International Arbitration and Human Rights: Exciting Opportunity or Existential Threat?[1]

Cherie Blair, CBE, QC

Chair and Founder of Omnia Strategy LLP

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Abstract

International arbitration is labelled by its detractors as a threat to the enjoyment of human rights globally. In truth, while international arbitration can, in some circumstances, have significant adverse social and environmental impacts, so too can it incentivise state protection of and business respect for human rights, and provide an effective avenue to remedy after violations. The relationship between international arbitration and human rights is growing ever clearer and more important. The author argues that rather than discarding Investor-State Dispute Settlement (ISDS), the practitioner community should redouble efforts to make investor-state arbitration not just compatible *with human rights but an effective forum to* promote and protect *human rights. The article, first presented as the 2021 Akin Gump Arbitration Lecture, outlines the critical challenges and suggests adjustments for consideration by a legal community that should strive to be part of the solution to humanity's biggest challenges, rather than part of the problem.*

I. Introduction

I have read again in recent months, this time in response to the *Eco Oro*[2] decision, that investment law is "one of the greatest threats to climate change, environmental protection, democracy and human rights". There are those who call for investor-state arbitration to be dismantled root and branch, and anti-Investor-State Dispute Settlement (ISDS) slogans have even adorned protest banners at street rallies against the Transatlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Reforms, they say, are a "nefarious fig-leaf"; a "dangerous distraction" to stave off ISDS abolition. In the same vein, Covid-19 and COP26 have focused minds on structural inequalities and systemic problems, and have renewed discussions on the

[1] Adapted from the author's 2021 Akin Gump Arbitration Lecture on 23 November 2021. The author wishes to thank her colleagues for their contributions, especially Ania Farren, Adam Smith-Anthony, Lauren Lederle and Alessandro Rollo. The author also thanks Akin Gump Strauss Hauer & Feld LLP, and particularly Hamish Lal, for the invitation to give the annual Akin Gump Arbitration Lecture.

[2] *Eco Oro Minerals Corp v The Republic of Colombia* (ICSID Case No.ARB/16/4), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, *https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf*.

compatibility of international arbitration and the protection and promotion of fundamental rights.

Yet, lest we forget, human rights law sets out the ground rules of international arbitration by prescribing a set of fair trial guarantees. Furthermore, arbitration is often an answer to concerns that national courts can be dysfunctional, corrupt, politically influenced and/or unqualified. Law firms and consultancies are sprouting human rights and environmental, social and governance (ESG) practices as their clients grapple with changing expectations, evolving regulations and the risks presented by social fragmentation and environmental crises, while courts and tribunals are hearing novel human rights arguments that push the boundaries of dispute resolution and corporate accountability.

In my experience, these opposing camps are largely, though of course not entirely, separate and siloed. The disconnect is exacerbated by the increasingly polarised views and binary choices to which we have become accustomed, and perhaps inured, more generally. We are used to dismissing or discounting the seemingly outrageous, exaggerated, or simply the diametrically opposed—whether in the political realm, the media landscape, the protest slogans or even *occasionally* in opposing counsel's correspondence and pleadings.

We would do well to direct our professional curiosity, analytical skills and legal creativity towards the uneasy and fast-changing relationship between international arbitration and human rights. I, for one, am sympathetic to many of the criticisms levelled at international arbitration, and these should inform and embolden our ongoing and future reform agenda, but I do not subscribe to the "tear it all down" view, not least because this tends not to be accompanied by any positive, viable alternative.

Instead, I see a path towards a more positive social and environmental role for international arbitration that requires:

- us to recognise human rights as a complex body of law in which specific expertise and experience are needed if advocates and adjudicators are to be effective, and outcomes are to be credible;
- a realistic world-view and pragmatic analysis of impacts on—and of—international arbitration. We must acknowledge states as primary human rights duty-bearers, without expecting them to operate perfectly. We must also understand the business responsibility to respect human rights, and that corporates and investors cannot expect rights and protections without obligations and accountability under international law; and
- us to appreciate that the stakes are high, and not only—or always—in financial terms. Good intentions will not themselves guard against serious unintended consequences.

As "forks in the road" go, this is not the easiest of the paths before us. But I believe it is the one we must take. Indeed, the journey has already begun. With that in mind, I first dwell on some of the criticisms of international arbitration from a human rights perspective and to consider the extent to which our professional community is responding. I will then share some thoughts about how we must go further to more fully recognise the opportunity before us and try to neutralise the

threat that we might unwittingly be part of humanity's biggest problems rather than part of their solutions.

