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SCHOLARLY ARTICLE

The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?

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Abstract

Investor–state dispute settlement (ISDS) has been heavily criticized from the perspective of human rights. However, the potential adverse human rights impacts of ISDS and the responsibilities of businesses to avoid causing or contributing to those impacts under the UN Guiding Principles on Business and Human Rights have yet to be spelled out. Although states are currently reforming ISDS, progress has been slow, and businesses have an independent responsibility to ensure that their operations do not harm human rights. Against this background, this article unpacks how businesses might contribute to three non-exhaustive examples of potential human rights impacts of ISDS: namely, the chilling effect on human rights regulation, crippling mega-awards and direct impacts on third-party rights. This article breaks new ground by exploring how human rights due diligence could be a useful tool for businesses to identify and address these impacts.

Keywords: Adverse human rights impacts; Due diligence; Guiding Principles on Business and Human Rights; International investment law; Investor–state dispute settlement

I. Introduction

Investor–state dispute settlement (ISDS)[1] is a mechanism by which foreign investors can take states to private arbitration when they consider that their rights under an investment treaty or contract have been breached. Whether or not human rights are directly invoked by the parties, the subject matter of investor–state disputes often raises human rights issues, as foreign investment projects frequently involve extraction of natural resources, privatized public services or other undertakings that impact society. While the problematic

[1] This article uses the umbrella term ISDS to refer to investment arbitration that takes place pursuant to investment treaties and contracts that contain typical standards including fair and equitable treatment, expropriation, full protection and security, non-discrimination, national treatment, etc. It is, therefore, the combination of the procedural dispute settlement mechanism of investment arbitration with the substantive protections that are upheld therein that is critiqued in this article. This article predominantly refers to investment treaties, but it has also been shown that investment contracts between states and foreign investors can be just as problematic where they provide for ISDS and, for example, contain stabilization clauses. See Federica Violi, 'Contracting in Land and Natural Resources: A Tale of Exclusion' (2021) 17 *International Journal of Law in Context* 145, 149; and Barnali Choudhury, 'Human Rights Provisions in International Investment Treaties and Investor–State Contracts' in Julian Scheu et al (eds), *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times* (Baden-Baden: Nomos, 2022) 94–97.

relationship between ISDS and human rights has been studied from various angles,[2] the idea that businesses may be causing or contributing to adverse human rights impacts by engaging with ISDS has not been explored. The UN Guiding Principles on Business and Human Rights (UNGPs), as a soft law instrument, allows for expansion and creativity in the project of holding businesses accountable for behaviour that contravenes human rights norms.[3] One of the challenges of the business and human rights project is to address behaviour that is not a violation of a law in a legalistic sense, but nevertheless can adversely impact human rights. An 'adverse human rights impact' under the UNGPs occurs when an action removes or reduces the ability of an individual to enjoy their human rights.[4] This standard captures a range of behaviour that affects human rights but is not necessarily illegal, such as financialization of housing, tax evasion and contribution to climate change.[5] This is an important feature of the UNGPs, because 'an individual liability model alone cannot fix the larger imbalances in the system of global governance'.[6] ISDS has been heavily criticized for a number of reasons, including its chilling effect on state human rights regulation,[7] how some awards may be crippling for respondent states,[8] and how the rights of investment-affected communities may be impacted but are rarely taken into account.[9] This article explores these criticisms as non-exhaustive examples of how ISDS can have adverse impacts on human rights.[10] While it is not illegal for a foreign investor to bring an arbitration case under an investment treaty, if doing so causes or contributes to adverse human rights impacts, then this enlivens a business's responsibilities under the UNGPs. This article therefore investigates whether a business could cause or contribute to adverse human rights impacts by engaging in ISDS, and how the process of human rights due diligence (HRDD) under the UNGPs could be used to identify and address such impacts.

