

STRIKING A BALANCE BETWEEN THE STATE  
POLICY SPACE TO PROTECT HUMAN RIGHTS  
OBLIGATIONS AND INVESTOR  
PROTECTIONS

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I. INTRODUCTION

In implementing national or international human rights policy measures, a State may face significant tension with its parallel existing investor protection obligations. Which one should the State prioritize? How can these two sets of obligations be harmonized? Current debates regarding the future and legitimacy of the investor-State dispute settlement system (ISDS) have centered on the balance between the States’ policy space to protect human rights obligations and investor protections.<sup>1</sup>

In the context of investment arbitration, “regulatory autonomy” and “policy space” refer to “[t]he ability of a State to determine its regulatory goals (such as the protection of public health or the conservation of natural resources) and to

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1. DAVID GAUKRODGER, BUSINESS RESPONSIBILITIES AND INVESTMENT TREATIES 2 (Consultation paper by the OECD Secretariat, 2020).

adopt and implement policies [and measures] to pursue those goals.”<sup>2</sup> A State measure includes any “[l]aw, regulation, procedure, requirement, or practice” by the State.<sup>3</sup>

Some arbitral tribunals have acknowledged that the State obligation to protect human rights and investor protections are not mutually exclusive.<sup>4</sup> In this regard, one might argue that there are sufficient existing elements that allow for privileging both the duty of States to protect human rights and standards of foreign investment, and that there is, in fact, regulatory space in the current system.<sup>5</sup> For instance, the existence of domestic norms, such as national constitutions (in some countries), ratified human rights treaties, and international custom, all support the idea that States have instruments available to protect human rights without necessarily compromising investment protection standards.

On the other hand, some argue that international arbitration and investment treaties may discourage States from taking these regulatory measures if they could potentially challenge investors’ rights.<sup>6</sup> This is also known as “regulatory chill.”<sup>7</sup> Some authors agree that the outsized cost of arbitration is

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2. ANDREW D. MITCHELL, ELIZABETH SHEARGOLD, AND TANIA VOON, *Chapter 1: Regulatory Autonomy and the Evolution of Australia’s Participation in PTAs and BITs*, in *The Evolution of Australian Policy on Trade and Investment* 2 (2017).

3. See 2012 U.S. Model Bilateral Investment Treaty art. 1 (providing that a “measure includes any law, regulation, procedure, requirement, or practice”).

4. See RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 294 (Surya Deva and David Birchall, eds., 2020) (discussing State obligations under human rights treaties and investment treaties); see also Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, *Human Rights Law and the Investment Treaty Regime* 20 (Columbia Ctr. on Sustainable Inv. (CCSI) Working Paper No. 6, 2019) (discussing the relationship between human rights and investment norms).

5. Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermaos S.A. (Uru.) v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 295 (July 8, 2016).

6. RESEARCH HANDBOOK, *supra* note 4, at 297.

7. UNCITRAL’s Working Group III has agreed that “regulatory chill” is a systemically important issue that must be addressed in the ISDS reform process. For more on the discussion of regulatory chill, see Gus Van Harten & D.N. Scott, *Investment Treaties and Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7(1) J. OF INT’L DISPUTE SETTLEMENT 92 (2016); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat of Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT’L ENV’T L. (2018).

enough on its own to chill State action on human rights policies. According to this argument, a number of States have not taken determinative regulatory action because of the potential risk of paying large sums to investors under a dispute settlement scenario.<sup>8</sup>

Other commentators argue that the coexistence of these obligations leads to a fragmentation issue. For instance, States are committed to loans from other international organizations, or decisions from other international tribunals, which create tension with existing obligations under investment treaties.<sup>9</sup> The principle of “systemic integration” mandates that, “although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say ‘other’ international law.”<sup>10</sup> The application of this principle has not been consistent in the investment arbitration scenario.

However, there has been a greater engagement between international arbitration and human rights issues at the national level in recent years. For instance, in the case *BTS v. Slovakia*, the European Court of Human Rights ruled that Slovakia violated an investor’s right to property by denying the enforcement of the award.<sup>11</sup> The Court acknowledged that while the domestic court denied enforcement in light of public policy, it did not take into account “the requirements of the

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8. For example, the District Court in The Hague held Shell liable for a case of serious oil pollution in Nigeria, however, Shell then initiated an arbitration against Nigeria for the said repercussions. See Reuters Staff, *Shell files int’l arbitration against Nigeria over oil spill case*, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-shell-nigeria-arbitration-idUSKBN2AF0VF>. For more on the cost of ISDS to States, see *Costs and Benefits of Investment Treaties: Practical Considerations for States*, CCSI, <http://ccsi.columbia.edu/2018/04/20/costs-benefits-iias/>.