II. Why is international arbitration perceived to be a threat to the enjoyment of human rights?

Condemnation comes from many serious sources. According to Alfred-Maurice de Zayas, the UN Independent Expert on the promotion of a democratic and equitable international order: "investors and transnational enterprises have invented new rules to suit their needs, rules that impinge on the regulatory space of States and disenfranchise the public".[3] Reporting to the UN General Assembly, de Zayas recommended that states abolish ISDS and replace it with an international investment court.[4] Similarly, Pope Francis, in a 2015 speech in Bolivia, criticised the negative impact of "free trade treaties" which, he said, "always tighten the belt of workers and the poor".[5]

More recently, in May 2020, the Columbia Center on Sustainable Investment called for an immediate moratorium on all investment treaty arbitrations and a permanent restriction on all arbitration claims related to measures taken to address the Covid-19 pandemic.[6]

And it is not just those outside of the arbitration world who are unsatisfied. For a consent-based system, the current disquiet amongst parties concerning the conduct and consequences of proceedings should be a cause for concern. Thus, rather than expecting the criticisms to melt away or continue without impact, let us look at the arguments advanced and see where we can learn from them.

1. Imbalance

ISDS is often perceived to be one-sided. Almost always—so the narrative holds—private investors successfully seek damages while states have limited scope for defence and counter-claims. However, in reality, tribunals have ordered compensation in favour of investors only in a minority of cases. According to the United Nations Conference on Trade and Development (UNCTAD), in all publicly-available concluded cases from 1987 to 2020, compensation was awarded to claimants in only 29% of cases. Respondent states prevailed in 37% of cases, with 20% being settled and the remainder discontinued or otherwise concluded without a compensation award, and that is without getting into the partial and delayed payment of compensation post-award.[7] In practice, ISDS is less one-sided than some detractors may think.

[3] Office of the High Commissioner at the United Nations Human Rights, "Mainstream human rights into trade agreements and WTO practice—UN expert urges in new report", 13 September 2016, *https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20473&LangID=E*.

[4] United Nations General Assembly, "Seventieth Session on the Promotion of a Democratic and Equitable International Order", 5 August 2015, para.60, *https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285*.

[5] *Time* Staff, "Read Pope Francis' Speech on the Poor and Indigenous Peoples", Time, 10 July 2015, *https://time.com/3952885/pope-francis-bolivia-poverty-speech-transcript/*.

[6] Columbia Center on Sustainable Investment, "Call for ISDS Moratorium During COVID-19 Crisis and Response", 6 May 2020, *https://ccsi.columbia.edu/content/call-isds-moratorium-during-covid-19-crisis-and-response*.

[7] United Nations Conference on Trade and Development, "International Investment Agreements Issues Note on Investor-State Dispute Settlement Cases: Facts and Figures", September 2021 (4), p.4, *https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf*.

As for counterclaims, it is true that many investment treaties allow claims only by investors. It is often impossible for states to raise human rights or environmental issues in counterclaims and to seek remedies for human rights breaches or environmental damage, but there are green shoots of reform in this area. For example, counterclaims were successful in two parallel International Centre for Settlement of Investment Disputes (ICSID) cases against Ecuador—*Burlington*,[8] and *Perenco*.[9] These cases concerned investments in oil blocks in the Ecuadorian Amazon region. Ecuador's environmental counterclaims were based on domestic environmental law and contractual obligations. Both tribunals found that the investors were liable for the costs of restoring the environment in the areas where the oil blocks were located. The *Burlington* tribunal awarded Ecuador US$41.5 million,[10] and the *Perenco* tribunal awarded US$54.5 million.[11]

In *Urbaser*,[12] which concerned a concession for water and sewage services in Argentina, the tribunal addressed a human rights counterclaim advanced by Argentina. The state claimed that the investor's failure to provide the necessary level of investment in the concession led to violations of the human right to water. The tribunal established that, as subjects of international law, corporations can also be subject to obligations under international law. Further, the tribunal explicitly recognised that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce".[13]

While the tribunal ultimately rejected Argentina's counterclaim on the merits, this case represents an unprecedented development in investor-state arbitration by accepting jurisdiction over a human rights counterclaim.

