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## Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?

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# ADDING NEW INGREDIENTS TO AN OLD RECIPE: DO ISDS REFORMS AND NEW INVESTMENT TREATIES SUPPORT HUMAN RIGHTS?

*Nicholas J. Diamond and Kabir A.N. Duggal\**

## ABSTRACT

The investor-State dispute settlement (“ISDS”) system has been undergoing significant change along two fronts. First, multi-stakeholder efforts, primarily led by States via the United Nations Commission on International Trade Law (“UNCITRAL”), have recently been considering various largely procedural reform options. Second, international investment agreements (“IIAs”) have likewise evolved in recent years, influenced by, *inter alia*, new foreign investment priorities and drafting approaches. Alongside this twin evolution, stakeholders continue to express concerns regarding the effects, both direct and indirect, of the ISDS system on human rights. As such, if the ISDS system is to better accommodate human rights considerations, States must deploy their many tools, such as negotiation and drafting of IIAs, in furtherance of such objectives, while concurrently aligning such efforts with ongoing discussions around procedural reforms, so as to avoid unintended fragmentation and maximize impact. Ultimately, we argue that the ISDS system may finally be positioned to bend the arc of its trajectory toward a more accommodating system for human rights. However, we caution that the focus on human rights remains fairly limited—perhaps, at times, even a mere afterthought—suggesting slow progress.

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I. INTRODUCTION: A DAWN FOR ISDS — TOWARDS REFORM?

The investor-State dispute settlement (“ISDS”) system has been undergoing significant change along two fronts. First, multi-stakeholder efforts, primarily led by States via the United Nations Commission on International Trade Law (“UNCITRAL”), have recently been considering various, largely procedural, reform options. Second, international investment agreements (“IIAs”) have likewise evolved in recent years, influenced by, *inter alia*, new foreign investment priorities and drafting approaches. Alongside this twin evolution, stakeholders

continue to express concerns regarding the effects, both direct and indirect, of the ISDS system on human rights.<sup>1</sup> In particular, the inherent investor-centric bias of the ISDS system has been said to negatively impact States' efforts to satisfy its human rights obligations on the international plane.<sup>2</sup>

We consider the convergence of the future trajectory of ISDS, encompassing both proposed procedural reform options and the recent evolution of IIAs, with the longstanding expressed concerns of the impact of the ISDS system on human rights. Several foci structure our analysis. First, entrenched barriers persist regarding the opportunity for a robust role for human rights considerations in the ISDS system. Such barriers are both procedural and substantive, suggesting the importance of broad reform efforts. Second, even where efforts have been made to better accommodate human rights considerations within the ISDS system, *which* human rights have been included remains limited. As the scope of human rights norms and obligations expands, so too must the ISDS system flex if it is to accommodate. Third, and crucially, States continue to play a paramount role in both the international human rights architecture and ISDS system. As such, if the ISDS system is to better accommodate human rights considerations, States must deploy their many tools, such as negotiation and drafting of IIAs, in furtherance of such objectives—while concurrently aligning such efforts with ongoing discussions around procedural reforms—so as to avoid unintended fragmentation and maximize impact. Ultimately, we argue that the ISDS system may finally be positioned to bend the arc of its trajectory toward a more accommodating system for human rights. However, we caution that the focus on human rights remains fairly limited—perhaps, at times, even a mere afterthought—suggesting slow progress.

In Section II, we first consider selected entrenched barriers, both procedural and substantive, in the ISDS system that have historically negatively impacted human rights considerations in the foreign investment context, to diagnose the problem motivating reform. Correspondingly, in Section III, we articulate the cumulative effects of said barriers on States' regulatory autonomy, which is part and parcel to the satisfaction of their human rights obligations on the international plane. In Sections IV–VI, we turn to ongoing reform developments, both characterizing efforts to date and their potential impact on said barriers. In Section IV, we introduce the so-called three “generations” of rights framework, to help categorize the impact of each development on the full spectrum of human rights. In Section V, we consider the

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1. See generally Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application*, 5 BUS. & HUM. RTS. J. 105 (2020).

2. *Id.* at 106.

robust, ongoing dialogue around largely procedural reform options, which has been primarily guided by UNCITRAL. In Section VI, we explore trends in recent IIA development that may impact human rights. Finally, in Section VII, we provide concluding thoughts on whether reforms effort will meaningfully reduce the historical tensions between the ISDS system and human rights.

## II. ENTRENCHED BARRIERS FOR HUMAN RIGHTS CLAIMS IN ISDS

The ISDS system accords certain rights to businesses or individuals *qua* foreign investors.<sup>3</sup> These rights “are not accorded to the investors for the sake of human flourishing,” but are instead “instrumental” for the exportation of capital.<sup>4</sup> At bottom, they are part of the “grand bargain” by States via IIAs for purposes of attracting foreign capital.<sup>5</sup> Moreover, these rights are only available to a limited subset of entities, owing to the significant costs associated with instituting ISDS proceedings.<sup>6</sup> In contrast, international human rights law accords rights to all individuals *qua* human beings.<sup>7</sup> These rights are universal, not selective.<sup>8</sup> They are also typically “domesticated,” which is to say that they are protected primarily by domestic courts,<sup>9</sup> with international

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3. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 44 (2d ed. 2012) (“International investment law is designed to promote and protect the activities of private foreign investors. . . . Investors are either individuals (natural persons) or companies (juridical persons).”).
  4. ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 320 (Larissa van den Herik & Jean D’Aspremont eds., Jonathan Huston trans.) (2016).
  5. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67, 77 (2005) (describing the grand bargain of IIAs as a *promise* to protect capital in return for the *prospect* of more capital in the future).
  6. PETERS, *supra* note 4, at 320.
  7. See G.A. Res. 217 (III), Universal Declaration of Human Rights, preamble (Dec. 10, 1948) (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).
  8. See International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”) [hereafter ICCPR].
  9. PETERS, *supra* note 4, at 321.

adjudicatory bodies playing primarily monitoring, not enforcement, roles.<sup>10</sup>

Consequently, the ISDS system and international human rights law “have evolved along radically divergent paths”<sup>11</sup> and “rest on different legal sources, contain different legal principles and are applied and administered in different institutional settings.”<sup>12</sup> Moreover, their intersection has been complicated by the ways in which human rights can be introduced, both as a sword and shield, for strategic purposes by the parties in a dispute.<sup>13</sup> Therefore, and perhaps unsurprisingly, several entrenched barriers obstruct the role of human rights norms and obligations within the ISDS system. Although international human rights law does not accord businesses or individuals *qua* foreign investors a privileged (normative) position,<sup>14</sup> this section seeks to highlight such barriers, so as to understand how the ISDS system *in toto* places downward pressure on States’ ability to satisfy its human rights obligations on the international plane.<sup>15</sup>

A. *Jurisdictional Barriers Have Generally Limited Human Rights  
Claims in ISDS*

Unsuccessful attempts to bring independent claims or counterclaims alleging human rights violations underline both the importance and complexities of establishing jurisdiction in investment disputes. As a reflection of party consent, a tribunal only has competence to hear claims that fall within its jurisdiction.<sup>16</sup> The scope

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10. See generally Clara Sandoval et al., *Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?*, 12 J. HUM. RTS. PRACTICE 71 (2020).
  11. Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 97, 107 (Pierre-Marie Dupuy et al. eds., 2009).
  12. Krajewski, *supra* note 1, at 108.
  13. Hirsch, *supra* note 11, at 107.
  14. *Id.* at 108.
  15. See *infra* text accompanying notes 107–112.
  16. See ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS 132 (2014) (“The jurisdiction of the tribunal is limited to the specific category of dispute that the parties have accepted for submission to the court or tribunal.”); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82, 83 (Pierre-Marie Dupuy et al. eds., 2009) (“[A]rbitral tribunals draw their jurisdiction to make binding rulings on a dispute solely from the consent of the parties. The tribunal’s jurisdiction is consequently both based on and limited to that agreement.”).

of the dispute resolution clause in both the IIA and the relevant arbitration rules is, therefore, crucial for determining which claims the tribunal may hear.<sup>17</sup> How a tribunal undertakes to interpret its own jurisdiction has been crucial for determining the role of human rights in investment disputes.<sup>18</sup>

### 1. Rejecting Human Rights Claims Because They Are “Independent” Claims

To the extent that a human rights issue affects a protected investment under the IIA, it may become arbitrable by virtue of its relationship to or impact on the investment.<sup>19</sup> Moreover, it has been argued that, in principle, a broad dispute resolution clause could provide for adjudicating a “pure human rights claim.”<sup>20</sup> Nonetheless, the case law supports the general trend that human rights claims do not have autonomous standing as independent claims before ISDS tribunals.<sup>21</sup> As such, the independent significance of the dispute resolution clause has been limited.<sup>22</sup> *Biloune* is the prototypical example of this trend, where the tribunal expressed its reluctance to consider an independent claim for an alleged human rights violation.<sup>23</sup> While the tribunal described the dispute resolution clause as “broad,”<sup>24</sup> it underscored its limited competence vis-à-vis the independent claim,<sup>25</sup>

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17. See Reiner & Schreuer, *supra* note 16, at 84–85.

18. *Id.*

19. *Id.*

20. See Vivian Kube & E.U. Petersmann, *Human Rights in International Investment Arbitration*, 11 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 65, 73 (2016) (“[I]f the jurisdictional and applicable law clauses of the respective IIA are sufficiently broad to include human rights violations, adjudicating a pure human rights claim could be possible.”).

21. Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 N.C. J. INT’L L. & COM. REG. 1107, 1123 (2012).

22. Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHISTOPOH SCHREUER 678, 679 (Christina Binder et al. eds., 2009).

23. See *Biloune v. Ghana Inv. Ctr.*, Ad Hoc Award on Jurisdiction and Liability, 95 I.L.R. 187 (UNCITRAL Trib. Oct. 27, 1989).

24. See *id.* at 202 (“The arbitration clause contained at Article 15 of the GIC Agreement is broad, providing for arbitration of ‘[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise.’”).

25. See *id.* at 203. Although the tribunal acknowledged the customary international law minimum standard of treatment that States must

not least because the wording “*in respect of* an approved enterprise” in said clause did not envision the parties’ consent to independent claims.<sup>26</sup>

In contrast, though with a similar outcome, the tribunal in *Chevron* construed the dispute resolution clause broadly such that it had the jurisdiction to entertain a denial of justice claim relating to the concession contracts underlying the dispute.<sup>27</sup> The claimants sought to have the tribunal rely on customary international law in support of its denial of justice claim, and cited to both human rights instruments<sup>28</sup> and jurisprudence<sup>29</sup> in this regard. The tribunal, however, held that the provisions in the IIA regarding denial of justice were *lex specialis*, which precluded the need to refer to customary international law.<sup>30</sup> It did not discuss the human rights references in its interpretation of the relevant provision in the IIA, thereby leaving doubt as to whether, absent a *lex specialis*, the claimants could have sustained its independent claim.<sup>31</sup>

Similarly, in *Toto*, the tribunal again weighed a denial of justice claim.<sup>32</sup> In this case, however, the tribunal discussed several human rights instruments relating to denial of justice.<sup>33</sup> Ultimately, it denied jurisdiction over the claim because of insufficient evidence.<sup>34</sup> While some argue that the tribunal seemed open to considering human rights

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accord foreign nationals within their territories, it held that “it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.” *Id.*

26. *Id.* at 188 (emphasis added).

27. *See Chevron Corp. (U.S.A.) v. Republic of Ecuador*, PCA Case No. 34877, Interim Award, ¶ 209 (UNCITRAL Trib. Dec. 1, 2008) (“Its language includes all disputes ‘arising out of or relating to’ investment agreements and this language is broad enough to allow the Tribunal to hear a denial of justice claim relating to the Concession Agreements.”).