9. For instance, Pakistan received a large loan from the International Monetary Fund in order to meet the urgent balance of payment needs stemming from the outbreak of the Covid-19 pandemic; however, parallelly, it faces an obligation to pay \$5.9 billion to an investor as part of an arbitral award. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pak.*, ICSID Case No. ARB/12/1, Decision on Stay, ¶ 143 (Sept. 17, 2019).

10. Coleman et al., *supra* note 4, at 7.

11. *BTS Holding, a.s. v. Slovakia*, App. No. 55617/17 (June 30, 2022), <https://hudoc.echr.coe.int/fre?i=002-13717> [hereinafter *BTS Holding, a.s. v. Slovakia*].

protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community rights."<sup>12</sup>

On this matter, the U.N. Guiding Principles on Business and Human Rights recognize the tension between human rights and investment norms and call on States to "[m]aintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises."<sup>13</sup>

In light of these existing tensions, how can a balance be struck between State regulatory space and the protection of investors? Perhaps a return to the roots could provide the beginnings of an actual solution. Participants within the system should collectively discuss the optimal calibration of substantive and procedural provisions in investment treaties to ensure that the system itself exists on sound footing.

Additionally, with the rising number of ESG and human rights related obligations, there is a wider scope for new disputes.<sup>14</sup> In this sense, international arbitration can be seen as a potential forum to address this kind of interactions<sup>15</sup> and not just as a parallel system that confronts human rights obligations. In this sense, a series of reforms could make the ISDS a more functional system, which would increase not only its legitimacy, but also its usefulness to the participants that make up the system.

This commentary will explore the tension between State regulatory space and human rights obligations followed by an assessment of proposed procedural and substantive reforms aimed at balancing both sets of obligations. Part I explores

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12. *BTS Holding, a.s. v. Slovakia*; Nicholas J. Diamond & Kabir A.N Duggal, *2022 Year in Review: Widening the Human Rights Aperture for ISDS*, KLUWER ARBITRATION BLOG (Feb. 1, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/02/01/2022-year-in-review-widening-the-human-rights-aperture-for-isds/>.

13. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. H.R. OFF. OF THE HIGH COMM'R, Principle 9, at 11 (2011). The commentary to Principle 9 notes that investment treaties "may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."

14. Diamond & Duggal (2023).

15. *Id.*

whether the redrafting and interpretation of investment treaties could cede more regulatory space to the State while protecting investors' obligations. It also analyzes how the interpretation of substantive provisions, like the Fair and Equitable Treatment (FET) standard, could potentially harmonize both sets of obligations in a dispute settlement scenario. Part II presents proposed amendments to the ISDS and examines whether they could effectively balance human rights obligations and investors' obligations.

## II. THE DRAFTING AND INTERPRETATION OF INVESTMENT TREATIES

### A. *The Drafting of Investment Treaties*

There is no specific prohibition in investment treaties against measures to fulfill human rights obligations. However, some authors suggest that the redrafting of investment treaties is a public policy decision that would make it much easier to privilege the State right to regulate these matters. Negotiating parties usually consider the precision of particular provisions and the inclusion or exclusion of certain terms.<sup>16</sup> Accordingly, explicit references to regulatory space and human rights obligations are usually analyzed under the preamble, the definitions, the general standards, and the general exceptions contained in the treaty.<sup>17</sup> Most recently, the Italy Model BIT, published in 2022, included language related to human rights in its preamble and a section addressing corporate social responsibility and responsible business conduct, along with a Denial of Benefits section covering the protection of human rights.<sup>18</sup> Yet, there is still much uncertainty related to the interpretation and application of these kinds of clauses.

On this matter, the definition and interpretation of the terms "investment" and "investor" within treaties has been a major focus of debate when analyzing tools for providing more regulatory space to the State. There is some precedent to using investment definitions as a policy tool. For example, some investment definitions require that, to be considered a cov-

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16. Coleman et al., *supra* note 4, at 14.