Without doubt, plenty remains to be done to make ISDS more balanced and to allow states to pursue human rights counterclaims. The relationship between states, investors and human rights is often complex. We do need to ensure that investor conduct adheres to international human rights and environmental norms and standards. But let's not forget, too, that states must meet their obligations in these areas. To assume—as some seem to—that their compliance will flow inevitably from a strengthened legal position is, I am afraid, wishful thinking.

2. Chilling effect

Following on from the above is the claim that ISDS has a chilling effect on human rights, even if the system, overall, is not one-sided. Take, for example, the observation of Dr Margaret Chain, former Director of the World Health

[8] *Burlington Resources Inc v The Republic of Ecuador* (ICSID Case No.ARB/08/5), Decision on Counter-Claims, 7 February 2017, *https://www.italaw.com/sites/default/files/case-documents/italaw8206.pdf*.

[9] *Perenco Ecuador Ltd v The Republic of Ecuador* (ICSID Case No.ARB/08/6), Award, 27 September 2019, *https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf*.

[10] *Burlington Resources Inc v The Republic of Ecuador* (ICSID Case No.ARB/08/5), Decision on Counter-Claims, 7 February 2017, p.468 para.1099, *https://www.italaw.com/sites/default/files/case-documents/italaw8206.pdf*.

[11] *Perenco Ecuador Ltd v The Republic of Ecuador* (ICSID Case No. ARB/08/6), Award, 27 September 2019, p.374, para.1023, *https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf*.

[12] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No.ARB/07/26), Award, 8 December 2016, *https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf*.

[13] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No.ARB/07/26), Award, 8 December 2016, p.317, para.1195, *https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf*.

Organisation, who has said that "one particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space".[14]

Indeed, various high-profile cases have highlighted these challenges. Tobacco control is a prominent example, an oft-cited instance being the notorious Philip Morris arbitration against Uruguay concerning the state's anti-smoking legislation. In that case, the tribunal ultimately ruled in favour of Uruguay.[15] However, there was almost certainly a temporary break on similar control measures in other states, and this is problematic.

Investment law is still young, in relative terms. Even if one accepts that most cases are decided in a boringly unremarkable and balanced way—duly respecting the public interest and a respondent state's right to regulate—the perceived risk that this might not happen in a future case can be enough to paralyse public decision-makers, or can be used to justify inaction. We have a surmountable problem of consistency and predictability, rather than an inherent flaw in concept. As it continues to mature, investment law's corpus of treaties and arbitral decisions must enable states—with confidence, and based on advice—to know what interventions and behaviour are, and are not, permissible. Outlying decisions cannot be entirely avoided, but they cannot be permitted to shake states' belief in the system and their willingness and ability to take reasonable regulatory action. It is, however, fair to say that the awards we are seeing these days do not always advance this cause.

3. The treaties

Climate change is increasingly recognised as a fundamental systemic threat to global security. As governments and COP-observers shifted their gaze from Glasgow to Egypt, campaigners warned that the Energy Charter Treaty (ECT) and other agreements with ISDS provisions are hindering the realisation of ambitious new climate commitments. "Withdraw or reform" has been the battle-cry.

Depriving all investors of protections against arbitrary and unfair government measures would be an odd way to pursue climate and social justice. Of course, the supermajors attract environmentalists' ire, but what of new green tech innovators who rely on an enabling regulatory environment, government subsidies, and protection against expropriation and their executives being locked up on sham charges? The better approach is to realign the ECT and our investment law structures to achieve compatibility with environmental and social justice. By adjusting the balance between the respective interests and legitimate expectations of investor and state, we can better reflect the evolving social contract.

To borrow a phrase from Dr Tarcisio Gazzini: "BITs are not necessarily treacherous legal products. As any other treaties … what really matters is their content, which obviously depends on the agendas, choices and concessions of the

[14] World Health Organization's address to the Sixty-Seventh World Health Assembly on "Health has an obligatory place on any post-2015 agenda", 19 April 2014, *https://www.who.int/director-general/speeches/detail/health-has-an-obligatory-place-on-any-post-2015-agenda*.

[15] *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No.ARB/10/7), Award, 8 July 2016, *https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf*.

parties".[16] This realignment work is underway with a new generation of bilateral investment treaties, only now being tested in tribunals. According to a study conducted by Diamond and Duggal,[17] 72% of the publicly available investment treaties concluded between 2018 and 2020 mention public health, environment, or regulatory autonomy in the preamble.