28. *See Chevron Corp. (U.S.A.) v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, ¶ 166 (UNCITRAL Trib. Mar. 30, 2010) (referencing the American Convention on Human Rights).

29. *See id.* ¶ 170 (referencing the European Court of Human Rights and the Inter-American Court of Human Rights).

30. *Chevron Corp. (U.S.A.) v. Republic of Ecuador*, ¶¶ 242–45 (UNCITRAL Trib. Dec. 1, 2008).

31. *Cf. Kube & Petersmann, supra* note 20, at 74–75 (“Hence, it is impossible to trace the precise impact of the human rights argumentation of the investor on the arbitral award.”).

32. *Toto Construzioni Generali S.P.A. v. Republic of Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 157–60 (Sept. 11, 2009).

33. *Id.*

34. *Id.* ¶ 168.



as independent claims,<sup>35</sup> some caution is warranted. In particular, the tribunal appeared to be referencing several external sources, including human rights instruments, simply for purposes of clarifying its statement that “[i]t has to be conceded that international law has no strict standards to assess whether court delays are a denial of justice,”<sup>36</sup> cautioning against extrapolating broader significance.

## 2. Rejecting Human Rights Counterclaims Because of a Narrow Reading of the Requirements for Counterclaims

The scope of the dispute resolution clause is likewise relevant for determining jurisdiction over counterclaims.<sup>37</sup> For States, where the applicable IIA provides for sufficient investor responsibilities, counterclaims can be a potential basis to allege human rights violations by investors.<sup>38</sup> The ICSID Arbitration Rules,<sup>39</sup> UNCITRAL Arbitration Rules,<sup>40</sup> and SCC Arbitration Rules<sup>41</sup> each provide for the possibility that a tribunal may entertain a counterclaim. In determining its jurisdiction over a counterclaim, a tribunal will typically consider two factors, namely, whether the parties had consented to the possibility of counterclaims and whether the counterclaim is sufficiently related to the underlying claim in the dispute.<sup>42</sup> In practice, tribunals have largely not permitted counterclaims for several reasons.

First, regarding whether the parties had consented to the possibility of counterclaims, explicit consent is typically not present.<sup>43</sup> Two notable

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35. See Kube & Petersmann, *supra* note 20, at 75 (arguing that the tribunal “appeared to be in principle open towards considering human rights as independent claims”); Freya Baetens, *Invoking Human Rights: A Useful Line of Attack or a Defence Tool for States in Investor-State Dispute Settlement?*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS 227, 232 (Martin Scheinin ed., 2019) (“Not only did it show willingness to accept the applicability of human rights law; it also seemed open to considering independent human rights assertions on the merits.”).

36. Toto Construzioni Generali S.P.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 155 (Sept. 11, 2009).

37. See generally Barnali Choudhury, *Investor Obligations for Human Rights*, 35 ICSID REV. (forthcoming).

38. *Id.*

39. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 46, Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereafter Convention on the Settlement of Investment Disputes].

40. G.A. Res. 68/109 (2013).

41. ARBITRATION INST. OF THE STOCKHOLM CHANGER OF COM., ARBITRATION RULES art. 9(1)(iii) (2017).

42. See, e.g., Choudhury, *supra* note 37.

43. See *id.*

exceptions concern the interconnected cases of *Burlington*<sup>44</sup> and *Perenco*,<sup>45</sup> where, in both cases, the parties had consented to the counterclaims. Where consent is not explicitly present, however, a tribunal will look to the wording of the dispute resolution clause.<sup>46</sup> If the wording is sufficiently broad, a tribunal may choose to entertain the counterclaim.<sup>47</sup> In *Aven*, the tribunal found that the dispute settlement clause was “in principle wide enough” to envisage counterclaims and, in particular, not exclusively claims brought by an investor.<sup>48</sup> Similarly, in *Urbaser*, the tribunal construed the dispute resolution clause broadly such that it provided for the “possibility” of a host State, not just an investor, submitting a claim.<sup>49</sup>

In contrast, several tribunals have denied jurisdiction over counterclaims based on either narrowly construing the dispute resolution clause to only permit claims brought by investors, not host States, or a lack of consent by the investor.<sup>50</sup> In *Spyridon Roussalis*, the tribunal denied jurisdiction over a counterclaim because the dispute resolution clause “undoubtedly” limited its jurisdiction only to claims brought by investors, not host States.<sup>51</sup> Similarly, in *Rusoro Mining*, the tribunal denied jurisdiction over a counterclaim because the IIA “does not leave room for doubt: [it] affords investors, and only investors,

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44. *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶ 60 (Feb. 7, 2017).
  45. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Perenco’s Application for Dismissal of Ecuador’s Counterclaims, ¶ 44 (Aug. 18, 2017).
  46. Choudhury, *supra* note 37, at 14.
  47. See Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461, 474 (2013) (“*Ab initio*, the tribunal’s decision with respect to counterclaims hinges on the authority given it by the treaty and by an investor’s consent to arbitrate according to the terms of the treaty.”).
  48. *Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of Tribunal, ¶ 740 (Sept. 18, 2018).
  49. *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1153 (Dec. 8, 2016).
  50. See, e.g., *id.*
  51. *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 869 (Dec. 7, 2011); but see *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman (Dec. 7, 2011) (“I understand the line of their analysis but, in my view, when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.”).

standing to file arbitrations against host States . . . .”<sup>52</sup> In *Vestey*, the tribunal denied jurisdiction over a counterclaim because of a lack of consent, owing to an insufficient connection between Venezuela’s obligations under the IIA and the subject matter of the counterclaim.<sup>53</sup> Moreover, in *Gavazzi*, the tribunal (by majority) denied jurisdiction over a counterclaim, holding that “[w]here there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the ‘spirit’ of the BIT.”<sup>54</sup>

Second, regarding whether the counterclaim is sufficiently related to the underlying claim in the dispute, the case law is varied. In *Urbaser*, the tribunal found a “factual link” between the two claims because they were both based on the same investment vis-à-vis the same IIA.<sup>55</sup> Similarly, in *Goetz*, the tribunal granted jurisdiction over a counterclaim because its subject matter, regarding damages, flowed from the underlying breach at issue in the primary claim.<sup>56</sup> In contrast, in *Saluka*, while the tribunal acknowledged the difficulty in determining a universal approach to establishing the appropriate degree of connectedness between a counterclaim and underlying claim,<sup>57</sup> it denied jurisdiction over the counterclaim because the legal basis was found in Czech law, not the IIA.<sup>58</sup> Similarly, in *Paushok*, the tribunal denied jurisdiction over the counterclaim due to a lack of connectedness with

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52. Rusoro Mining Ltd. V. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶ 627 (Aug. 22, 2016).
53. Vestey Group Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, ¶ 333 (Apr. 15, 2016).
54. Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (Apr. 21, 2015); see also Tomoko Ishikawa, *Marco Gavazzi and Stefano Gavazzi v Romania: A New Approach to Determining Jurisdiction over Counterclaims in ICSID Arbitration?*, 32 ICSID REV. FOREIGN INV. L.J. 721, 725 (2017) (“IIA-based ICSID arbitration tribunals have consistently determined the presence and absence of consent to jurisdiction over counterclaims by scrutinizing the language of the dispute resolution clause, without requiring an explicit authorization of counterclaims in the relevant IIA. The emphasis placed by the . . . majority decision on the omission of reference to counterclaims in the BIT is a departure from consistent case law.”).
55. Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1151 (Dec. 8, 2016).
56. Goetz v. Republique du Burundi, Affaire CIRDI No. ARB/01/2, Sentence, ¶ 285 (June 21, 2012).
57. See *Saluka Invs. BV (Netherlands) v. Czech Republic*, Partial Award, ¶ 63 (PCA 2006) (“No single attempt to define this requirement with universal effect is likely to be satisfactory”).
58. *Id.* ¶ 79.

the underlying claim and seemed to imply that matters concerning domestic law can never satisfy the connectedness requirement.<sup>59</sup>

*B. Tribunals' Interpretations of the Scope of the Applicable Law Has  
Resulted in Inconsistent Practice*

Even where the scope of the dispute resolution clause may not permit a tribunal to entertain an independent claim or counterclaim, a tribunal may, nonetheless, consider human rights by way of the applicable law.<sup>60</sup> Indeed, *which* specific human rights might apply is determined by the substantive standards of the applicable law.<sup>61</sup> If an IIA specifies the applicable law, it is typically both domestic law and international law.<sup>62</sup> If, however, an IIA is silent as to the applicable law, it will be determined by the applicable rules of procedure.<sup>63</sup> Where a tribunal has recourse to international law, it may introduce international human rights norms, obligations, or instruments.<sup>64</sup> However, at least three barriers may persist regarding a robust role for human rights *qua* applicable law.

*First*, the law does not obligate a tribunal to consider human rights, even where the applicable law encompasses international law.<sup>65</sup> Indeed, it may decide not to because it does not view human rights as directly

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59. Paushok v. Mongolia, Award on Jurisdiction and Liability, ¶ 693 (UNCITRAL Apr. 28, 2011) (“In considering whether the Tribunal has jurisdiction to consider the counterclaims, it must therefore decide whether there is a close connection between them and the primary claim from which they arose or whether the counterclaims are matters that are otherwise covered by the general law of Respondent.”).

60. *Cf.* DE BRABANDERE, *supra* note 16, at 134 (“[T]here is no reason for the tribunal to exclude *ipso facto* human rights considerations as a matter of applicable law.”).

61. *See* Reiner & Schreuer, *supra* note 16, at 84 (“[I]t does not suffice to establish the tribunal’s jurisdiction over alleged violations of human rights, since the analysis and evaluation of the breaches will depend upon the applicable substantive standards.”).

62. NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2015); *see also* Reiner & Schreuer, *supra* note 16, at 84 (describing such clauses as “composite choice of law clauses”).

63. *See, e.g.*, Convention on the Settlement of Investment Disputes, *supra* note 39, art. 42(1) (providing that, failing an agreement between the parties as to the applicable law, the tribunal must apply the domestic law of the host State and “such rules of international law as may be applicable”); *see also* ICSID Convention, Regulations and Rules, art. 42, Apr. 2006 (clarifying that “international law” in Article 42(1) has been interpreted as reflective of Article 38(1) of the ICJ Statute).

64. DE BRABANDERE, *supra* note 16, at 134–36.

65. *See* Convention on the Settlement of Investment Disputes, *supra* note 39.

impacting the core issues of the dispute. For example, in *CMS*, Argentina argued that “as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights.”<sup>66</sup> The tribunal disagreed with this attempt to privilege human rights vis-à-vis the IIA, finding that “there is no question of affecting fundamental human rights” in the case.<sup>67</sup>

*Second*, if a tribunal decides to consider human rights, *which* specific human rights norms, obligations, or instruments it introduces are at its discretion.<sup>68</sup> Moreover, the scope of certain human rights, particularly second and third-generation human rights, may not be precise, thus creating confusion on the obligations of States regarding those rights.<sup>69</sup> *Urbaser* aptly illustrates this flexibility. In that case, the tribunal observed that the IIA was not “a closed system strictly preserving investors’ rights,”<sup>70</sup> but a part of international law, thereby including human rights.<sup>71</sup> It then discussed an array of human rights instruments, including several nonbinding instruments, seeming to treat each as having equal dispositive weight.<sup>72</sup> It further expressed its “reluctan[ce]” to accept that guaranteeing the right to water must be exclusively a State obligation<sup>73</sup> and stated, rather controversially and absent substantiation, that “international law accepts corporate social responsibility.”<sup>74</sup>

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66. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 114 (May 12, 2005).

67. *Id.* ¶ 121.

68. See Monica Feria-Tinta, *Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay*, 34 J. INT’L ARB. 601, 628 (2017) (discussing how human rights and international investment law have a ‘tense’ relationship).