17. *Id.*

18. Model Text for the Italy Bilateral Investment Treaty (August 2022); Diamond & Duggal (2023).

ered investment, “[i]t must contribute to a host State’s economic development, or comply with its laws.”<sup>19</sup> In this sense, a tribunal might establish that if an investor did not comply with domestic human rights standards, it would not even have the right to enter such jurisdiction.

Another important policy tool is the inclusion of general exceptions within the treaties. These are designed to “permit a treaty party to lawfully perform its regulatory and legislative functions by taking measures directed towards a specific regulatory purpose, policy, industry or sector.”<sup>20</sup> In this regard, there are very few—in fact, almost nonexistent—treaties which explicitly address the State duty to protect human rights and the general exceptions to protect this type of measures. Colombia<sup>21</sup> and Switzerland<sup>22</sup> are among the few States that have explicitly addressed the issue of revising their existing treaties to incorporate stronger references to regulatory space to protect obligations directed at human rights and sustainable development.<sup>23</sup>

The case *Eco Oro v. Colombia* presents an example of the tensions that result even with the existence of general exceptions protecting the State regulatory space. In this case, the dispute arose out of Colombia’s prohibition on carrying out mining activities in an Andean ecosystem. Eco Oro alleged that the actions of Colombia’s public authorities resulted in the expropriation of its investment without compensation and breached the Minimum Standard of Treatment (MST) clause in the Treaty. In the words of Phillipe Sands, one of the three arbitrators in the case, two aspirations were in tension: “[o]n

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19. See Bilateral Investment Treaty, India-Kyrg., art. 1.4, June 3, 2019 (providing the definition for “investment”); Free Trade Agreement, Arg.–Chile, art. 8.1, Nov. 2, 2017.

20. Ahmed Bakry, *Treaty Exclusions*, JUS MUNDI (June 3, 2022), <https://jusmundi.com/en/document/publication/en-treaty-exclusions>.

21. GOVERNMENT OF COLOMBIA, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (2020-2022), <https://globalnaps.org/wp-content/uploads/2018/04/pna-colombia-english.pdf>.

22. SWISS CONFEDERATION, UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, SWISS NATIONAL ACTION PLAN 2020-2023 (2020), [https://globalnaps.org/wp-content/uploads/2020/05/beilage-01-principes-directeurs-de-l%E2%80%99onu-relatifs-aux-entreprises-et-aux-droits-de-l%E2%80%99homme-plan-d%E2%80%99action-nationale-de-la-suisse-2020-2023\\_en-zu-bra-eda-wbf.pdf](https://globalnaps.org/wp-content/uploads/2020/05/beilage-01-principes-directeurs-de-l%E2%80%99onu-relatifs-aux-entreprises-et-aux-droits-de-l%E2%80%99homme-plan-d%E2%80%99action-nationale-de-la-suisse-2020-2023_en-zu-bra-eda-wbf.pdf)

23. GAUKRODGER, *supra* note 1, at 2.

the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment.”<sup>24</sup>

Colombia argued that the general exception in Article 2201(3) of the FTA, containing a general exception for measures “necessary [t]o protect human, animal or plant life or health” and for “the conservation of living or non-living exhaustible natural resources,” excluded environmental measures from the scope of its consent to arbitrate and excluded its liability to pay compensation.<sup>25</sup> Although the tribunal recognized the legitimate exercise of Colombia’s police powers to protect the environment under other standards of the treaty, it also found that, under this exception, the treaty allowed Colombia to adopt or enforce a measure for environmental conservation if it was not arbitrary, unjustifiably discriminatory, or a disguised restriction on international investment.<sup>26</sup> However, the Tribunal also established that “there is no provision in Article 2201(3) permitting such action to be taken without the payment of compensation.”<sup>27</sup> As the tribunal found that Colombia frustrated Eco Oro’s legitimate expectations under a previous standard, the exception was not applied.<sup>28</sup>

In light of this case, the usefulness of the inclusion of general exceptions remains an open question. In fact, some opinions suggest that modifying or signing new treaties will not have a substantial effect, as there is always a risk that an arbitral tribunal will interpret the treaty apart from the parties’ intent. Renegotiating treaties on these terms can also lead to “inflation” in treaty-making, consuming a significant amount of time and political will. The renegotiating of treaties could

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24. *Eco Oro Minerals Corp. v. Republic of Colom.*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, Partial Dissent of Phillipe Sands QC, ¶ 1 (Sept. 9, 2021) [hereinafter *Eco Oro v. Colombia*].