For example, the preamble of the Cape Verde-Hungary BIT, concluded in 2019, states that the parties seek:

> "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."[18]

The Morocco-Nigeria Bilateral Investment Treaty (BIT) is another good example.[19] Other new treaties include general exception provisions similar or identical to Article XX of the General Agreement on Tariffs and Trade (GATT),[20] which in certain circumstances can justify measures necessary to pursue certain specific policy goals, such as public health or the environment.

4. Lack of transparency

Another major feature of the criticism is the perception that arbitration is afflicted by a lack of transparency. It is common for the documents relating to the negotiation of investment treaties, and sometimes the text of the treaties themselves, not to be publicly available. This does impair popular participation in the conduct of public affairs. However, in recent years, it has become easier for practitioners, commentators and the public to access investment treaty texts, thanks to initiatives such as UNCTAD's Investment Policy Hub,[21] which hosts a large online collection.

Arbitration, of course, has its origins as a process for resolving commercial disputes between private parties in which the confidentiality of proceedings has been sacrosanct. This can become a problem if that dispute encompasses allegations of human rights violations or environmental degradation, in which society or particular victims might have a keen interest, or where—in the case of ISDS—the respondent is a state rather than a private party.

Some steps have been taken to address this lack of transparency. The most prominent initiative is the Mauritius Convention on Transparency in Treaty-based

[16] Tarcisio Gazzini, "Nigeria and Morocco Move Towards a 'New Generation' of Bilateral Investment Treaties", 8 May 2017, *EJIL Talk*, *https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/*.

[17] Nicholas J. Diamond and Kabir A.N. Duggal, "Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?" (2021) 53(1) *Case Western Reserve Journal of International Law* 152, *https://scholarlycommons.law.case.edu/jil/vol53/iss1/7/*.

[18] Preamble of the Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments 2019, *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5916/download*.

[19] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria 2016, Article 15, *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download*.

[20] The General Agreement on Tariffs and Trade 1947 Article XX, *https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm*.

[21] United Nations Conference on Trade and Development's Investment Policy Hub, *https://investmentpolicy.unctad.org/*.

Investor-State Arbitration (Mauritius Convention)[22] adopted in 2014. The rules provide, among other things, for public notice of investor-state disputes, public access to documents, third-party submissions and public hearings. While the Mauritius Convention so far has just 23 signatories and nine fully-committed state parties,[23] it is nevertheless significant and there is potential for still greater impact in years to come.

In a further tentative move towards transparency, arbitral institutions have been publishing more information about the cases they handle. ICSID, for example, has published more awards and orders in recent years and its proposed revision of its arbitration rules would promote still greater transparency. In a similar vein, the International Chamber of Commerce (ICC) has decided that for awards issued from 2019 onwards, the presumption is that the ICC Court may publish the award no less than two years after its notification, unless the parties object.[24]

5. Third-party human rights advocates

Another related issue, particularly in ISDS, is the limited role afforded to third-party human rights advocates, such as NGOs, human rights victims and local communities. While *amicus curiae* submissions have been used for a long time, it has often felt like tribunals have been merely going through the motions, with interveners unable to access the record of the arbitration and their submissions given limited weight.

This is a shame and a missed opportunity. Such filings can make a substantial contribution to a case and the legitimacy of its outcome, without unduly imposing a management burden upon the tribunal or costs and delay on the parties. Indeed, in other fora, *amici curiae* are playing this much greater role.[25]

I have, therefore, been glad to see that *amicus* submission in ISDS proceedings have gained more prominence in recent years. In 2020, a study from the National University of Singapore identified 141 third-party submissions in ISDS proceedings and found that, of the treaties allowing for third-party submissions, over 50% were concluded between 2015 and 2019.[26] Further, I welcome the thought being given

[22] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf*.

[23] Status on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, *https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status*.

[24] International Chamber of Commerce, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of the Arbitration", 1 January 2019, pp.7–8, *https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf*.