69. See *infra* text accompanying notes 111–120 (discussing second and third generation human rights).

70. *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1191 (Dec. 8, 2016).

71. *Id.* ¶ 1192.

72. *Id.* ¶¶ 1196–8.

73. *Id.* ¶ 1193; see Krajewski, *supra* note 1, at 124 (“Yet, if there is a human right obligation to provide water to the citizens and if the investor is bound by human rights it is not convincing that the investor would not be bound by such an obligation as well.”).

74. *Urbaser S.A. v. Argentine Republic*, 2016 ICSID ¶ 1195; see Krajewski, *supra* note 1, at 124–5 (“The tribunal not only erroneously held that Article 30 of the UDHR and Article 5 of the ICCPR contain a legal basis of human rights obligations of individuals and companies . . . [T]he tribunal’s reasoning does not reflect the current state of human rights law.”).

*Third*, even supposing that a tribunal introduces human rights norms, the role that such norms play in the decision may vary. In *Urbaser*, human rights considerations discussed by the tribunal had a dispositive impact on the merits of the counterclaim,<sup>75</sup> although not in a manner that supported human rights as such. In *Suez-InterAgua*, Argentina argued that its obligations regarding the right to water superseded its obligations under the IIA and the presence of such a right enabled it to take actions contrary to its obligations under the BIT.<sup>76</sup> The tribunal concluded that it could “not find a basis for such a conclusion either in the BITs or international law,” and held that Argentina was subject to the obligations arising under both human rights and the IIAs.<sup>77</sup> Hence, and as quintessentially representative of the attendant challenges for States, “Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.”<sup>78</sup>

*C. Continued Scarcity of Investor Responsibilities in IIAs*

Currently, investors do not have *direct* obligations regarding human rights on the international plane.<sup>79</sup> It has, however, been said that businesses have a “social license to operate.”<sup>80</sup> Indeed, the Human Rights Council has underscored “imbalances” between businesses and States, which may negatively impact human rights, as a result of the proliferation of IIAs and their role in the ISDS system.<sup>81</sup> In particular, given the expansion of nonbinding global norms regarding responsible business conduct, it has been argued that “IIAs are seemingly now at odds with contemporary practice defining business responsibility.”<sup>82</sup> While efforts continue to establish binding human rights obligations for corporations on the international plane,<sup>83</sup> provisions in IIAs establishing investor responsibilities remain relatively permissive.<sup>84</sup> Selected

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75. *See Urbaser S.A. v. Argentine Republic*, 2016 ICSID ¶¶ 1206–10.

76. *Suez-InterAgua v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240 (July 30, 2010).

77. *Id.*

78. *Id.*

79. PETERS, *supra* note 4, at 101.

80. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/8/5, ¶ 54 (Apr. 7, 2008).

81. *Id.* ¶ 12.

82. Choudhury, *supra* note 37, at 2.

83. *See, e.g., id.*

84. Jesse Coleman et al., *International Investment Agreements 2018: A Review of Trends and New Approaches*, YEARBOOK ON INT’L.

categorical examples are discussed here, to illustrate their impact, while Section VI provides an exhaustive analysis of recent trends.

*First*, IIAs may contain operative provisions requiring that investors comply with the laws of the host State, typically only during the establishment phase of the investment.<sup>85</sup> For example, the Argentina–UAE BIT broadly requires that “the investors and investments of each Party shall comply with the laws, regulations, and policies of the host Party with respect to the management, operation, and disposition of investments.”<sup>86</sup> Noncompliance with domestic laws, in this instance, “will have an international legal effect.”<sup>87</sup> Tribunals have relied on such provisions to deny jurisdiction over an investor’s claim.<sup>88</sup> Other tribunals have applied proportionality to their analyses

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INVESTMENT L. & POL’Y 2018, §7, §7.73–4 (2018); *see also* Jean Ho, *The Creation of Elusive Investor Responsibility*, 113 AM. J. INT’L L. UNBOUND 10, 13 (2019) (“When corporate investors, whether motivated by profit or civic duty, voluntarily adopt sustainable and lawful business practices, the pursuit of investor responsibility in international fora becomes redundant.”).

85. *See* Matthew C. Bate, Stephen Khon & Cynthia Liu, *Investment Treaties: What Every Emerging Market Investor Needs to Know*, EMPEA, <https://www.empea.org/research/investment-treaties-what-every-emerging-market-investor-needs-to-know/> [<https://perma.cc/G8UV-AMDN>].
86. Agreement for the Reciprocal Promotion and Protection of Investments, Arg.-U.A.E., art. 14(a), Apr. 16, 2018.
87. Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 394 (Aug. 16, 2007).
88. Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 118 (Dec. 23, 2010); Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 335 (Aug. 2, 2006); Alasdair Ross Anderson v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, ¶ 59 (May 19, 2010).

of such provisions to both grant<sup>89</sup> and deny<sup>90</sup> jurisdiction. In particular, to the extent that domestic laws include human rights-related obligations for businesses vis-à-vis foreign investments, they may be a jurisdictional bar to investor's claims.

*Second*, IIAs may contain operative provisions seeking to combat corruption, which can be directed to either the parties or investors.<sup>91</sup> For example, the Brazil–Ethiopia BIT provides that the *parties* “shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing” regarding matters within the scope of the agreement.<sup>92</sup> For another example, the Belarus–India BIT provides that *investors* “shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.”<sup>93</sup> Notably, breach of this provision precludes investors from initiating arbitrations under the agreement.<sup>94</sup> While some tribunals have relied on the presence of corruption to deny jurisdiction,<sup>95</sup> other tribunals have carefully parsed

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89. *See, e.g.*, Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 483 (Mar. 30, 2015) (“The Tribunal agrees with the view that not every trivial, minor contravention of the law should lead to a refusal of jurisdiction. It must strike a balance between two criteria.”); Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 413 (Mar. 8, 2017) (“In the Tribunal’s view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation.”).
90. *E.g.*, Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Award of the Tribunal, ¶¶ 319–21 (Oct. 22, 2018).
91. *See* Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, Brazil–Eth., art. 15(1), Apr. 11, 2018.
92. *Id.*
93. Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-India, art. 11(ii), Sept. 24, 2018.
94. *Id.* at art. 13.3.
95. *See, e.g.*, World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (“[T]his Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus,



the relationship between the corrupt acts and the investment to decline to deny jurisdiction.<sup>96</sup> Moreover, the presence of corruption itself requires complicity on the part of the host State,<sup>97</sup> belying complex dynamics for a tribunal to sort.

*Third*, IIAs may contain operative provisions regarding corporate social responsibility (“CSR”), although the practical effect of such provisions remains unknown and likely minimal,<sup>98</sup> due to the drafting of the provisions. CSR provisions often employ broad, open-textured language.<sup>99</sup> They are also often couched in nonbinding terms requiring, for example, that investors “strive” or “endeavor” to achieve certain human rights objectives.<sup>100</sup> In many instances, they are directed to

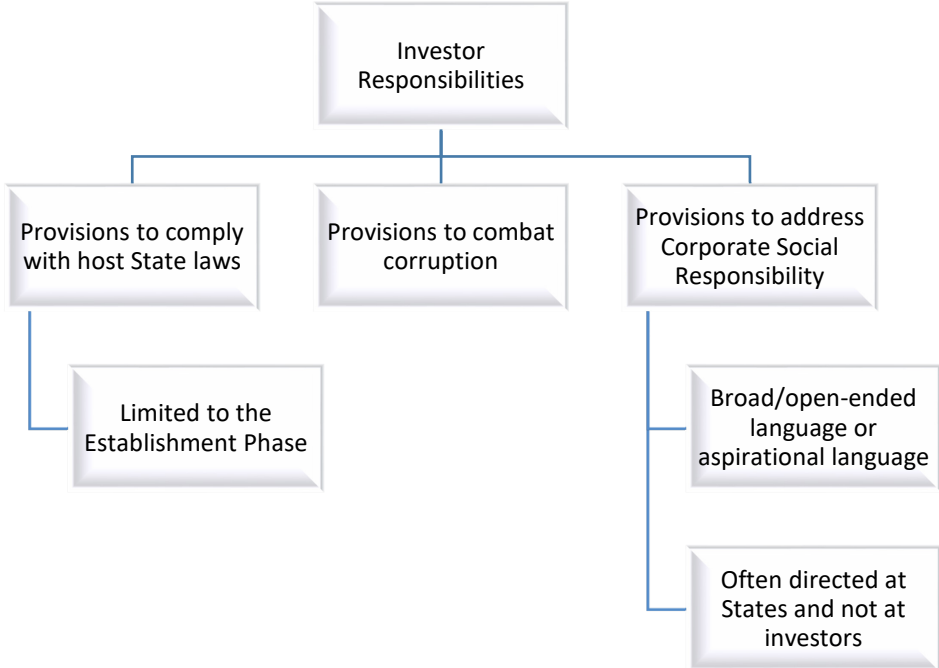
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claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 290 (Oct. 4, 2013).

96. *E.g.*, *Niko Resources (Bangladesh) Ltd. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, ¶ 454 (Aug. 19, 2013) (holding that, because “the [joint venture agreement] had been concluded long before the acts of corruption”, the tribunal retained jurisdiction).
97. *See, e.g.*, *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 180 (Oct. 4, 2006) (“[O]n the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant.”).
98. *But see* David Gaukrodger, Consultation Paper by the OECD Secretariat, Business Responsibilities and Investment Treaties ¶¶ 401–04 (Jan. 15, 2020) (highlighting the purposes of such provisions, such as: leveling the playing field between products produced in host versus home States under different regulatory regimes regarding responsible business conduct; potentially overcoming objections to the extraterritorial reach of activities in the host State; and providing a foundation for applying doctrines like “clean hands” for purposes of both bringing a claim or recovery).
99. *E.g.*, Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, art. 17, Dec. 1, 2018 (providing that the parties reaffirm the importance of encouraging investors to voluntarily incorporate “internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by” the party in whose jurisdiction the investor operates).
100. *E.g.*, Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Brazil-U.A.E., art. 15(1), Mar. 15, 2019 (“Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles, and standards set out in the OECD Guidelines for Multinational Enterprises.”).

States, rather than investors.<sup>101</sup> The Morocco-Nigeria BIT is a notable exception in this regard, requiring that investors “uphold” human rights in the host State,<sup>102</sup> although the use of “uphold,” rather than “respect, protect, and fulfill” creates some confusion.<sup>103</sup> Other IIAs contain related, but more permissive provisions.<sup>104</sup> Finally, the consequences for breach of binding or nonbinding CSR provisions can be unclear, thereby reducing their practical effects.<sup>105</sup>

The diagram below illustrates the different typologies when it comes to investor responsibilities:



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101. *Id.* at art. 15(2).

102. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, art. 18(2), Dec. 3, 2016.

103. Krajewski, *supra* note 1, at 115.

104. *E.g.*, Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, Brazil-Malawi, art. 9(1), June 25, 2015 (“Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.”).

105. Coleman et al., *supra* note 84, ¶ 7.79.

### III. POTENTIAL IMPACT OF ISDS CLAIMS ON A STATE'S REGULATORY AUTONOMY RESULTING IN A REGULATORY CHILL

Regulatory autonomy has been referred to as “the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.”<sup>106</sup> States exercise their regulatory autonomy to enact domestic measures that provide for satisfaction of their direct obligations regarding human rights.<sup>107</sup> Such obligations can exist regionally or internationally.<sup>108</sup> While States only consent to the regional or international human rights instruments to which they wish to be party, their direct obligations regarding human rights on the international plane likewise originate in customary international law.<sup>109</sup> Moreover, States have the primary obligation to respect, protect, and fulfill the human rights of all individuals within their jurisdiction in the context of corporate

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106. AIKATERINI TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* 33 (2014).