25. *Id.* ¶ 60. See also *Majority in Eco Oro v. Colombia finds violation of minimum standard of treatment, holds that a general environmental exception does not preclude obligation to pay compensation*, INT’L INST. FOR SUSTAINABLE DEV. (IISD) (Dec. 20, 2021), <https://www.iisd.org/itm/en/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/>.

26. *Eco Oro v. Colombia*, ¶ 829.

27. *Eco Oro v. Colombia*, ¶¶ 829-830.

28. *Id.* ¶ 837.

even create a parallel system between old and new generation treaties<sup>29</sup> with no practical effects in the system. Consequently, examining the interpretation of substantive provisions that are already contained in the treaties has become another important focus of the discussion.

### B. *The Interpretation of Substantive Provisions*

Some argue that the discussion around the State regulatory space should focus on the substantive norms contained in investment treaties which give rise to the disputes, rather than the renegotiation of treaties.

The Fair and Equitable Treatment (FET) standard, one of the most controversial substantive provisions, is included in nearly 95% of investment treaties, but also around 83% of all treaty-based investor–State arbitration claims.<sup>30</sup> Despite its widespread application, the FET standard does not contain any direct reference to the right of a State to regulate,<sup>31</sup> and “tribunals have tried to formulate a definition and application while interpreting the provision, gradually expanding its scope and content.”<sup>32</sup> Consequently, it is not clear what standards tribunals are expected to follow when faced with a question of whether a State policy assessing human rights issues is aligned with this substantive standard.

Many tribunals have established that the idea of legitimate expectations, and therefore FET, implies the stability of the legal and business framework to the investor.<sup>33</sup> Important

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29. Simon Batifort intervention at the International Institute of Sustainable Development Webinar: Implications of the Eco Oro Decision for Investment Treaty Negotiations and Reforms (Oct. 28, 2021). *See also*, José Alvarez *ISDS Reform: The Long View* 16 (Inst. For Int’l L. and Just. (IILJ), Working Paper, 2021).

30. Florencia Sarmiento and Suzy Nikièma, *Fair and Equitable Treatment: Why it matters and what can be done*, IISD 1 (2022), <https://www.iisd.org/system/files/2022-11/fair-equitable-treatment-en.pdf> (citing *UNCTAD Report, INVEST. POLICY HUB* (2022), <http://investmentpolicyhub.unctad.org/IIA>).

31. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 *VAND. J. TRANSNAT’L L.* 355, 378 (2017).

32. Sarmiento and Nikièma, *supra* note 30, at 1.

33. *See, e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005); *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ¶ 260; *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, Final Award, ¶ 183 (July 1, 2004).



questions arise at this point when considering how a tribunal distinguishes “bona fide regulatory measures” from regulatory measures that may be designed solely with discrimination or protectionism.<sup>34</sup> Additionally, there is no clear baseline of “normal” regulatory activity against which to measure variation.<sup>35</sup> Furthermore, the substance of the standard of FET treatment also overlaps with the meaning of good faith,<sup>36</sup> which broadens the scope of the interpretation of an arbitral tribunal.

In this respect, tribunals have emphasized that the requirement of stability is not absolute and should not necessarily prevent a State from adapting its legal system to changing circumstances, as human rights obligations also evolve.<sup>37</sup> A number of tribunals have also highlighted the need for States to maintain the regulatory space for domestic matters in the public interest.<sup>38</sup> In this regard, the Tribunal in *Lemire v. Ukraine* established that: “The protection of the legitimate expectations must be balanced with the need to maintain a reasonable degree of regulatory flexibility on the part of the host

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34. Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606, 608 (Chester Brown & Kate Miles, eds., 2011).

35. *Id.* at 608.