[25] For example, Omnia Strategy was pleased to represent two NGOs—the Corporate Justice Coalition and the International Commission of Jurists—in their intervention before the UK Supreme Court in *Vedanta* (*Vedanta Resources PLC v Lungowe* [2019] UKSC 20, *https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf*)—the landmark Business and Human Rights case in 2019. The case concerned parent company liability for human rights and environmental harms allegedly caused by overseas subsidiaries. Our clients' submission outlined the latest international standards, government implementation of those standards, and rulings from other jurisdictions in comparable cases. Having been in court for the hearing on jurisdiction, this was clearly a tremendously helpful contribution and was well-received by the court.

[26] National University of Singapore, "An Empirical Study on the Effectiveness of Non-Disputing State Party Submissions in ISDs", Spring 2020, *https://www.tradelab.org/single-post/2020/06/16/an-empirical-study-on-the-effectiveness-of-non-disputing-state-party-submissions-in-inves*.

to this issue, for example in the UNCITRAL Working Group III on ISDS reform,[27] and as part of the proposed amendment of the ICSID rules.[28]

6. Disproportionate awards

Critics of the ISDS system also often point to large financial awards in favour of private investors, which can have crippling effects on developing economies. Examples in recent years include the US$8.5 billion awarded to Conoco Phillips against Venezuela,[29] and the US$6.6 billion awarded to Process & Industrial Developments against Nigeria.[30] As mentioned above, only in a minority of cases have tribunals awarded compensation against states. But still, with awards being paid by states out of public funds, large awards can have devastating effects on the welfare of emerging economies and their ability to protect and promote economic and social rights. These sums can worsen the chilling effect touched upon above, with states deterred from adopting regulations for which they have a democratic mandate.

Tribunals should consider carefully whether large monetary awards are justified. The approach of many tribunals, in line with the "full reparation" standard,[31] has been to put the injured party in the situation in which it would have been in the absence of the breach. In particular, the Articles on State Responsibility require that compensation include "loss of profits insofar as it is established".[32]

However, we should question whether this approach is appropriate and sustainable given the public status of respondent states, notwithstanding the commercial nature of these disputes. Many domestic legal systems provide for different remedies in public law and private law cases. For example, public law employs the concept of "just satisfaction", which eschews a formulaic approach in favour of greater discretion for the court. Internationally, this features prominently in the jurisprudence of the European Court of Human Rights.[33] We should consider whether, in cases involving a state party or a public purpose, and particularly when large awards could cause substantial damage to a developing state or its population, just satisfaction—rather than full reparation—should guide tribunals' compensation awards.

[27] United Nations Conference on Trade and Development, "Remarks of the Chair of Working Group III at the 52nd Session of UNCITRAL", 16 July 2019, p.4, *https://uncitral.un.org/sites/uncitral.un.org/files/remarks_from_wg_iii_chair_at_the_52nd_session_of_uncitral.pdf*.

[28] International Centre for Settlement of Investment Disputes, "Proposals for Amendment of the ICSID Rules Working Paper #6", November 2021, Rule 67, *https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf*.

[29] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV and ConocoPhillips Co v Bolivarian Republic of Venezuela* (ICSID Case No.ARB/07/30), Award, 8 March 2019, *https://www.italaw.com/sites/default/files/case-documents/italaw10402.pdf*.

[30] *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm), *https://www.bailii.org/ew/cases/EWHC/Comm/2020/2379.html*.

[31] *Case concerning the Factory at Chorzow*, Judgment by the Permanent Court of International Justice, 13 September 1928, p.47, *https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf*. It says: "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".

[32] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries", 2001 art.36.2, *https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf*.

[33] European Convention on Human Rights art.41, *https://www.echr.coe.int/Documents/Convention_%20ENG.pdf*.

A related problem is the disparity between investors' ability to access litigation funding, including for sometimes spurious claims against states, and the limitations of the public purse. I have seen first-hand the frustration this causes governments and the difficulty of states securing third-party finance for such cases.[34]

This inequality of arms gives investors an advantage. You will not be surprised to hear me say that sometimes investors deploy attritional, gratuitously high-cost case strategies—drawing out proceedings to force settlement, including in connection with weak claims.

Arbitration was intended to be a quick, flexible and even alternative to domestic litigation. Too often, we find the pendulum has swung too far and now prejudices states, but tools to address claimants' resort to this type of strategy already exist. For example, the ICSID arbitration rules provide for an expedited procedure to dispose of manifestly unmeritorious claims at the preliminary stage. More broadly, tribunals have broad case management discretion and need not entertain the protraction of the proceedings, even if this means deciding against investors on procedural matters rather than "splitting the baby" in the time-honoured fashion.