107. *See, e.g.*, Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMP. L. 31, 41–43 (discussing the importance of “horizontal enforcement” in human rights law).

108. *See generally* Başak Çalı, *Regional Protection, in* INTERNATIONAL HUMAN RIGHTS LAW, 411, 411–424 (Daniel Moeckli et al. eds., 2018) (discussing the historical relationship between regional and international human rights obligations and instruments).

109. *See* Henkin, *supra* note 107, at 35–41 (arguing that “[i]nternational human rights law is a revolutionary penetration of the once impermeable state” and describing the emergence of customary international law obligations regarding human rights).

activities,<sup>110</sup> including specifically with regard to obligations arising under the ICCPR<sup>111</sup> and ICESCR.<sup>112</sup>

The effect of the ISDS system on States' efforts to satisfy its obligations on the international legal plane, whether directly relating to human rights or otherwise, has been described as "chilling."<sup>113</sup> Broadly, so-called regulatory chill refers to the fact that "[i]n some circumstances, governments will respond to a high (perceived) threat of investment arbitration by failing to enact or enforce bona fide regulatory measures (or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished)."<sup>114</sup> Indeed, as South Africa described during the WGIII discussions regarding ISDS reform:

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110. See Office of the High Comm'r for Human Rts., *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, at I(A)(1) (2011) ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.").

111. See ICCPR, *supra* note 8 at art. 2(1); see also Office of the High Comm'r for Human Rts., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 1326 May 2004, ¶ 8 (adopted Mar. 29, 2004) ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.").

112. See International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

113. See, e.g., Krajewski, *supra* note 1, at 112; Choudhury, *supra* note 38, at 6; Salacuse & Sullivan, *supra* note 5, at 70, 77; Suzanne A. Spears, *Making Way for the Public Interest in International Investment Agreements, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 271-72 (Chester Brown & Kate Miles eds., 2011); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606-10 (Chester Brown & Kate Miles eds., 2011).

114. Tienhaara, *supra* note 113, at 610.

Often, investors use ISDS strategically, publicly and repeatedly filing cases to coerce governments to agree on favourable terms for their investments, rather than turning to ISDS as a measure of last resort. Even though IIAs do not in themselves directly limit the legislative or regulatory powers of States, they may lead governments to tread more cautiously—and hence potentially insufficiently from a public-interest perspective—when planning and designing regulation. As such, governments might refrain from imposing regulatory measures in the public interest due to the threat of investment arbitration and the high damages it entails.<sup>115</sup>

Recent cases in investment treaty arbitration have shown that international regulation of foreign investment can touch upon sensitive areas of public concern, such as environmental regulation,<sup>116</sup> a regulation protecting the public health,<sup>117</sup> measures relating to energy policies,<sup>118</sup> measures taken to protect indigenous cultures and cultural heritage,<sup>119</sup> urban policy,<sup>120</sup> and taxation.<sup>121</sup>

The current backlash towards the ISDS partly stems from the fact that the treaty terms are indeterminate and, therefore, the degree of delegation to decentralized arbitral tribunals has resulted in broad interpretations that were often not envisioned by State parties.<sup>122</sup> This

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115. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa*, ¶ 63, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019).
116. *Methanex Corp. v. U.S.*, UNCITRAL Case, Final Award on Jurisdiction and Merits (Aug. 3, 2005); *Chemtura Corp. v. Canada*, UNCITRAL Case, Award (Aug. 2, 2010).
117. *Philip Morris Brands SÀRL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/07, Award (July 8, 2016).
118. *Charanne B.V. v. Kingdom of Spain*, Arb. Inst. of the Stockholm Chamber of Com. Case No. 062/2012, Final Award (Jan. 21, 2016).
119. *Glamis Gold Ltd v. U.S.*, UNCITRAL Case, Award (June 8, 2009).
120. *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004).
121. *Sergei Paushok, CJSC Golden East Co. v. The Government of Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability (Apr. 28, 2011); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).
122. Andreas Kulick & Eberhard Karls, *Reassertion of Control: An Introduction, in REASSERTION OF CONTROL OVER THE INV. TREATY REGIME* 25 (Andreas Kulick & Eberhard Karls eds., 2016) (“A high level of control lies undoubtedly with the Contracting Parties with regard to treaty drafting, amendment and termination. However, as long as a tribunal may interpret the IIA, drafting and amendment are no warranty that the tribunal follows exactly what the Contracting Parties had in mind”).

results in an asymmetric system that is allegedly skewed towards the investor with constant sidelining of regulatory powers of the State and human rights concerns raised by them.<sup>123</sup> The challenge for States becomes ensuring satisfaction of their direct human rights obligations, including vis-à-vis businesses, *within* the constraints of the ISDS system, which can be especially difficult in emergency situations, such as a financial crisis requiring rapid and decisive regulatory actions in service of human rights.<sup>124</sup> One obvious remedy that States have adopted to that end has involved redrafting treaties to provide more clarity and potentially insert institutional and procedural mechanisms that control or limit the exercise of delegated interpretation.<sup>125</sup>

#### IV. CREATING A HUMAN RIGHTS TYPOLOGY TO EVALUATE THE ISDS REFORM PROCESS: THE THREE “GENERATIONAL” OF HUMAN RIGHTS

Before delving into the thematic characteristics of the reform proposals, it is pertinent to chart out the conceptualization of human rights for the purposes of this paper. We seek to utilize the framework developed by Karel Vašák: a threefold taxonomy for classifying human rights.<sup>126</sup> While we do not seek to delve into the merits of the taxonomy, we lay a broad outline for the purposes of this paper as it acts as a prism through which the unique nature of ISDS vis-à-vis human rights

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123. Lorenzo Cotula & Brooke Güven, *Investor-State Arbitration: An Opportunity for Real Reform?*, INTERNATIONAL INSTITUTE FOR ENVIRONMENTAL DEVELOPMENT: BLOG (Dec. 7, 2018), <https://www.iied.org/investor-state-arbitration-opportunity-for-real-reform> [<https://perma.cc/WK9F-X9M8>].

124. See Choudhury, *supra* note 37, at 6 (“Yet when States are confronted with new situations—such as in a financial crisis or upon becoming aware of a new health peril—it may need to enact new regulations that can impede investors’ rights. In these instances, States must choose whether to regulate to protect human rights or interfere with investors’ rights and risk an adverse, and often costly, arbitral award.”).

125. Eleni Methymaki & Antonios Tzanakopoulos, *Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation*, in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 161–62 (Andreas Kulick & Eberhard Karls eds., 2016) (“However, interpretation by the parties remains as an important safeguard so that they will not end up being bound by obligations they did not really (mean to) assume”).

126. Karel Vašák, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 29–32 (1977); see also Sumner B. Twiss, *Moral Grounds and Plural Cultures: Interpreting Human Rights in the International Community*, 26 J. RELIG. ETHICS 271, 272 (1998) for a description of a similar taxonomy of human rights.

may be seen. The three generations of rights elucidated above are described below in greater clarity to establish a working framework of the three generations of rights.

According to Vašák, first-generation rights encompass negative rights and correspond to civil and political rights.<sup>127</sup> Civil-political human rights primarily include two categories: rights relating to physical security (e.g., prohibition against torture, slavery, arbitrary arrest) and rights relating to civil liberties (e.g., fair trial, right to property, due process, judicial efficiency etc.).<sup>128</sup> Such rights find their genesis in legal documents such as the Magna Carta<sup>129</sup> and the United States Bill of Rights.<sup>130</sup> In their modern form, they are enshrined in the International Covenant on Civil and Political Rights<sup>131</sup> and may primarily be viewed in a “negative sense.”<sup>132</sup> This prohibits the State from undertaking acts that may be detrimental to the civil and political liberties of its citizens (“First-Generation Rights”).

Second-generation rights reflect a positive action on behalf of the State to include economic, social, and cultural rights.<sup>133</sup> Similarly, socio-economic rights are bifurcated into two categories: rights relating to social needs (e.g., water, nutrition, health care etc.) and rights relating to economic needs (e.g., fair wage, healthcare insurance, etc.).<sup>134</sup> In contrast to First-Generation Rights, rights under this category place an obligation on the State to undertake positive acts to bolster the social, economic and cultural status of its citizens.<sup>135</sup> The prominent international legal instrument for such rights is the International

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127. Vašák, *supra* note 126, at 29.

128. David Pupovac, Spasimir Domaradzki, & Margaryta Khvostova, *Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse*, 20 HUM. RTS. REV. 423, 437 (2019) (“The dominant bigrams in the first generation of rights are ‘civil society,’ ‘war crimes,’ ‘human dignity,’ ‘death penalty,’ ‘crimes (against) humanity,’ ‘property rights,’ ‘freedom of association,’ and ‘religious freedom.’”).

129. Magna Carta, 1215, (Eng.).

130. U.S. CONST. amends. I-X.

131. ICCPR, *supra* note 8.

132. *The Evolution of Human Rights*, COUNCIL OF EUR., <https://www.coe.int/en/web/compass/the-evolution-of-human-rights> [<https://perma.cc/4HPU-P3A6>]

133. *Id.*

134. Lindsey Reid, *The Generations of Human Rights*, UAB INST. FOR HUM. RTS. BLOG (Jan. 14, 2019), <https://sites.uab.edu/humanrights/2019/01/14/the-generations-of-human-rights/> [<https://perma.cc/EN7V-RQX6>].

135. *Id.*

Covenant on Economic, Social and Cultural Rights (“Second Generation Rights”).<sup>136</sup>

Finally, third-generation rights encompass so-called collective rights, such as the right to a healthy environment and right to participation in cultural heritage.<sup>137</sup> Rights of such nature focus on the collective action of society as a whole and include within its ambit, *inter alia*, the rights to self-determination, and preservation of a healthy environment.<sup>138</sup> By placing their emphasis on collective action of States and individuals, such rights may be found in international instruments such as the Stockholm Declaration,<sup>139</sup> Declaration on the Right to Development,<sup>140</sup> and United Nations Declaration on the Rights of Indigenous People<sup>141</sup> (“Third-Generation Rights”).

Traditionally, the ISDS regime has recognized certain civil and political rights, perhaps most notably the right to property, but also access to justice and due process.<sup>142</sup> As such, it has primarily focused on these certain First-Generation Rights. In contrast, Second-Generation Rights have received only modest attention within the ISDS regime. Notably, Second- and Third-Generation Rights have recently been discussed in the context of evolving operative provisions in IIAs<sup>143</sup> and drafting new model investment agreements.<sup>144</sup> However, on the

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136. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

137. Spasimir Domaradzki, Margaryta Khvostova & David Pupovac, *Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse*, 20 HUM. RTS. REV. 423 (Sept. 6, 2019).

138. *See, e.g.*, U.N. Conference on the Human Environment, *Report of the United Nations*, U.N. Doc. A/CONF.48/14/Rev.1 (June 5–16, 1972).

139. *See id.*

140. *See, e.g.*, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

141. *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Mar. 2008).

142. Kabir A.N. Duggal, *ISDS Reform and Advancing All “Generations” of Human Rights*, KLUWER ARB. BLOG (Nicholas J. Diamond ed. June 17, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/> [<https://perma.cc/3HHG-LH2A>].

143. *See generally* Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT’L L. 670 (2011).

144. *See generally* Kabir A.N. Duggal & Laurens H. van de Ven, *The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves*, 35 ARB. INT’L 347 (2019).



whole, Second- and Third-Generation Rights have not factored prominently in ISDS.