36. RUDOLF DOLZER, URSULA KRIEBAUM, CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 226-8 (2d ed., 2022).

37. *Id.* at 206. *See also* Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 327–38 (Sept. 11, 2007); BG Grp. Plc. v. The Republic of Arg., UNCITRAL, Award, ¶¶ 292–310 (Dec. 24, 2007); Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶ 219 (Aug. 27, 2008); Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 258–61 (Sep. 5, 2008); AES Summit Gen. Ltd. and AES-Tisza Erömü Kft v. Republic of Hung., ICSID Case No. ARB/07/22, Award, ¶ 9.3.29 (Sep. 23, 2010); Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Gov’t of Mong., UNCITRAL, Award, ¶ 302 (April 28, 2011); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶¶ 290–91 (June 21, 2011); El Paso Energy Int’l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 344–52, ¶¶ 365–74 (Oct. 31, 2011).

38. *See* Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶¶123–24,162, 309, 333, 429 (Dec. 27, 2010). *See also* Plama Consortium, *supra* note 37, ¶ 177; EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶ 299 (2009); El Paso Energy, *supra* note 37, ¶ 374.

State in order to respond to changing circumstances in the public interest.”<sup>39</sup>

Also, the tribunal in *EDF v. Romania* stated on this matter that “The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework.”<sup>40</sup>

Further, the role of the investor has been a critical question when analyzing legitimate expectations—in particular, the weight that should be given to an investor’s due diligence when making the investments. When looking for a balance between human rights regulatory space and investors’ obligations, a tribunal might want to consider whether the investor conducted a formal due diligence process to protect those legitimate expectations.<sup>41</sup>

In addition, under the FET, the arbitral tribunal may apply an analysis of the investor’s behavior in light of the applicable law, which in some cases includes an examination of the domestic law of the State. In a liability analysis, the tribunal will usually assess the scope and content of the host State’s measures under domestic law and then proceed to analyze these measures under the framework of the BIT and international law.<sup>42</sup> This analysis is key to the systemic recognition that bilateral investment agreements do not constitute a parallel legality to the domestic legal system. Rather, they should be analyzed in a comprehensive and harmonized manner under the principle of systemic integration.

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39. Joseph Charles Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction, ¶ 500 (Jan. 14, 2010).

40. EDF, *supra* note 38, ¶ 217.

41. Yulia Levashova, *Fair and Equitable Treatment and Investor’s Due Diligence Under International Investment Law*, 67 NETH. INT’L L. REV. 233, 233 (2020).

42. See Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment No. 2004/03, 2004), <http://dx.doi.org/10.1787/675702255435> (discussing the FET standard under international law).

Moreover, when analyzing the National Treatment (NT) and Most Favored Nation (MFN) standards, the Respondent State will have to prove that there were legitimate, non-discriminatory reasons for the difference in treatment between the investor and a domestic or foreign competitor. This analysis raises several questions regarding State regulation. For example, a tribunal might examine whether the measure had a rational connection to the policy of the host State. However, several questions remain regarding this analysis, for instance, it is not clear what a “strong” connection with the overall host State policy may be. Similarly, it is unclear where to draw the line between legitimate and non-legitimate measures under these standards. Thus, there is a need to achieve greater efficiency and predictability in the application of these standards.

### III. AMENDMENTS TO THE ISDS

#### A. *Proposed Amendments*

Some experts assert that the balance between human rights and investors’ obligations within the ISDS will depend on the terms, legal grounds, and procedural and substantive mechanisms contained in the international investment agreements (IIAs). This commentary will provide an overview of some of the proposed amendments to the ISDS that aim to provide a balance between the State regulatory space and investors’ obligations under different circumstances. These include: (i) Damages awarded to the State in case of an investor breach of the Treaty; (ii) Counterclaims by the State based on the explicit reference to investors’ obligations in investment treaties; (iii) Third party participation in the investor-state disputes.

#### i. *Damages*

Under this proposal, an investor’s breach of the Treaty would lead to damages in favor of the State; thus, there would be compensation awarded based on human rights violations committed by the investor.<sup>43</sup> Other authors have suggested that the behavior of investors could be considered to “contribute” to a breach of the Treaty if it triggered the State’s re-

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43. FILIP BALCERZAK, *Investor – State Arbitration and Human Rights*, in 119 INT’L STUDIES IN H. R. 218 (2017).

sponse in the light of the State's international obligation to protect human rights.<sup>44</sup>

In the light of this, some cases have showed that tribunals may have the power to take negligent and active behavior by investors into consideration when calculating damages.<sup>45</sup> For instance, the Tribunal in *Copper Mesa Mining Corporation v. The Republic of Ecuador* determined that “[a]n award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.”<sup>46</sup>

The tribunal also accentuated the words of the Tribunal in the *Delagoa Bay Railway* case: “[A]ll these circumstances that can be put forward against the concessionaire and to the credit of the Portuguese government lessen the responsibility of the latter and justify [. . .] a reduction in the damages to be granted.”<sup>47</sup>

Further, the India model BIT allows tribunals to reduce damages to reflect “mitigating factors” which can include “[a]ny unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.”<sup>48</sup>

Under this proposal, an investor claim would be less likely to succeed when in tension with a legitimate government mea-

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44. *Id.* at 218.

45. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004) (confirming the concept of contributory negligence); *Occidental Petroleum Co. and Occidental Exploration and Prod. Co. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 679-687 (Oct. 5, 2012). The tribunal found that the investor acted negligently and committed an unlawful act, and therefore the claimants should “pay a price” for that. The tribunal decided that “as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered” and confirmed that it exercised “wide discretion” when deciding on this issue. *See also* *Hulley Ent. Ltd. (Cyprus) v. The Russ. Fed.*, UNCITRAL, PCA Case No. 2005-03/AA226, Award, ¶¶ 1599-1600 (July 18, 2014).

46. *Copper Mesa Mining Co. v. Republic of Ecuador*, PCA No. 2012-2, Award ¶ 678, at ¶ 6.95 (March 15, 2016).

47. *Id.* ¶ 6.95.

48. Annex, 2015 Model Text for the Indian Bilateral Investment Treaty art. 26.3, [https://dea.gov.in/sites/default/files/ModelBIT\\_Annex\\_0.pdf/](https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf/).

sure protecting a human rights obligation. Yet, this proposal poses a number of practical questions related to the calculation of damages and the wide discretion of the tribunal when assessing its distribution.

ii. *Counterclaims*

This amendment proposes the inclusion of explicit reference to investors' obligations in investment treaties. This could widen the *bona fide* regulatory space of the State and allow it to counterclaim. According to this proposal, this would signify a substantial recalibration by balancing the playing field between the investors and the State.<sup>49</sup> However, it is not clear to what extent those counterclaims mechanisms are available in investment treaties.<sup>50</sup>

The cases *Urbaser v. Argentina* and *Saluka v. Czech Republic* addressed the possibility of host-State counterclaims.<sup>51</sup> Nevertheless, many questions remained unanswered in light of the tribunal argumentation and the construction of the narrative behind it.

In *Perenco v. Ecuador*,<sup>52</sup> Ecuador filed two counterclaims arguing that Perenco was liable for the environmental damage arising from the operation of the concessions. The tribunal held that Perenco was liable for those damages, which would be awarded by the Tribunal in the corresponding phase. Further, in *Burlington v. Ecuador*,<sup>53</sup> Ecuador filed counterclaims against Burlington and requested compensation. The Tribunal ordered Burlington to pay compensation to Ecuador for environmental and infrastructure damage. In this case, the investor did not contest any jurisdictional objections to the counterclaims.

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49. Patrick Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration*, 1 BRILL OPEN L. 61, 64 (2018).

50. Ted Gleason, *Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspectives*, 21 INT'L ENV'T AGREEMENTS 427, 430 (2021).

51. *Id.* at 431.

52. *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6 (2019).

53. *Burlington Res., Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (2017).

In *David Aven v. Costa Rica*,<sup>54</sup> although the Tribunal determined that Costa Rica's counterclaims were inadmissible based on procedural requirements, it determined that it could be argued that the treaty contained obligations to investors since Article 10.11 of the treaty stipulated that the host State could adopt measures to "[e]nsure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."<sup>55</sup>

The availability of host-State counterclaims remains unclear. The possible legal basis to counterclaim should be established as there are additional barriers to counterclaims beyond the procedural rules and consent, including the relationship of the counterclaim with the investor's underlying claims,<sup>56</sup> questions regarding jurisdiction and admissibility,<sup>57</sup> or difficulties of holding shareholders accountable.<sup>58</sup>

### iii. *Third Party Participation*

This proposal entails situations in which the State will not adequately represent the interests of communities or other actors within a counterclaim. Since natural persons and civil society cannot initiate a counterclaim procedure, some argue for the need to equilibrate the investment treaty terms with third parties.<sup>59</sup>

The already existing figure of *amicus curiae* has not been demonstrated to be decisive, since it will always depend on how the tribunal interprets and accepts it. There is an ongoing proposal to explore how communities can efficiently access local mechanisms or, in foreign fields, have the possibility to initiate claims against the investors.