7. Arbitrator human rights expertise and experience

Last but not least is the criticism that many arbitrators are commercial practitioners lacking the expertise and experience to handle human rights concerns. The commercial mindset of these arbitrators often does prioritise contractual and economic interests, perhaps typified by the "sole effects" doctrine when it comes to expropriation. In response, many have argued that for investor-state claims arbitration is simply unsuitable and should be replaced by a permanent investment court. The rationale is—in part—that to qualify to sit on such a court, would-be judges must meet selection criteria including human rights proficiency. It is an interesting and much-discussed proposal, though I will not weigh up the pros and cons in this article, however one thing is certain: creating such a body would be a massive undertaking at a time when ambition to create, grow or even maintain international bodies can be hard to come by, and the international rules-based order itself is so often under threat.

So, what of action that we should be taking now? For starters, we should expect to see human rights competence within arbitral tribunals. Parties—and certainly states—should be demanding this of their arbitrators, and ICSID and others have a role in facilitating this through both their appointments and specialist training.

As counsel, we sometimes talk of pro-state and pro-claimant arbitrators, but we should avoid slipping into the trap of seeking to strike—or even permitting—a balance between those with basic competence in human rights and those without. Instead, we should require cross-disciplinary experience, and human rights expertise should be as much a prerequisite for sitting as arbitrator on an investor-state case as professional ethics and knowledge of the relevant procedural rules. Already,

[34] Omnia Strategy was proud to assist the Government of The Gambia in receiving from the International Development Law Organization's Investment Support Programme for Least Developed Countries. This financial support was crucial for The Gambia, one of the poorest countries in Africa, to meet the legal costs of defending an investor-state claim. However, such examples are vanishingly scarce, and available pots of money are hard to come by.

this is increasingly required of lawyers to meet our clients' own obligations and stated values, and this trend seems set to continue.

III. Reform

In the face of such criticism, and with the steps towards reform already underway, what should we do? I am persuaded neither by calls to pull down ISDS in its entirety nor by those who would dismiss all criticism as some unwelcome liberal incursion. Rather than throwing the baby out with the bathwater, or sticking our heads in the sand, we should redouble reform efforts with the aim not just to make investor-state arbitration *compatible* with human rights, but also to pave the way for arbitration to become an effective forum to *promote and protect* human rights. This approach enjoys the support of the UN Working Group on Business and Human Rights. In a report in July 2021, the Working Group recommended reform to enable states to "ensure that all existing and future investment agreements are compatible with their international human rights obligations".[35]

1. A change in mindset

The first adjustment I recommend is a change in mindset. Investment treaty arbitration should no longer be seen as a self-contained regime—a law unto itself, isolated from the rest of international law. Other legal disciplines have a crucial part to play, including (but not only) international human rights and environmental law. We live in a complex and interconnected world and coherent and effective responses must be holistic and multi-disciplinary.

As previously mentioned, this shift is already finding expression in certain tribunals—such as in *Urbaser*[36]—and some new investment treaties—like the Cape Verde-Hungary,[37] and Morocco-Nigeria BITs.[38] For older treaties still in force, the parties could agree upon interpretative statements to guard against investment obligations undermining the effective protection of human rights. A joint statement could, for example, clarify how good faith regulations adopted to advance public health or the environment should not fall foul of prohibitions against unlawful expropriation.

What we still need, frankly, is for tribunals faithfully to give effect to the new bargain struck in these treaties. This does not always happen. There is a concern, in particular, that arbitrators intimately familiar with decisions made under old treaties are a little too comfortable importing this same analysis when considering new treaties. Even where the drafters of modern treaties have agreed to more sophisticated exceptions provisions, some tribunals are reducing host-state flexibility to a single line of defence apparently no stronger than before.

[35] United Nations General Assembly, Seventy-Sixth Session on Human rights-compatible international investment agreements, 27 July 2021, p.1, *https://undocs.org/A/76/238*.

[36] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No.ARB/07/26), Award, 8 December 2016, *https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf*.

[37] Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments 2019, *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5916/download*.

[38] Reciprocal Investment Promotion and protection agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria 2016 art.15, *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download*.