## V. KEY REFORM PROPOSALS FOR THE FUTURE OF ISDS

With this framework in mind, we delve into the substance of key reform proposals. We first focus on the UN negotiations to reform ISDS conducted under the aegis of the UNCITRAL Working Group III (“Working Group III”).<sup>145</sup> Consequently, we delve into a major European proposal for a Multilateral Investment Court (“Multilateral Investment Court”). Finally, at an institutional level we analyze the proposal for amendment to the ICSID Rules.

### *A. UNCITRAL Working Group Report III — Are solely procedural reforms adequate?*

The decentralized nature of ISDS provides a State with multiple avenues of reform discussions ranging from ICSID Workshops,<sup>146</sup> UNCTAD events,<sup>147</sup> OECD conferences,<sup>148</sup> and various other regional forums.<sup>149</sup> Working Group III has emerged as the umbrella multilateral forum bringing several relevant stakeholders to the table. In line with the UNCITRAL process, Working Group III was entrusted with ensuring deliberations among the widest possible breadth of available expertise from relevant stakeholders.<sup>150</sup> The mandate of the Working Group III encompasses identification and consideration of concerns regarding ISDS, whether reforms may be desirable and, if so, develop and recommend options to UNCITRAL.<sup>151</sup> The Working Group III by

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145. See, e.g., *UNCITRAL and Reform of Investment Dispute Settlement*, IISD (July 2017), <https://www.iisd.org/projects/uncitral-and-reform-investment-dispute-settlement> [<https://perma.cc/E49V-PYDT>].

146. See *News & Events*, ICSID, <https://icsid.worldbank.org/news-and-events/events> [<https://perma.cc/TN66-MML5>].

147. *Meetings and Events*, UNCTAD, <https://unctad.org/meetings-search?Operator=and&keys=oeed> [<https://perma.cc/N3YL-WGVN>].

148. *Meetings / Conferences / Agendas*, OECD, <https://www.oecd.org/corporate/publicationsdocuments/meetingsconferencesagendas/> [<https://perma.cc/P39M-CJBL>].

149. See also *Proposals for Amendment of the ICSID Rules* (ICSID Working Paper, Paper No. 4, 2020) (discussing proposals for amending the ICSID Arbitration Rules).

150. Draft Rep. of the Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session, U.N. Doc. A/CN.9/964 (2018).

151. Possible Reform of Investor-State Dispute Settlement (ISDS) Information on Options for Implementing a Workplan, U.N. Comm’n on Int’l Trade L., Working Group III (Investor-State Dispute Settlement Reform)

its very mandate limits itself to procedural aspects of ISDS.<sup>152</sup> It was clarified in explicit terms that the “mandate given to the working group focused on the procedural aspects of dispute settlement rather than on the substantive provisions.”<sup>153</sup> At the same time, broad discretion was proffered on Working Group III with regard to solutions it would devise, after taking into account the view of all States.<sup>154</sup>

Thus, by divorcing substantive aspects of ISDS reform from its mandate, the stage is set for the reform proposal to focus minimally on Second- and Third-Generation Rights. Working Group III was tasked with a laser-focused mandate of placing sole emphasis on improving certain First-Generation Rights.<sup>155</sup> The reform agenda is currently examining several issues. First, the Working Group III briefly considered alternative modes of arbitral appointments<sup>156</sup> and sought to develop a code of conduct to mitigate an apparent lack of independence for arbitrators.<sup>157</sup> The appointment of arbitrators has been blithely

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Thirty-Seventh Session, Note by the Secretariat, Apr. 1–5, 2019, at 2, U.N. Doc. A/CN.9/WG.III/WP.158 (Jan. 25, 2019).

152. See, e.g., *UNCITRAL and Reform of Investment Dispute Settlement*, IISD (July 2017), <https://www.iisd.org/projects/uncitral-and-reform-investment-dispute-settlement> [<https://perma.cc/E49V-PYDT>].
153. U.N. Comm’n on Int’l Trade L., Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fourth Session, U.N. Doc. A/CN.9/930/Rev.1, ¶ 20 (2017) [hereinafter Report of Working Group III - 34th Session].
154. See Gen. Assembly, Rep. of the U.N. Comm’n on Int’l Trade L., ¶ 264, U.N. Doc. A/72/17 (2017) (emphasizing that each State has “the choice of whether and to what extent it wished to adopt the relevant solution(s)”).
155. Duggal, *supra* note 142.
156. See U.N. Comm’n on Int’l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.169 (2019) [hereinafter Possible Reform of ISDS - Selection and Appointment] (noting that “disputing parties normally enjoy broad powers in the selection of arbitrators” and “the rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators and to agree directly upon their identity”).
157. See U.N. Comm’n on Int’l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Background Information on a Code of Conduct, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.167 (2019) (“At the thirty-fifth and thirty-sixth sessions of the [UNCITRAL] Working Group . . . it was suggested that measures enhancing confidence in the independence and impartiality of ISDS tribunal members would be in the interest of both States and investors”).

unregulated<sup>158</sup> in the ISDS regime, resulting in private commercial law practitioners occupying Tribunal positions, which explains the second-grade treatment provided to crucial human rights issues.<sup>159</sup> Thus, the Working Group III seeks to further various ideas such as utilization of a pre-established roster of arbitrators (that takes into account gender balance, diversity and geographical distributions)<sup>160</sup> and a more emphasized role of arbitral institutions in appointments.<sup>161</sup> Thus, such foundational reforms towards regulating arbitrator appointments in the ISDS regime ensures a step towards “*competent, independent and impartial*”<sup>162</sup> adjudicators in the true sense.

Second, the Working Group III is considering issues relating to counterclaims, costs, and durations of ISDS proceedings.<sup>163</sup> It has noted that obligations of investors in instances such as human rights, environment and corporate social responsibilities fall under the umbrella consideration of counterclaims.<sup>164</sup> The Working Group even

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158. See Possible Reform of ISDS – Selection and Appointment, *supra* note 156, at ¶10 (noting that the selection and appointment of arbitrators is “flexible” and “not strictly regulated”).

159. See Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INST. INT’L & COMP. LAW Q. 573, 576–77 (2011) (“This might be in the investment arbitrators’ genes, because what is probably the large majority of them has a private or commercial law rather than a public law or public international law background and might thus tend to see international human rights as a potential, or probable, cause of political disturbances, intruding in their ‘purely legal’, autonomous field, with its ground rules being determined by neo-liberal thought. In a way, this is not hard to understand, because, after all, protection of foreign investment is to benefit the investor, while human-rights-based claims, if and when they arise in investment disputes, will mainly appear as defenses argued by States that have interfered in such investments.”).

160. See Possible Reform of ISDS – Selection and Appointment, *supra* note 156, ¶ 26 (noting that “[o]verall, a roster should take into account the gender balance, geographical distribution, and balancing between arbitrators from developing and developed countries”).

161. See *id.* ¶ 35 (“A system where institutions administering ISDS cases would play a greater role in the selection and appointment of members of ISDS tribunals is an option for reform that could be considered in conjunction with the creation of a roster.”)

162. See ICCPR Art. 14(1), *supra* note 8, at 176.

163. See Possible Reform of ISDS – Selection and Appointment, *supra* note 156, ¶ 17.

164. U.N. Comm’n on Int’l Trade L., Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-seventh Session (New York, 1–5 April 2019), U.N. Doc. A/CN.9/970, ¶ 34 (2019) [hereinafter Report of Working Group III - 37th Session] (noting the related issues of “obligations of investors (for example, in relation to human rights, the environment as well as to corporate social

goes on to allude to the notion of protecting sustainable development as a legal basis for furthering counterclaims.<sup>165</sup> The Working Group III sought to potentially consider claims by third parties against investors.<sup>166</sup> Thus, despite the mandate of the Working Group III being limited to procedural matters,<sup>167</sup> counterclaims may prove to be a crucial substantive reform it has taken within its ambit to bolster Second-and-Third-Generation Rights.

At its 39<sup>th</sup> Session, the Working Group III further attempted to forward key reforms to tackle concurrent proceedings, frivolous claims, security for costs and abuse of process.<sup>168</sup> By seeking to chop off inefficiencies to chart a more robust justice delivery mechanism, we see a clear advancement of certain First-Generation Rights of ensuring a *procedural economy* in a dispute resolution system.<sup>169</sup> Moreover, the Working Group III has prioritized coherence and consistence in interpretation by considering treaty parties' involvement and control mechanisms on treaty interpretation.<sup>170</sup> It has considered mechanisms such as release of *travaux préparatoires* and greater usage<sup>171</sup> of

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responsibility)” and “the question of allowing counterclaims by States as well as claims by third parties against investors”).

165. U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Multiple Proceedings and Counterclaims, Note by the Secretariat, 2020 U.N. Doc. A/CN.9/WG.III/WP.193, ¶¶ 40–41 (2020) [hereinafter Possible Reform of ISDS - Multiple Proceedings and Counterclaims] (“[T]he Working Group may wish to consider formulating provisions on investor obligations which would form the basis for a State’s counterclaims . . . The Working Group may wish to further consider how to impose such obligations in investment treaties as well as in relevant contracts or domestic laws governing foreign investment.”).
166. Report of Working Group III - 37th Session, *supra* note 164, ¶ 34.
167. Report of Working Group III - 34th Session, *supra* note 153, ¶ 20.
168. Possible Reform of ISDS – Multiple Proceedings and Counterclaims, *supra* note 165, ¶ 30.
169. See *CCJE Opinions and Magna Carta*, COUNCIL OF EUROPE (Nov. 24, 2004), <https://rm.coe.int/168074752d> [<https://perma.cc/Q5FM-SZXR>] (choose “Opinion n°6 (2006)”) (“The CCJE considers that the judicial system should not obstruct access to justice through excessive costs . . . . Under Principle 2, judges should have power to control abuse of procedure, by sanctions on a party or lawyers.”).
170. See Draft Rep. of the Working Grp. III, *supra* note 150.
171. U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment treaties by Treaty Parties, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.191, ¶ 38 (2020) [hereinafter Possible Reform of ISDS - Interpretation of Investment Treaties by Treaty Parties] (“It should be noted that, according to UNCTAD’s Investment Policy Hub, 126 of the 2,573, treaties analysed (4.9 per cent) are marked as expressly

institutionalized cooperation between treaty parties to establish standing bodies,<sup>172</sup> thereby facilitating common interpretations.<sup>173</sup>

There exists continued apprehensions from all corners<sup>174</sup> that a *solely procedural* mandate would drastically diminish the opportunity to address core substantive issues.<sup>175</sup> This apprehension is magnified by the fact that substantive issues often form the basis of growing discontentment amongst developing countries stemming from “expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly

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allowing for binding interpretations by the contracting parties or by interpretative committees or commissions. Only thirty-one treaties, or slightly over 1.56 per cent contain institutional arrangements in the form of interpretative committees or commissions.”).