The central argument of this article might seem counter-intuitive at first, as ISDS is typically presented as a procedural exercise whereby a foreign investor's rights are

[2] For an extended bibliography of human rights and international investment law, see Ursula Kriebaum, 'Human Rights and International Investment Arbitration' in Thomas Schiltz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 150. For a sample of more recent contributions, see also Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration' in Ilias Bantekas and Michael Ashley Stein (eds), *The Cambridge Companion to Business and Human Rights Law* (Cambridge: Cambridge University Press, 2021) 406; Choudhury, note 1; and Nicolas Bueno et al, 'Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses' (2023) 24 *The Journal of World Investment & Trade* 179.

[3] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) (UNGPs).

[4] OHCHR, 'The Corporate Responsibility to Respect Human Rights – An Interpretative Guide', HR/PUB/12/02 (2012), 5.

[5] David Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' (2019) 1 *University of Oxford Human Rights Hub Journal* 120.

[6] John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101:4 *American Journal of International Law* 819, 839.

[7] Kyla Tienhaara et al, 'Investor–State Dispute Settlement: Obstructing a Just Energy Transition' (2022) *Climate Policy* 1 (online).

[8] Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83:6 *The Modern Law Review* 1246.

[9] Nicolas M Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7 *Transnational Legal Theory* 383.

[10] The examples set out in this article were limited due to space constraints. The explored examples strike the author as the most conceptually direct and explicable adverse human rights impacts of ISDS. However, they are described as non-exhaustive because further examples, such as the diversion of public funds towards defending claims, also merit further research.

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confirmed by impartial arbitrators.[11] However, this image of ISDS obscures its systemic impact and the role that multinational corporations play in upholding and validating a system that constrains state regulatory power and prioritizes commercial rights and interests over human rights.[12] Although states themselves are under an obligation to ensure that their investment treaties are compatible with human rights[13] and some reform is underway,[14] businesses' human rights responsibilities exist independently of whether states are fulfilling their obligations.[15] It is therefore argued that moving away from a legalistic approach to the concept of human rights impacts under the UNGPs and nudging the boundaries of whether and how businesses can be considered to be causing or contributing to adverse human rights impacts is worth exploring as one avenue to confront the human rights-related issues of ISDS.[16]

This article begins in Section II with an exploration of the concept of 'adverse human rights impacts' under Pillar II of the UNGPs. Section III investigates how ISDS can adversely impact human rights, and to what extent investment treaty provisions, arbitration tribunals and reforms to the international investment law system address these impacts. Three examples of potential human rights impacts of ISDS are explored: regulatory chill, crippling mega-awards, and direct effects on the rights of third-party individuals. Section IV explores how HRDD could be used by businesses to identify, prevent and mitigate adverse human rights impacts of ISDS. Section V concludes.

II. The UNGPs and a Non-Legalistic Concept of Adverse Human Rights Impacts

Although work continues to be done showing that corporations can and perhaps should have direct human rights obligations under international law,[17] the dominant configuration of the current legal landscape with regard to business and human rights takes the form of soft law, based on 'social norms'.[18] This section considers how the responsibility not to contribute to adverse human rights impacts, and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations,[19] can be understood as requiring businesses to assess the potential adverse impacts of the decision to arbitrate a claim via ISDS.

[11] For example, Thomson Reuters Practical Law Glossary, 'Investor–State Dispute Settlement' (undated), https://uk.practicallaw.thomsonreuters.com/0-624-6147 (accessed 2 August 2023).

[12] For critical accounts of the systemic origins and impacts of ISDS, see, for example, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), and Nicolas Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford: Oxford University Press, 2021).

[13] UNGPs, note 3, Principle 9.

[14] UNCITRAL Working Group III: Investor–State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state (accessed 2 August 2023).

[15] UNGPs, note 3, Principle 11.

[16] The thesis of this article also raises several other questions, such as the responsibility of arbitrators and lawyers who engage with ISDS, and how investment tribunals would consider a claimant's assessment of the human rights impacts of its claim, which are important to examine in future research but beyond the scope of this article.

[17] Andrés Filipe López Latorre, 'In Defence of Direct Obligations for Businesses Under International Human Rights Law' (2020) 5:1 *Business and Human Rights Journal* 56.

[18] John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (12 June 2017), *HKS Faculty Research Working Paper Series RWP17-030*, https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights (accessed 2 August 2023) 13.