Tribunals are vulnerable to the charge that they are, in the words of Wolfgang Alschner: "rolling back State-driven change". He goes on to say that "we should talk less about a backlash against arbitration and more about an arbitral backlash".[39]

I do not for a moment imagine that any such backlash is intentional, or that arbitrators see themselves as undercover agents radically resisting change. I do, however, think it is entirely possible that some have not yet detected and reflected the tectonic shifts beneath our feet. And that, we know, is never a good thing.

2. "Sustainable investments" as a limitation to jurisdiction

A second possibility is to limit the jurisdiction of tribunals to "sustainable investments". One option would be to require investments to be registered with an agency of the host state before the protections of a relevant treaty can be activated. This is a common requirement in domestic legislation providing for investment protection, and could be replicated in investment treaties. The registration process could allow the host state to assess sustainability credentials and filter out investments that do not comply with human rights or environmental standards.

Another approach would be to reconsider how any given investment treaty defines a protected investment. These definitions could be enhanced—and made fit for purpose in today's world—by excluding investments that do not comply with human rights and environmental standards. Similarly, investors' protection could be made conditional upon satisfactory impact assessments and ongoing human rights and environmental due diligence, potentially including community engagement and transparency requirements. Indeed, we would not be starting from scratch. On the back of the 2011 UN Guiding Principles on Business and Human Rights,[40] mandatory corporate ESG risk management is already a feature of domestic law in France,[41] Norway[42] and Germany,[43] and the European Commission has now proposed similar legislation at the EU level.[44] This trend promises to be transformational, and the international investment law community should pay attention and look for areas of cross-over.

3. Counterclaims

A third option is to provide jurisdiction over counterclaims in investment treaties, including for these new human rights obligations of investors. It is no longer

[39] Twitter from Wolfgang Alschner (@w_alschner): "4) As more and more tribunals read new treaties like old ones and roll back state-driven change, we should talk less about a backlash against arbitration and more about an arbitral backlash", 15 September 2021, *https://twitter.com/w_alschner/status/1438242884793344004*.

[40] United Nations Human Rights, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, respect and Remedy' Framework 2011", *https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf*.

[41] Law 2017-399 of 27 March 2017 on the "Duty of Care of Parent Companies and Ordering Companies", *https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626*.

[42] Resolution to the Act on Business Transparency and Work on Fundamental Human Rights and Decent Working Conditions (the Transparency Act) of 10 June 2021, *https://stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2020-2021/vedtak-202021-176/*.

[43] Act on Corporate Due Diligence Obligations in Supply Chains of 16 July 2021, *https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=30DA36DA3C83E5C10FA473E27843A7CA.delivery1-replication?__blob=publicationFile&v=3*.

[44] European Commission's Sustainable Corporate Governance Initiative, *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en*.

controversial that investors have human rights responsibilities, and, as recognised in *Urbaser*,[45] that investment treaties can impose obligations on investors as well as bestowing rights. Various new investment treaties include references to the need for investors to comply with human rights, labour or environmental standards. Many of them frame these provisions as mere recommendations. However, a limited number of treaties stipulated that investors have a legal obligation to comply with these standards.

For example, the Economic Community of Western African States Supplementary Act on Common Investment Rules requires investors to uphold human rights and manage and operate their investments without breaching or circumventing human rights.[46] The Bangladesh-Denmark BIT expressly provides that if the host state "suffers from a loss, destruction of damages with regard to its public health or life or the environment" then the investor is obliged to compensate the host state.[47] We should continue to move in this direction, and I believe that we will, with counterclaims—and perhaps even newly initiated claims—pursued by states on human rights and environmental grounds.

4. Third-party funding

Finally, third-party funding can also play a role in promoting human rights in arbitration. While more balanced access is required, one should not discount the role of third-party funding in facilitating the right to access to justice. For claimants, funding can facilitate meritorious claims that might otherwise be out of reach owing to financial constraints. Funding respondents can also be impactful from a human rights perspective, enabling governments with limited resources to retain legal counsel and effectively defend a claim on behalf of the state and its people. The same is true for vulnerable groups and local communities who might become party to arbitration proceedings. To date, this has been of limited appeal to commercial funders as the financial incentive is not quite there, but this would change if counterclaims come to the fore. Meanwhile, those who measure "Return on Investment" in social and environmental impact, rather than in dollars, should take a closer look at investor-state respondents.