172. *See, e.g.*, Canada Honduras Free Trade Agreement, Can.- Hond. art. 21.1.3, Oct. 1, 2014 (“The Commission may: (a) adopt interpretive decisions concerning this Agreement, which shall be binding on the dispute settlement panels established under Article 21.10 and on Tribunals established under Section C of Chapter Ten (Investment – Settlement of Disputes between a Party and an Investor of the Other Party)”); Agreement between The Belgium-Luxembourg Economic Union and Montenegro on The Reciprocal Promotion and Protection of Investments, Belg.-Montenegro art.13, Feb. 16, 2010 (“the dispute shall be submitted to a joint commission consisting of representative of the two parties”).
173. *See* Possible Reform of ISDS - Interpretation of Investment Treaties by Treaty Parties, *supra* note 171, ¶¶ 40–42 (“[I]nterpretations can be issued on the initiative of the committees or commissions, at the request of either of the contracting parties, at the request of the tribunal if a respondent or a disputing party asks for an interpretation, or as the result of various combinations of grounds.”).
174. *See* U.N. Comm’n on Int’l Trade L., Possible reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.176, ¶ 20 (2019) (“South Africa is of the view that we cannot divorce the procedural from substantive concerns as they are intricately related. Given that the UNICTRAL process is government-led and the Commission when giving the mandate agreed that broad discretion should be left to the Working Group in discharging its mandate, the Working Group would not be fully discharging its mandate if discussions on the substantive concerns were excluded.”); U.N. Comm’n on Int’l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.180, ¶ 65 (2019) (“Bahrain shares the views expressed by the governments of Thailand and Indonesia in their remarks to Working Group III that restricting consideration of ISDS reform to procedural aspects alone – without considering reform of substantive treaty protections – is a missed opportunity.”).
175. *See* Submission from the Government of South Africa, *supra* note 174; Submission from the Government of Bahrain, *supra* note 175.

pro-investor interpretations at the expense of states.”<sup>176</sup> The Working Groups Reports have intermittently displayed accommodative flexibility in bringing compelling substantive issues under the wing of identified procedural concerns.<sup>177</sup> However, by improving some of these First-Generation Rights, there might be trickle down reforms in substantive Second- and Third-Generation Rights, for example, the appointment of arbitrators.

*B. Can the Multilateral Investment Court Provide Solutions for the  
Future of Human Rights in ISDS?*

The Multilateral Investment Court proposal seeks to recognize that the current ISDS framework is administered, by ICSID or other centers, where tribunals are set up on a case-by-case basis, and are thus heavily fragmented. Thus, a radical overhaul of a fragmented ISDS framework is spearheaded by the European Union, by seeking to establish a permanent investment court, with sovereign appointed adjudicators akin to other international judicial bodies such as the ICJ, ICC, and ITLOS.<sup>178</sup> A first step towards establishing a court system was seen in agreements between the EU and Canada (CETA),<sup>179</sup> as well as negotiations with multiple other States.<sup>180</sup> While emerging as a European reform proposal, today, it forms a part of UNCITRAL Working Group III’s<sup>181</sup> discussion mandate—emanating out of the

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176. *Public Statement on the International Investment Regime*, OSGOODE HALL L. SCH. (Aug. 31, 2010), <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> [<https://perma.cc/U5YS-F5Y8>].

177. *See generally* U.N. Comm’n on Int’l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanisms, Note by Secretariat, U.N. Doc. A/CN.9/WG.III/WP/185 (July 17, 2019) [hereinafter Possible Reform of ISDS – Appellate and Multilateral Court Mechanisms]; U.N. Comm’n on Int’l Trade L., Submission from the European Union and Its Member States, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019) [hereinafter Submission from the European Union and Its Member States].

178. *See generally* Submission from the European Union and Its Member States, *supra* note 177.

179. *See generally* Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Can.-European Union Ch. 8 Sec. F, Oct. 30, 2016.

180. *See Legislative Train 10.2020 3 International Trade – INTA: TTIP Negotiations on Investment Court System for TTIP*, EUROPEAN PARLIAMENT, [www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-investment-court-system-for-ttip](http://www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-investment-court-system-for-ttip) [<https://perma.cc/NPR7-Y6A8>].

181. U.N. Comm’n on Int’l L., Rep. of Working Grp III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eighth Session, U.N. Doc. A/CN.9/1004/Add.1 (Jan. 28, 2020).

European Union’s proposal for a standing Multilateral Investment Court.<sup>182</sup>

EU’s proposal for a Multilateral Investment Court envisioned a two-tier system of adjudication.<sup>183</sup> Decisions of the tribunal of first instances would be appealable before a multilateral appellate body staffed by tenured judicial figures.<sup>184</sup> Appeal procedures would be open only for errors of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts.<sup>185</sup> The appeal mechanism would further be ring-fenced from abusive practices by mechanisms such as provision of security.<sup>186</sup> The proposal for a standing multilateral court may be indicative of trust in practical experiences of

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182. *See generally* Submission from the European Union and Its Member States, *supra* note 177.

183. *See generally* Possible Reform of ISDS – Appellate and Multilateral Court Mechanisms, *supra* note 177, ¶ 47 (“A multilateral appellate body could also be established as a second tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.”).

184. *See* Possible Reform of ISDS – Appellate and Multilateral Court Mechanisms, *supra* note 177, ¶ 47 (“A multilateral appellate body could also be established as a second tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.”); Submission from the European Union and Its Member States, *supra* note 177, ¶ 53 (“Instead, adjudicators would be considered independent and impartial on account of their tenure and it would only be in very specific limited cases that a potential conflict of interest might arise and would need to be dealt with.”).

185. *See* Submission from the European Union and Its Member States, *supra* note 177 (“[A]ppellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a de novo review of the facts”); Possible Reform of ISDS – Appellate and Multilateral Court Mechanisms, *supra* note 177, ¶ 19 (“A question for consideration is whether an appellate mechanism should provide for a review of issues de novo or whether it should accord some degree of deference to the findings of the first adjudicator. Formulations limiting the appeal to “clear”, “serious” or “manifest” errors of law/assessment of the facts, depending on the grounds for appeal, would thus limit the scope of review, and define the “balance of power” between the first and second tier. In a Submission, it is suggested that an appellate mechanism should be tasked to review, in addition to errors of law, manifest errors in the appreciation of the facts, but that it should not undertake a de novo review of the facts (see below, para. 53)”).

186. *See* Submission from the European Union and Its Member States, *supra* note 177.

the WTO Dispute Settlement mechanism.<sup>187</sup> Quite akin to the WTO, the EU proposal for a Multilateral Investment Court suggests full-time adjudicators would not conduct external activities, subject to strict ethical requirements similar to other international courts.<sup>188</sup> Like UNCITRAL Working Group III, the proposal in its birthing stages emphasizes certain limited First-Generation Rights with minimal references to Second- and Third-Generation Rights. The only linkage to Second- and Third-Generation Rights is seen from a linkage to other reforms expounded above; specifically, the possibility of counterclaims.<sup>189</sup>

Finally, third-party participation as a lighthouse for transparency in proceedings has been highlighted and, taking the example of communities affected by the dispute participating in proceedings,<sup>190</sup> the Working Group has alluded to the possibility of Second-Generation Rights coming into play.<sup>191</sup> Yet, there exists limited substantive guidance on this issue within the proposal for a Multilateral Investment Court.

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187. See U.N. Comm'n on Int'l Trade L., Submission from the Government of China, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.177, at 4 (July 19, 2019) (“The practical experience of the World Trade Organization dispute settlement mechanism reflects the relatively high efficiency of its appeal mechanism as well as its moderate operating costs.”).
188. See *generally Multilateral Investment Court: Overview of the Reform Proposals and Prospects*, EUR. PARLIAMENT THINK TANK (Jan. 1, 2020), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)646147](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646147) [<https://perma.cc/7XZ3-7G99>].
189. See Submission from the European Union and Its Member States, *supra* note 177, ¶ 70 (“A standing mechanism might also include (i) mechanisms for ensuring early dismissal of unfounded claims; (ii) a possibility for encouraging parties to solve their dispute through mediation; (iii) a mechanism to cater for possible counter-claims by respondents”).
190. See Submission from the European Union and Its Member States, *supra* note 177, ¶¶ 28–29 (“A high level of transparency of the proceedings should be ensured. . . . It should also be provided that third parties, for example representatives of communities affected by the dispute, be permitted to participate in investment disputes.”)
191. See Nicholas J. Diamond & Kabir A.N. Duggal, *ISDS Reform and Advancing All “Generations of Human Rights*, WOLTERS KLUWER (June 17, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/> [<https://perma.cc/TJ5Z-8C3A>].



## VI. EVALUATING RECENT STATE PRACTICE AND HOW IT MAY IMPACT HUMAN RIGHTS

As noted above, a common criticism faced by international investment law is the allegation that substantive obligations, as envisioned under international investment agreements, competes with a State's power to regulate.<sup>192</sup> As a result, States have proceeded to include treaty safeguards and provisions of various forms (which shall be discussed in greater detail) to actively assert the prominence of the State's regulatory right and human rights in the ISDS framework.<sup>193</sup>

It is noteworthy to make a preliminary observation at this stage that the inclusion of provisions affirming State's right to regulate may be viewed in two ways. First, the new treaties may suggest that core investment obligations have always provided for a certain margin for the State regulatory powers. The inclusion of provisions affirming State's right to regulate is a mere re-statement of the existing view of States.<sup>194</sup> Second, the new treaties suggest an active paradigm shift towards State's asserting a shift in how the Tribunal must interpret investment obligations in a manner that does not second-guess the regulatory choices of the State organs. Such a view would radically change the core of existing investment obligations.<sup>195</sup>

The conundrum mentioned above may take different shapes and forms depending on the particular wordings of the treaty. This paper attempts to map investment agreements entered into since 2018. Of a total of 66 investment agreements, the English versions, a total of 38 agreements, are publicly available from a wide array of States in both developing and developed countries. This provides a meaningful insight into what States are doing in light of the backlash against ISDS. The subsequent section delves into the different shapes and forms in which States have attempted to incorporate Second- and Third-Generation Human Rights into investment agreements.

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192. See D. SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 43 (2008) ("While seemingly providing some stability to investment interests, it destabilizes the capacity for self-government represented by constitutional rules that enable democratic processes to do their work").

193. See generally Investment Protection Agreement, art. 2.2, European Union-Viet., June 30, 2019.

194. See generally Comprehensive Economic and Trade Agreement (CETA), art. 8.9, ¶1, European Union-Can., Oct. 30, 2016.

195. *Id.* ¶ 2-4.

*A. Treaty Practice 2018-2020*

1. References in a Treaty's Preamble

In unsurprising contrast to the BITs concluded in 2000,<sup>196</sup> a little over 95 percent of investment agreements signed since 2018 include references to health and safety, environment or sustainable development in the treaty.<sup>197</sup> Only two IIAs within the scope of the analysis provide no specific reference to health, environment, or the State's regulatory space.<sup>198</sup> IIAs surveyed for the purposes of this paper concluded between 2018 and 2020 may be bestowed the moniker "New Age Investment Agreements" as they have adopted various tools to avoid legitimate regulation by a State to safeguard the rights of its citizens is put to test before an investment tribunal. Select key tools include the references in an IIA's preamble, provisions preserving policy space for regulating in the public interest, exclusion of welfare measures from expropriation, and general exception provisions.<sup>199</sup>

Preambles are generally the first harbor for the tribunal's search for the purpose and objective of a treaty and form an important interpretative tool.<sup>200</sup> Although preambular recitals are not an operative legal part of the treaty,<sup>201</sup> they may suggest the object and purpose of

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196. *International Investment Agreements Issues Note: Recent Developments in the International Investment Regime*, UNCTAD (May 2018) [hereinafter UNCTAD], [https://unctad.org/system/files/official-document/diaepcbinf2018d1\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf) [<https://perma.cc/NNT5-TDFL>].

197. *See generally id.*

198. *See generally* Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments, Kaz.-U.A.E., Mar. 24, 2018 [hereinafter Kazakhstan-UAE BIT, 2018]; Agreement between The Hong Kong Special Administrative Region of The People's Republic of China and the Government of the United Arab Emirates: For The Promotion And Reciprocal Protection Of Investments, H.K.-U.A.E., June 16, 2019 [hereinafter Hong Kong-China-UAE BIT, 2019].

199. *See* UNCTAD, *supra* note 196.

200. *See* Vienna Convention on the Law of Treaties, arts. 31(1)–(2), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose . . . . The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes."); *see also* Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 259 (May 22, 2007) ("The Tribunal gives weight to the text of the Treaty's Preamble . . .").