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54. David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3 (2018).

55. *Id.* ¶ 385, Award.

56. Andrea K. Bjorklund, *The role of counterclaims in rebalancing investment law*, 17 LEWIS AND CLARK L. REV. 461, 466-8 (2020).

57. Xuan Shao, *Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law*, 24 J. OF INT'L ECON. L. 157, 157 (2021).

58. *Id.* at 158.

59. Abel, *supra* note 49, at 86.

In *Odyssey v. Mexico*, Arbitrator Philippe Sands gave a dissenting opinion related to an *amicus curiae* submission.<sup>60</sup> Arbitrator Sands established that the third parties involved could “bring a unique perspective to the specific perspective” that would assist the Tribunal and “offer a unique perspective due to its ability to place this dispute in the context of broader debates and developments in international law.”<sup>61</sup> Further, the submissions “would not have unduly burdened the parties, unfairly prejudiced either party or disrupted the arbitral proceedings.”<sup>62</sup>

Exhaustion requirements are another way to address third party interests in the international arbitration scenario. For instance, the Morocco Model BIT (2019)<sup>63</sup> establishes that investors must first comply with the consultation and negotiation requirements and submit to local courts. Only then, if a judgment is not obtained within a certain amount of time, can investors file under ISDS. Another example is found in the exhaustion requirement in the US-Mexico Annex of USMCA.<sup>64</sup> Brazil’s model is an interesting example since some of Brazil’s Cooperation and Facilitation Investment Agreements (CFIAs) require certain dispute prevention procedures before turning to State-State arbitration.<sup>65</sup> Additionally, these CFIAs do not include anti-corruption and other corporate social responsibility obligations as covered points under the dispute settlement mechanism, which means that the State is in charge of arbitrating any cases that deal with third party related issues. In this respect, the deference to third party opinions, domestic insti-

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60. *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Decision on the Application for Leave to File a Non-Disputing Party Submission, Dissent of Phillipe Sands KC (Dec. 20, 2021), <https://www.italaw.com/sites/default/files/case-documents/italaw16448.pdf> [hereinafter *Odyssey v. Mexico Dissent*].

61. *Odyssey v. Mexico Dissent* ¶¶ 4, 6.

62. *Odyssey v. Mexico Dissent* ¶ 7; Diamond & Duggal (2023).

63. Bilateral Investment Treaty, Braz.–Morocco, June 13, 2019.; Hamed El-Kady & Yvan Rwananga, *Morocco’s New Model BIT: Innovative features and policy considerations*, IISD (June 20, 2020), <https://www.iisd.org/itm/en/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/>.

64. United States-Mexico-Canada (USMCA) Agreement, July 1, 2020.

65. Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Comparative Commentary to Brazil’s Cooperation and Investment Facilitation Agreements (CFIAs) with Mozambique, Angola, Mexico, and Malawi*, IISD 12 (Sep. 2015).

tutions, and exhaustion of local remedies are essential elements to be discussed.

#### IV. CONCLUSION

The interaction between corporate responsibility to respect human rights, commercial disputes, and State regulatory measures is constantly growing. This unique intersection calls for an amendment to the ISDS that will make the system more useful to all participants involved. To achieve this objective, the proposals must be practical and reasonable, not idealistic.

There is no clear answer on how to strike a balance between the State policy space to protect human rights obligations and investor protections. Yet, rather than analyzing them in tension, one should strive to strike a proper and balanced interaction between them, using different perspectives, including, but not limited to, the application of new procedural rules, the renegotiation of treaties, the re-interpretation of existing substantive provisions, and the inclusion of new legal figures into the treaties, among others.

There is a lack of precedent in the implementation of these proposals, and it appears that they would be slowly implemented within the system by a learning-by-doing approach, which is time consuming and may also endeavor error costs.

In light of these risks, the application and analysis of the already existing substantive provisions, as the basis of the system, present a more realistic approach to this balance between the State regulation and investor protections. However, the most challenging part will be to guide the discussion based on the same set of paradigms we want the system to promote.