5. Innovation

Reforming and redirecting arbitration will take time, determination and creativity. Fortunately, our professional community is up to the task and already starting to create change. Consider, for instance, how arbitration could serve as a much-needed tool for addressing climate-change related disputes. The "Arbitration of Climate Change Related Dispute" task force created by the ICC Commission on Arbitration and ADR with the support of the ICC Commission on Environment and Energy

[45] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No.ARB/07/26), Award, 8 December 2016, *https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf*.

[46] Economic Community of West African States Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008 art.14(2), *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download*.

[47] Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the People's Republic of Bangladesh and the Kingdom of Denmark, 27 February 2013 art.2, *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5125/download*.

examined whether and how arbitration could be used to address climate change.[48] According to their report, the ICC is prepared and uniquely positioned to provide a forum for disputes relating to climate and the Sustainable Development Goals.[49]

Another interesting project has been developed by Human Rights at Sea, a UK-based NGO, with Shearman & Sterling.[50] Their project seeks to establish a standalone, institutional system of international arbitration—similar to ICSID—specifically tailored to the sensitivities and complexities of human rights at sea issues.

Another topic that has been hotly debated is the role that commercial arbitration can play in settling business and human rights disputes. In 2017, the UN Working Group on Business and Human Rights proposed that arbitration should be used as a binding mechanism to resolve such disputes.[51] In response, a team led by former International Court of Justice Judge Bruno Simma drafted the Hague Rules on Business and Human Rights Arbitration, which were launched in the Peace Palace in December 2019.[52]

The idea is that these specially designed arbitration rules, modelled on UNCITRAL rules, would then be applied by the existing arbitration institutions, with a major contribution of the initiative being to show how the main features of international arbitration may be used to embrace new fields of law, not least by introducing international enforceability to the sphere of human rights.

It will take time for the new Rules to become an established tool in the international arbitration toolkit. Some have expressed scepticism about the Rules' ability to have any impact at all, as they are consent-based but silent on how that consent should be established. Further remaining challenges also include funding and equality of arms, confidentiality versus transparency, and the participation of victims of human rights abuses.

Nevertheless, the seed has been planted and, while all of these exciting projects are in their infancy and thus untested, it is encouraging to see the arbitration community thinking of ways it can have a positive impact.

IV. Conclusion

What am I asking the arbitral community to take away from all of this? That ISDS remains an immensely useful tool, especially for developing countries, with

[48] ICC Arbitration and ADR Commission Report, "Resolving Climate Change Related Disputes through Arbitration and ADR", *https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/*.

[49] ICC Arbitration and ADR Commission Report, "Resolving Climate Change Related Disputes through Arbitration and ADR", para.75, *https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf*.

[50] The Human Rights at Sea Arbitration's website, *https://hrasarb.com/*.

[51] Jan Eijbouts and Robert Thomason presented their paper entitled "International Business and Human Rights" at a seminar at the Arbitration Institute of the Stockholm Chamber of Commerce on 23 March 2017. A summary can be found at *https://sccinstitute.com/about-the-scc/news/2017/new-business-and-human-rights-arbitration-rules-a-call-by-international-law-experts/* and *http://arbitrationblog.practicallaw.com/arbitration-a-new-forum-for-business-and-human-rights-disputes/*.

[52] Center for Legal Cooperation, "The Hague Rules on Business and Human Rights Arbitration", December 2109, *https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf*. Omnia Strategy provided input as a member of the drafting team's Sounding Board and one of Omnia's Partners spoke at the launch of the Hague Rules.

international investment directly creating more than 40 million jobs over the past two decades.[53]

However, this does not justify the serious negative impacts that ISDS can, in some circumstances, have on human rights. Without doubt, a narrow focus on protecting the economic rights of investors—and their lawyers—is unsustainable. Both in terms of our social and environment impacts, and our social licence to operate as practitioners, there are serious risks to which we must not be blind. Therein lies the two-fold existential threat.

But this is avoidable. Indeed, I am optimistic, and have no doubt that there are exciting opportunities: the prospect of better harnessing arbitration in support of universal enjoyment of human rights, and also the chance, by genuinely embracing human rights, to enhance our professional contribution and to be part of the solution to humanity's biggest challenges, rather than part of the problem.

[53] United States Council for International Business, "Bilateral Investment Treaties and Investor-State Dispute Resolution—Six key facts", available at *https://www.uscib.org/docs/ncs_key_messages.pdf*.