201. Jan Klabbbers, *Treaties and Their Preambles*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 172,172 (Michael J. Bowman & Dino Kritsiotis ed., 2018)

a treaty, and are also part of the treaty's context.<sup>202</sup> The range of treaties surveyed under this paper shows that 28% of treaties do not expressly mention protection of public health, environment and regulatory autonomy in their preambles.<sup>203</sup> This is seen even in treaties that are heavily protective of Second-Generation Rights of public health and environmental protection, in the form of various other treaty mechanisms.<sup>204</sup>

When it comes to preambles themselves, States have adopted different approaches. Reserving rights in the preamble, for example, some treaties provide that: "resolving to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals."<sup>205</sup> Some anchor obligations with international standards in the preamble's language, with investments *being made* in consonance with Second-Generation Rights, for example: "*seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised human rights, labour rights, and internationally recognised standards of corporate social responsibility.*"<sup>206</sup> This stands in contrast with forward-looking

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202. *See id.* at 184–88.

203. This is based on authors' analysis of IIAs signed from 2018 through 2020 listed and publicly available as of August 2020 via UNCTAD'S International Investment Agreement Navigator. *See generally International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> [<https://perma.cc/C5A4-4TJP>].

204. *See generally* Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, Jan. 25, 2020 [hereinafter Brazil-India BIT, 2020]; Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-India, Sept. 24, 2018 [hereinafter Belarus-India BIT, 2018].

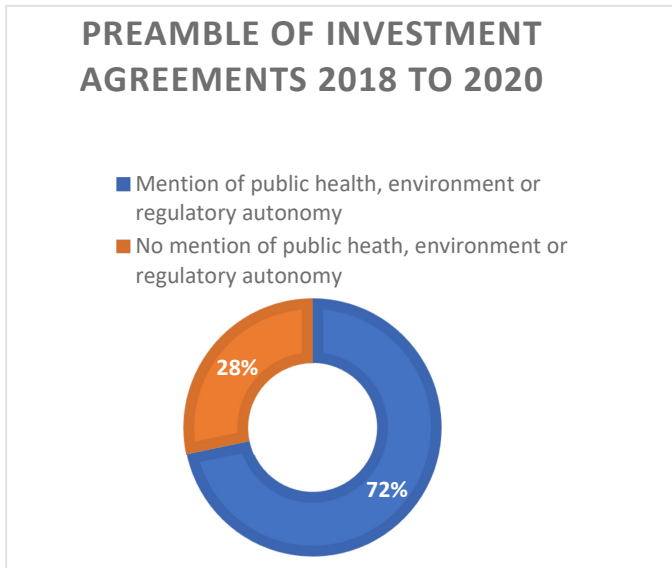
205. *See* Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment, Morocco-Japan, Jan. 8, 2020 [hereinafter Japan-Morocco BIT, 2020]; Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, Apr. 5, 2019 [hereinafter Australia-Uruguay BIT, 2019].

206. *See* Agreement Between the Government of the Republic of Belarus and the Government of Hungary, Belr. -Hung., Jan. 14, 2019; Agreement Between the Government of Hungary and the Government of the Republic of Cape Verde for the Promotion and Reciprocal Protection of Investments, Hung.-Cape Verde, Mar. 28, 2019 [hereinafter Cabo Verde-Hungary BIT, 2019].

preambles that seek to preserve the State's regulatory flexibility.<sup>207</sup> Some reference a general right to preserve autonomy, for example: "Reaffirming their regulatory autonomy and policy space."<sup>208</sup> The essence of the matter being, preambles affirming State's emphasis on protection of Second-Generation Rights were once known as "non-traditional preambles,"<sup>209</sup> have now come to be a mainstay in investment agreements (albeit in differing formats).

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207. Cabo Verde-Hungary BIT, 2019, *supra* note 206 ("Seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised standards of corporate social responsibility"); Agreement Between the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments, Belr.-Hung., Jan. 14, 2019 ("Seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised standards of corporate social responsibility.")
208. *See* Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-Operative Republic of Guyana Preamble, Braz.-Guy., Dec. 13, 2018 [hereinafter Brazil-Guyana BIT, 2018] ("Reaffirming their regulatory autonomy and policy space"); Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname Preamble, May, 2, 2018 [hereinafter Brazil-Suriname BIT, 2018] ("Reassuring their regulatory autonomy and each Party's policy space")
209. *See* UNCTAD, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, at 5, U.N. Sales No. E.06.IID.16 (2007) (Table 2. Examples of non-traditional preambles. BIT between the Republic of Korea and Trinidad & Tobago (2002) "The Government of the Republic of Korea and the Government of the Republic of Trinidad and Tobago (hereinafter referred to as 'the Contracting Parties'), Desiring to intensify economic cooperation between both States, Intending to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit, Recognizing that the promotion and protection of investments on the basis of this Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both States, Respecting the sovereignty and laws of the Contracting Party within whose jurisdiction the investments fall, and Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application, Have agreed as follows: . . .")

**Figure 1**<sup>210</sup>



## 2. Provisions Preserving Policy Space for Regulating in the Public Interest

Another tool for attempting to safeguard Second-Generation Rights of health and environment, as well as a State’s broader regulatory space is seen in the form of a specific treaty provision.<sup>211</sup> Countries have attempted to protect public welfare measures more broadly by adding general language supporting a “right to regulate.”<sup>212</sup> For example, the EU–Vietnam IPA provides that “[t]he Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public

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210. This is based on authors’ analysis of IIAs signed from 2018 through 2020 listed and publicly available as of August 2020 via UNCTAD’S International Investment Agreement Navigator. *See International Investment Agreements Navigator*, *supra* note 203.

211. *See* Simon Lester & Bryan Mercurio, *Safeguarding Policy Space in Investment Agreements*, INST. OF INT’L ECON. L. ISSUE BRIEF 4 (2017) (“In recent years, governments have paid greater attention to this issue and negotiated a series of provisions aimed at further safeguarding public interest. These include express provisions on the host state’s right to regulate, interpretive statements, provisions designed to narrow the scope of expropriation and FET, preambular language underscoring the importance of public policy concerns, and as mentioned above and the focus of this Issue Brief, general exceptions clauses”).

212. *See* EU-Canada Comprehensive Economic and Trade Agreement (CETA) art. 8.9, ¶1, European Union-Can., Oct. 30, 2016.

morals, social or consumer protection, or promotion and protection of cultural diversity.”<sup>213</sup> Treaty practices indicate that such provisions seeking to preserve the State’s policy space for regulating in the public interest are primarily worded in three forms.

*First*, a slew of investment agreements include a provision stating that nothing within the agreement would prevent the State from regulating investment activity to further protect of Second-Generation Rights such as public health, environment and labor rights.<sup>214</sup> At the same time, they do not explicitly affirm an obligation of non-dilution of Second-Generation Rights by the States in order to attract investments. For example, the Peru–Australia FTA provides that “[n]othing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.”<sup>215</sup>

*Second*, another set of investment-agreements merely affirms an obligation on States to not dilute existing Second-Generation Rights frameworks (such as environmental, labor and health laws) in order to attract investments. Such agreements do not include the second limb that makes an affirmation that nothing within the agreement would preclude the State’s right to regulate.<sup>216</sup> This trend is primarily seen in investment agreements signed by Japan after 2018.<sup>217</sup>

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213. Investment Protection Agreement art. 2.2, European Union-Viet., June 30, 2019.

214. *See, e.g., id.*; Cabo-Hungary BIT, 2019, *supra* note 206, at art.3; Hong Kong-China-UAE BIT, 2019, *supra* note 198, at art. 15; Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments, art. 3, Belr.- Hung., Jan. 14, 2019.

215. Peru-Australia Free Trade Agreement art. 8.16, Peru-Austl., Feb. 12, 2018.

216. *See generally* Cabo-Hungary BIT, 2019, *supra* note 206, at art. 3.

217. *See, e.g.*, Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment, Morocco-Japan art.19, Aug. 1, 2020 [hereinafter Japan-Morocco BIT] (“Each Contracting Party shall refrain from encouraging investments by investors of the other Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion in its Territory of investments by Investors of the other Contracting Party”).

*Third*, some provisions provide for a two-pronged approach:<sup>218</sup> the provision states that nothing within the agreement would prevent the State from regulating investment activity for the further protection of Second-Generation Rights such as public health, environment and labor rights; the provision affirms that the State may not dilute existing Second-Generation Rights framework of the State in order to attract investment. This trend is primarily seen in investment agreements signed by Brazil after 2018.<sup>219</sup>

*Fourth*, another example found in investment agreements is when a State has sought to exclude a dispute resolution framework from the scope of its provisions.<sup>220</sup> As an example, the Brazil–Suriname BIT provides that certain articles may not be subject to arbitration, including Article 6(1) on combatting corruption, Article 15 on CSR, and Article 17 on the environment, labor, and health.<sup>221</sup>

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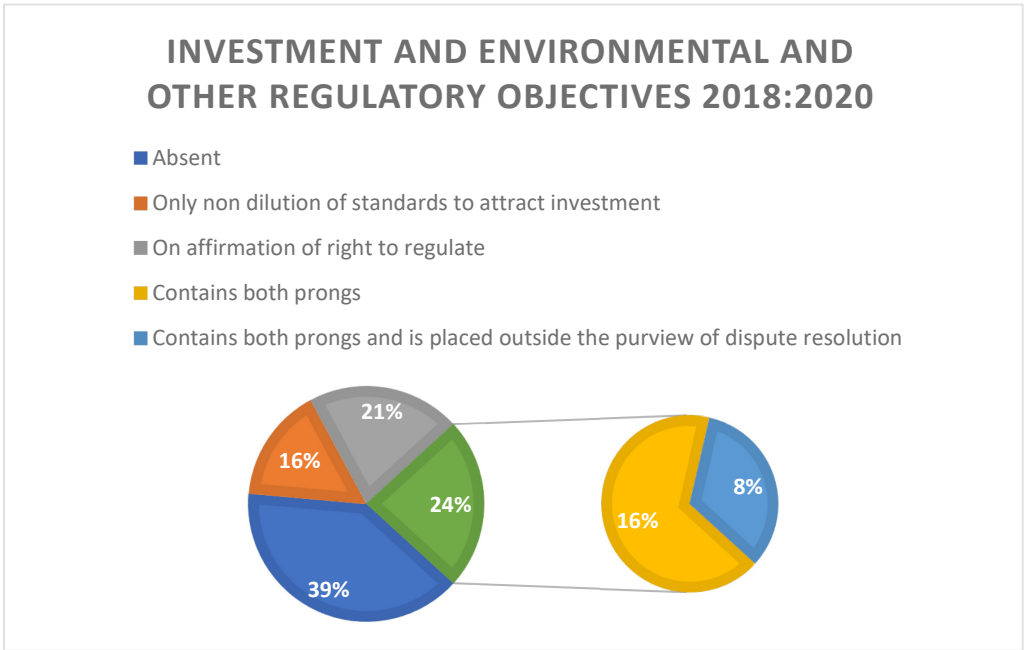
218. *See, e.g.*, Comprehensive Economic Partnership Agreement Between the EFTA States and The Republic of Ecuador, Art. 4.6, June 25, 2018; Agreement for the Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the United Arab Emirates, Arg.-U.A.E., art. 12, Apr. 16, 2018 [hereinafter Argentine-UAE BIT].

219. *See, e.g.*, Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, art. 6, Jan. 25, 2020; Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., art. 17, Mar. 15, 2019; Brazil-Guyana BIT, 2018, *supra* note 208, at art. 17; Brazil-Suriname BIT, 2018, *supra* note 208, at art.17; Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, art. 16, Apr. 11, 2018.

220. *See, e.g.*, Brazil-Guyana BIT, 2018, *supra* note 208, art. 25.3; Brazil-Suriname BIT, *supra* note 209, 2018, art. 25.3, Argentine-UAE BIT, *supra* note 218, art. 21.1 (b).