[19] UNGPs, note 3, Principle 13.

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UN Guiding Principles on Business and Human Rights

The UNGPs, developed by John Ruggie and unanimously endorsed by the Human Rights Council in 2011, set out the duties of states and responsibilities of businesses regarding human rights abuses linked to business enterprises. Although non-binding, over the past decade the 'protect, respect, remedy' framework underpinning the UNGPs has become widely recognized as an authoritative expression of state obligations and business responsibilities.[20] Indeed, states and businesses have 'accepted the UNGPs as an articulation of what should be, even if it does not reflect the law as it is now'.[21] More than 10 years on from their endorsement, the UNGPs continue to provide a common platform for the promotion of respect for human rights in a business context.[22] Despite this, they are no silver bullet for the ongoing harms caused by corporations worldwide, and many businesses remain unaware of or apathetic towards their responsibilities.[23] Pillar I of this framework articulates that states have a duty to protect against human rights abuses in their territory or jurisdiction, including those perpetrated by business enterprises. Pillar II sets out the responsibilities of businesses to respect internationally recognized human rights. Finally, Pillar III addresses the obligations and responsibilities of states and businesses to ensure that those affected by human rights abuses have access to an effective remedy.

Under Pillar II, the responsibility of businesses to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights impacts and address such impacts when they occur (Principle 13); prevent or mitigate adverse human rights impacts that are directly linked to their operations by their business relationships (Principle 13); and carry out HRDD addressing actual and potential human rights impacts (Principle 17). As set out below,[24] the potential adverse human rights impacts of ISDS are not caused by businesses alone, but through engagement in a mechanism set up by states and international organizations. It could therefore be argued that it is states, rather than businesses, that cause or contribute to any adverse human rights impacts arising from ISDS. Indeed, states are the creators and enforcers of the international investment law system and have the power and the obligation to change it to better support respect for human rights. However, this state obligation does not negate the contribution of businesses to the adverse human rights impacts by engaging with the system, contrary to their responsibility to respect human rights. The business responsibility to respect human rights is independent of state obligations, as businesses should respect internationally recognized human rights regardless of whether these have been enshrined in state legislation where the business is operating.[25]

The UNGPs are dynamic and have the capacity to 'push the development of new norms and practices that go beyond their initial content'.[26] Ruggie expressed hope that the UNGPs

[20] Ruggie, note 18; Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14:1 *Human Rights Law Review* 133.

[21] Tara Van Ho, 'Defining the Relationships: "Cause, Contribute, and Directly Linked To" in the UN Guiding Principles on Business and Human Rights' (2021) 43:4 *Human Rights Quarterly* 625, 630.

[22] UN Working Group on Businesses and Human Rights, 'Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade' (2021), A/HRC/47/39, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf (accessed 2 August 2023)

[23] Nicola Jägers, 'UN Guiding Principles at 10: Permeating Narratives or Yet Another Silo?' (2021) 6 *Business and Human Rights Journal* 198, 199–200.

[24] See Section III for a discussion of the terminology 'cause' and 'contribute to'.

[25] UNGPs, note 3, Principle 23.

[26] César Rodríguez-Garavito, 'Introduction: A Dialogue Across Divides in the Business and Human Rights Field' in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 3.

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'would trigger an iterative process of interaction among the three global governance systems, producing cumulative change over time'.[27] The following section explores the notion of adverse human rights impacts, making particular use of Birchall's doctrinal study of the term.

The Fullness of the Concept of Human Rights Impacts Under the UNGPs

The non-legalistic framework of the UNGPs leaves space for creativity and expansion when it comes to conceptualizing the human rights responsibilities of businesses. Although it certainly has drawbacks in relation to enforceability, the broad language of 'adverse human rights impacts' encompasses an expansive scope of human rights-related harms. Birchall has developed a formula for how the concept of adverse impacts could be used to address harmful actions taken by businesses that cannot be said to be human rights violations *per se*.[28] Birchall argues that:

