compliant investment. This may include, for example, aligning their investment approval processes with relevant human rights guidance, requiring the carrying out of human rights impact assessments before projects are approved, and/or re-considering the role and substance of investor-state contracts, if used.

Home states can also play a critical role in clarifying both the primacy of human rights obligations over investment treaties for states parties and the responsibilities of investors to respect human rights. Home

¹⁴⁸ On treaty interpretation, see generally Lise Johnson, ‘Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights’ (GEG Working Paper 2015/101) <<http://ccsi.columbia.edu/2015/05/21/ripe-for-refinement-the-states-role-in-interpretation-of-fet-mfn-and-shareholder-rights/>>. See also Cordes, Johnson and Szoke Burke, *Land Deal Dilemmas* (n 29) 36-37.

¹⁴⁹ Phase 2 of UNCTAD’s Roadmap for IIA Reform (UNCTAD, Roadmap for IIA Reform of Investment Dispute Settlement <<http://investmentpolicyhub.unctad.org/News/Report/Archive/523>>) focuses on addressing existing treaties, and maps out 10 policy options for addressing these treaties.

¹⁵⁰ See eg, Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, ‘Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law’ (CCSI Policy Paper, April 2018) <<http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/>>.

¹⁵¹ *ibid.*

states could condition investment treaty protection and other support, including financial and technical support, for outward investors upon compliance with the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and/ or relevant sector-specific guidance, such as the Voluntary Guidelines on the Responsible Governance of Tenure.¹⁵² States could also enact domestic legislation to require investors operating both within and beyond the home state to implement other defined human rights obligations.¹⁵³ With respect to access to justice for investment-affected rights holders, home states should create mechanisms to address legal and technical barriers that undermine accountability for human rights abuses caused or exacerbated by their outward investors. Options include allowing investment-affected rights holders to bring civil claims in the home state and establishing complaints mechanisms capable of investigating extra-territorial complaints against outward investors.¹⁵⁴

Human rights tribunals and UN treaty bodies have an irreplaceable role to play in strengthening the narrative on human rights and investment. Through jurisprudence and authoritative guidance, human rights tribunals can clarify and elaborate the relationship between human rights obligations and investment treaty standards, which in turn could guide states faced with potential conflicts. States could also request an advisory opinion from a relevant regional human rights tribunal on the matter of how to comply with human rights obligations in the context of other legal obligations, including those arising from investment treaties, applicable to international investment projects.¹⁵⁵ Through general comments and concluding observations of state compliance with treaties, UN treaty bodies can help to clarify the relationship between human rights and investment norms.¹⁵⁶ They also could play a more prominent role if, for example, engaged by states to review the conformity of investment treaties with human rights norms.¹⁵⁷ If adopted, a binding instrument to regulate the activities of transnational corporations and other business enterprises will also have implications for the relationship between human rights and investment norms and the obligations of international investors.¹⁵⁸ For this treaty to have an impact on the challenges outlined in this Chapter, its provisions will need to be carefully worded to, for example, address the matter of primacy of human rights obligations with respect to investment treaty obligations.¹⁵⁹

¹⁵² Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012).

¹⁵³ See eg, LOI n 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre <<https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>>.

¹⁵⁴ See eg, Appointment of Canadian Ombudsperson for Responsible Enterprise <https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html>.

¹⁵⁵ Cordes, Johnson and Szoke-Burke, Land Deal Dilemmas (n 29) 5.

¹⁵⁶ See UNHRC 'Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas' (2015) UN Doc A/HRC/30/44 [66(b)].

¹⁵⁷ UNHRC 'Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas' (2015) UN Doc A/HRC/30/44 [66(b)]. See also Bruno Simma and Diane Desierto, 'Bridging the Public Interest Divide: Committee Assistance for Investor-host State Compliance with the ICESCR' (2013) 1 Transnational Dispute Management.

¹⁵⁸ For a discussion of the impact of a binding treaty on transnational corporations and other business enterprises on international investment law, see Peter Muchlinski, '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 University Press 2017) 346-374.

¹⁵⁹ The 'legal elements' paper included a recognition of primacy in the 'principles' section, the 'objectives' section, and the section outlining general provisions. The paper did not include specific wording for a clause establishing the primacy of these obligations over investment obligations in the case of conflict. OEIGWG, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2017)

V. Conclusion

The current fragmented international legal system, as it has been interpreted and enforced, is failing rights holders. The system has pitted their interests against those of often powerful investors who have been granted legal protections that, in effect, are stronger or more enforceable than those that have been afforded to other rights holders. Less clear is the path forward for re-balancing protections and ensuring that rights holders do not suffer in the context of international investment. We have outlined above a range of measures that could help. Yet these steps will not work in isolation, and a more holistic and comprehensive approach to reforming international law may be required to prevent human rights law and broader public interest objectives from being crippled by the international investment regime.

With ongoing discussions regarding reform, the time is ripe for substantive and procedural reforms designed to establish a human rights-compliant investment regime. This requires more than tweaking around the margins. Debating, for example, the virtues of ad-hoc investment arbitral tribunals versus permanent investment courts will not suffice. Rather, a full-fledged rethinking of economic governance, within the business and human rights paradigm, will be imperative. Overhauling global economic governance to align it more closely with human rights may be the key to ensuring that, in the future, rights holders are not the ones who bear the heaviest burdens in the context of investment-related disputes.

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> sections 1.2, 1.4, 10. The zero draft of the instrument, published in July 2018, provides that future trade and investment treaties ‘shall not contain any provisions that conflict with the implementation’ of the Convention and provides that ‘existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention, notwithstanding other conflicting rules of conflict resolution arising from customary international law or from existing trade and investment agreements’ (art 13(7)). Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (16 July 2018) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>>.