221. Brazil-Suriname BIT, 2018, *supra* note 208, at art. 25.3.

**Figure 2**<sup>222</sup>



### 3. Exclusion of Welfare Measures from Indirect Expropriation

Twenty-eight of the thirty-eight treaties surveyed for the purposes of this paper include a clarificatory note to the provision on expropriation.<sup>223</sup> Treaties have more broad and uniform language, such as: “[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.”<sup>224</sup>

222. *International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> [perma.cc/3Z7X-LJLV] (Based on authors’ analysis of publicly available IIAs signed from 2018 through 2020).

223. *See, e.g.*, Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, art. 6, Jan. 25, 2020.

224. Agreement Between The Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on The Reciprocal Promotion and Protection of Investments, Turk.-Cambodia, art. 5.2, Oct. 21, 2018; Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, art. 6, Dec. 1, 2018; Agreement Between the Government of the Republic of Kazakhstan and the



This clear and unequivocal clarification by States with regard to primacy of regulation safeguarding Second- and Third-Generation Rights has emerged in the backdrop of a barrage of investment claims against environmental and public health regulation,<sup>225</sup> among other policies, with recent cases relating to industries such as mining, pharmaceuticals,<sup>226</sup> and tobacco<sup>227</sup> causing controversy and concern. Such claims demonstrate increasing legal sophistication by claimants in exploiting open-textured provisions and tribunals adopting the *sole effects doctrine*<sup>228</sup> to adjudicate indirect expropriation claims. Clarificatory notes with regard to indirect expropriation may seek to effectively stem such claims and lift off the shroud of regulatory chill from the States in order to safeguard Second-Generation Rights of the citizens.

#### 4. General Exception Provisions

Close to sixty-eight percent of investment agreements executed since 2018 contain a *General Exceptions provision*.<sup>229</sup> The General Exceptions provision finds its origin in Art. XX of the General Agreement on Trade and Tariffs (GATT),<sup>230</sup> and is structured in three distinct elements (a similar structuring is seen both in investment agreements as well as Art. XX of the GATT): (1) an exhaustive list of permissible policy objectives (pursuant to which States may enact measures in contravention of general treaty obligations);<sup>231</sup> (2) a nexus

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Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments, Kaz.-Sing., art. 6.6, Nov. 21, 2018; Agreement Between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments, S. Kor.-Arm., annex 1.3(b), Oct. 19, 2018.

225. See, e.g., *Methanex Corp. v. U.S.*, UNCITRAL Case, Final Award on Jurisdiction and Merits (Aug. 3, 2005).
226. See *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, Final Award (Perm. Ct. Arb. 2012).
227. See *Philip Morris Brands v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/07, Award, (July 8, 2016).
228. See, e.g., *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 116 (May 29, 2003), 19 ICSID Rev. (“The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.”).
229. See *supra* text accompanying note 211.
230. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. pt.5, 55 U.N.T.S. 194 [hereinafter GATT].
231. *Id.* at (a)–(f).

requirement (which highlights the relation between the measure undertaken and the policy goal sought);<sup>232</sup> and (3) the *chapeau* requirement (the measure should not be arbitrary or cause unjustifiable discrimination where like conditions prevail or disguised restrictions on trade and investments exist).<sup>233</sup> Investment agreements signed since 2018 show a rapid upsurge in the incorporation of the General Exceptions provision.<sup>234</sup> General Exceptions provisions seek to provide a last line of defense for States in cases where measures taken to protect public health, environment, etc. are challenged.<sup>235</sup>

There are two forms under investment treaties that the provisions are structured around.<sup>236</sup> Forty-seven percent of treaties see a *mutatis mutandis* incorporation of all three elements of Article XX of the GATT.<sup>237</sup> Twenty-one percent incorporate a General Exceptions provision with certain limited modifications.<sup>238</sup> Several trends persist. First, the General Exceptions provision may be invoked only in cases where the claim pertains to National Treatment or the MFN provisions.<sup>239</sup> Second, the General Exceptions provision may be invoked

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232. *Id.* at (g)–(k).

233. GATT, *supra* note 230.

234. *International Investment Agreements Navigator*, *supra* note 222.

235. See JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 14–18, (Cambridge Univ. Press, 2012).

236. Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INVESTMENT TREATY NEWS (May 21, 2015), [https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/\[perma.cc/K88M-ZHAD\]](https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/[perma.cc/K88M-ZHAD]) (“There are two different models of general exceptions in IIAs—one that follows the approach of Article XX of the General Agreement on Tariffs and Trade (GATT) and another that is modelled on Article XIV of the General Agreement on Trade in Services (GATS).”).

237. See, e.g., Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, art. 15, Dec. 1, 2018; Comprehensive Economic Partnership Agreement Between the EFTA States and The Republic of Ecuador, Art. 6.3, June 25, 2018; Agreement Between Japan and the Hashemite Kingdom of Jordan and Protection of investment, art. 15, Japan-Jordan, Nov. 27, 2018; Economic Partnership Agreement, CARIFORUM States-U.K., art. 224, 2019; Treaty Between the Republic of Belarus and the Republic of India on Investments, Belr.-India, art. 32, Sept. 24, 2018.

238. See *International Investment Agreements Navigator*, *supra* note 222.

239. See Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, E.U.-Viet., June 12, 2020, Art. 8.53. (“Subject to the requirement that such measures are not applied in a manner which

solely where the claim pertains to the National Treatment provision.<sup>240</sup> Third, the General Exceptions provision may partially incorporate of the *chapeau* from Art. XX of the GATT.<sup>241</sup> The General Exceptions provision contains a protective mechanism to prevent abuse by States. This is in the form of ensuring that the measures are not *arbitrary or unjustified discrimination or a disguised restriction on international investment*.<sup>242</sup> The India-Kyrgyz BIT and the 2019 and the 2018 Cambodia-Turkey BIT<sup>243</sup> incorporate only a single limb of this chapeau by requiring the measure to only be non-discriminatory.<sup>244</sup> Fourth, the General Exceptions provision may completely omit the *chapeau*.<sup>245</sup> The 2018 Argentina-UAE BIT peculiarly omits both requirements of the

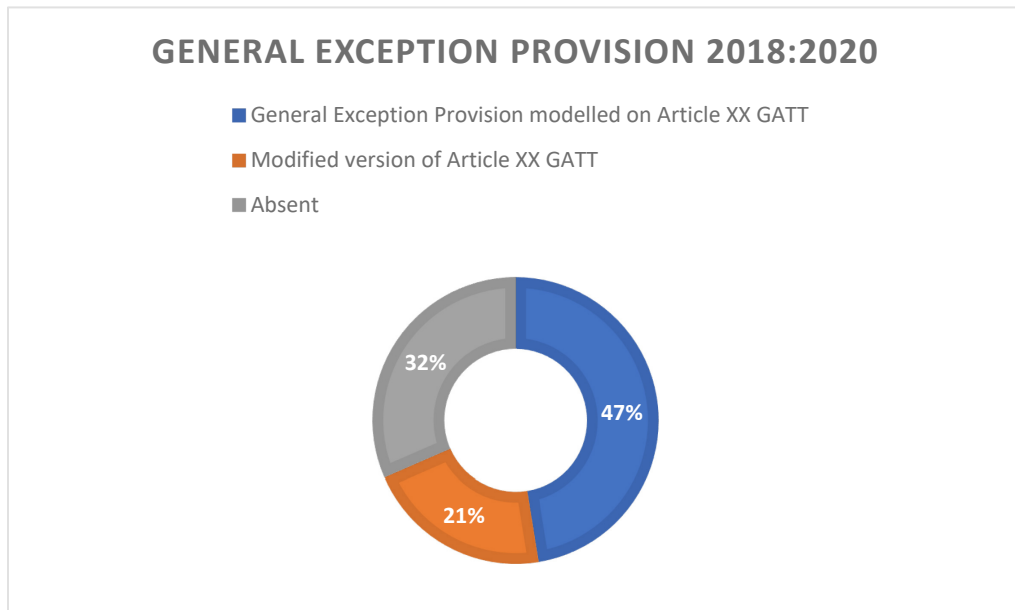
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would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on establishment or cross-border supply of services, nothing in this Chapter shall be construed as preventing the adoption or enforcement by any Party of measures”).

240. See Free Trade Agreement Between the European Union and the Republic of Singapore, art. 8.62, Oct. 19, 2018 (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party where like conditions prevail, or a disguised restriction on establishment or cross-border supply of services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures . . . necessary to protect public security or public morals or to maintain public order.”).
241. See Levent Sabanogullari, *supra* note 236.
242. *Id.*
243. See Agreement Between The Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on The Reciprocal Promotion and Protection of Investments, Turk.-Cambodia, art. 4.1, Oct. 21, 2018 (“Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures”).
244. See Bilateral Investment Treaty Between the Government of the Kyrgyz Republic and the Government of the Republic of India, Kyrg-India, art. 32.1, June 14, 2019 (“Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non discriminatory basis that are necessary to: (i) protect public morals or maintaining public order; (ii) protect human, animal or plant life or health”).
245. See Argentine-UAE BIT, art. 18 (“Nothing in this Agreement shall prevent the implementation by either Party of measures it deems necessary in order to: (a) maintain public order; (b) protect its own national interests, including its essential security interests; (c) fulfil its obligations with respect to the maintenance or restoration of international peace and security; (d) protect human, animal and plant life or health”).

measure being *non-discriminatory* as well as *not being a disguised restriction on international investment*.<sup>246</sup>

**Figure 3**<sup>247</sup>



The table below summarizes the State practice in the new-generation treaties:

Provision	Example forms of treaty practice
References in an IIA's preamble	<ul style="list-style-type: none"> <li>• Preserve a “general” right to a state’s regulatory space</li> <li>• Preserve certain specifically identified rights that are protected within the ambit of a State’s regulatory powers (e.g., health, environment)</li> </ul>

246. *Id.*

247. *International Investment Agreements Navigator*, *supra* note 222.

Provision	Example forms of treaty practice
	<ul style="list-style-type: none"> <li>• Require investments to be made in conformity with international standards</li> </ul>
Operative provisions preserving a State's regulatory/policy space	<ul style="list-style-type: none"> <li>• Protect a State's right to adopt measures in the public interest</li> <li>• Affirm an obligation not to dilute public interest matters</li> <li>• Exclude public interest matters from the scope of the dispute resolution clause</li> <li>• Combinations of the approaches above</li> </ul>
Operative provisions excluding welfare measures from the scope of indirect expropriation clause	<ul style="list-style-type: none"> <li>• Provisions that clarify that nondiscriminatory measures to further legitimate public welfare objectives are not considered an indirect expropriation, although such measures may be challenged as discriminatory or illegitimate</li> </ul>
General Exception provisions	<ul style="list-style-type: none"> <li>• Provisions incorporating exceptions modeled on GATT, Art. XX, either in whole or in part</li> </ul>

## VII. LOOKING AHEAD

While several entrenched barriers have hindered the role of human rights within the ISDS system, notable movement to better recognize human rights within ISDS reform efforts and new IIAs have emerged. Such developments are no doubt positive, but we caution that progress may be slower than stakeholders might appreciate. Moreover, the scope of this progress may be restricted to First-Generation Rights (as in ISDS reform proposals), and only very select Second- and Third-Generation Rights (as in new IIAs). Equally, we caution that this bifurcated approach, whereby ISDS reform efforts and new IIAs have been largely pursued separate and distinct from each other, may result in further inconsistencies and a general lack of alignment, suggesting the persistence of the above-mentioned entrenched barriers. Finally, it bears mention that the ultimate arbiter, as it were, of the future intersection of ISDS and human rights remains how reforms and new

IIAs impact arbitral practice. If meaningful change is to emerge, it must be evident in the outcomes of investment disputes.