> 'impacts' expands well beyond the scope of legal infractions to capture a much wider range of harms. Most importantly, it captures the harmful outcomes of non-violative, or legally-permitted, acts. Any business 'act' that impacts any 'individual' is covered insofar as the act causes the outcome of a 'removal or reduction' in rights enjoyment. The notion of 'reducing' rights enjoyment is particularly important for socio-economic rights, where corporate acts may quantitatively reduce access to a right through legal and ostensibly legitimate business practices.[29]

The extension of this formula to legally permitted acts is an important gap-filler in business and human rights discourse. There are many examples of times where corporate behaviour can negatively affect human rights outcomes even while the corporation is acting perfectly lawfully. Such situations include circumstances where the state does not adequately regulate activity to protect human rights; where the state is working to regulate well but there remain loopholes or unintended consequences that are difficult or impossible to fully eradicate through law; and where the business may not have an explicit legal duty imposed upon it, but its behaviour contravenes a human rights norm that only binds states. The focus on socio-economic rights is relevant to the impacts of ISDS set out below, such as the right to health and the multi-faceted effects of climate change.

The importance of including legally permitted acts in analysis of a corporation's human rights responsibilities is well illustrated by Birchall through the examples of housing, tax avoidance and carbon emissions.[30] When corporations invest in housing, this can contribute to extreme price inflation, effectively reducing the ability of lower-income individuals to access housing.[31] While such behaviour is not illegal, it impacts the affordability of housing, which is a criterion of the right to housing.[32] Similarly, corporate tax avoidance through use of legal loopholes and ambiguities leads to the loss of billions of dollars of state revenue, impacting particularly developing states' fiscal ability to fulfil socio-economic rights.[33]

[27] Ruggie, note 18, 15.
[28] Birchall, note 5, 120.
[29] Ibid, 122.
[30] Ibid.
[31] Ibid.
[32] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 4: The Right to Adequate Housing' (1991) E/C.12/1992/23, para 8(c).
[33] International Bar Association, 'Tax Abuses, Poverty and Human Rights' (October 2013), https://www.crop.org/Other-Resources/Reports-and-Surveys/Tax-Abuses-Poverty-and-Human-Rights.aspx (accessed

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Emission of greenhouse gases by private actors may in many cases not be strictly illegal, but the proven effects of greenhouse gases on climate change indisputably lead to adverse impacts on the enjoyment of human rights.[34] Birchall acknowledges that not all impacts should be prohibited in a binding sense, as this would not be feasible.[35] Rather, the concept of impacts 'provides an authoritative argumentative framework through which social understandings of what constitutes harmful business impacts upon human rights can evolve'.[36] While law is an imperfect mechanism through which to promote socio-economic rights, which require a robust policy response at a systemic level, conceptualizing the demonstrable impact that corporations can have on these rights as a matter of corporate human rights responsibility is one additional tool in the toolbox.

III. Investor–State Dispute Settlement and Adverse Human Rights Impacts

The link between ISDS and human rights is increasingly being made by civil society,[37] academia[38] and international organizations.[39] In 2021, the UN Working Group on the issue of human rights and transnational organizations and other business enterprises (UN Working Group) presented a report to the General Assembly highlighting the ways that international investment agreements are incompatible with the human rights obligations of states and businesses.[40] The report noted that investment agreements can constrain state capacity to regulate investors, give investors rights without imposing obligations to respect human rights, and can impair the ability of communities affected by investment projects to obtain remedy for human rights abuses by investors.[41] However, the particular ways that ISDS can cause or contribute to adverse human rights impacts within the meaning set out in Section II have yet to be spelled out.

Three Possible Human Rights Impacts of ISDS

Recalling the definition of adverse human rights impacts set out in Section II, the ways that the ability of individuals to enjoy their human rights can be removed or reduced by ISDS can be illustrated through three non-exhaustive examples; first, instances where states may be deterred from taking regulatory or administrative action aimed at fulfilling their human rights obligations due to the threat of ISDS (regulatory chill); second, instances where huge

2 August 2023); Phillip Alston and Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford: Oxford University Press, 2019).

[34] OHCHR, 'Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (undated), https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf (accessed 2 August 2023); UNEP, 'Climate Change and Human Rights' (December 2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf?sequence=2&amp%3BisAllowed= (accessed 2 August 2023).

[35] Birchall, note 5, 123.

[36] Ibid.

[37] For example, Kavaljit Singh and Burghard Ilge (eds), 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' (BothEnds, Madhyam and SOMO, 2016), https://www.somo.nl/rethinking-bilateral-investment-treaties/ (accessed 2 August 2023); Lora Verheecke et al, '10 ISDS Stories' (Friends of the Earth, TNI and CEO, 2019), https://10isdsstories.org/report/ (accessed 2 August 2023).

[38] See note 2.

[39] Working Group on Business and Human Rights, 'Human Rights-Compatible International Investment Agreements' A/76/238 (27 July 2021).

[40] Ibid.

[41] Ibid, para 3.

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compensation awards against states reduce their capacity to spend on fulfilling their human rights obligations such as on healthcare and education (crippling mega-awards); and third, instances where ISDS tribunals directly affect the rights of third parties, for example by effectively quashing judicial decisions that uphold the human rights of victims of corporate human rights abuses (third party rights). This section sets out how ISDS can cause adverse human rights impacts through these three examples.

Regulatory Chill

State human rights obligations and state obligations under investment treaties may conflict.[42] Although ISDS tribunals cannot force states to withdraw or change regulation or administrative measures, states may nevertheless be deterred from taking action aimed at fulfilling their human rights obligations due to the threat of becoming tied up in costly and lengthy ISDS proceedings.[43] Under the broad definition of adverse human rights impacts set out above, the absence of such action could be considered to remove or reduce the enjoyment of human rights for those affected. Adverse human rights impacts of ISDS can arise even where foreign investors have not abused human rights in the establishment or operation of their investment. For instance, in relation to general regulation, states regulate carbon emissions to address the human rights impacts of climate change. If emissions regulation is deterred by an ISDS claim, the human rights impacts of climate change are brought forward or increased. Second, in relation to particular permits, states are obliged to prevent, mitigate and redress human rights abuses of foreign investors operating in their territory. If a state is deterred from enforcing domestic law relating to human rights and the environment by the threat of ISDS, or holding foreign investors accountable for their human rights-abusing conduct, the enjoyment of individuals affected by investment projects such as mines of their human rights is removed or reduced.

Most investment treaties in force today contain vague standards such as fair and equitable treatment that can be interpreted by tribunals very broadly,[44] which 'may undermine States' ability to pursue legitimate public policy goals'.[45] States do not always cite human rights as the motivation behind potential measures relating to social or environmental welfare, meaning that the connection between ISDS cases and human rights can be obscured. However, some legislative areas that impact investors are particularly identifiable as protecting human rights. These areas – including health and safety, labour and employment rights, protection of the environment and cultural heritage and protection from discrimination – can be used as a 'surrogate for human rights obligations'.[46] Where this article refers to state legislative action to secure human rights outcomes, such action would typically consist of social and environmental laws or regulations.

[42] *Sempra v Argentina*, ICSID Case No. ARB/02/16 (28 September 2007) Award, para 332; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26 (8 December 2016) Award, para 716; Eric De Brabandere, 'Human Rights and International Investment Law' in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham: Edward Elgar, 2019) 642–644.

[43] Choudhury, note 1, 93; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement' (2018) 7:2 *Transnational Environmental Law* 229; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

[44] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29:2 *European Journal of International Law* 507, 518.

[45] Working Group on Business and Human Rights, note 39, para 20.

[46] Andrea Shemberg, 'Stabilization Clauses and Human Rights', *IFC/SRSG Research Paper* (27 May 2009).

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Although it is difficult to measure regulatory chill because it involves the absence of action, there is an increasing amount of empirical and anecdotal evidence showing that states do in fact refrain from taking action that may trigger ISDS proceedings in circumstances where that action would fulfil the state's human rights obligations.[47] The most striking example of this is that while the cases of *Philip Morris v Australia*[48] and *Philip Morris v Uruguay*[49] were pending, other states such as New Zealand were deterred from bringing in similar regulation of cigarette packaging, [50] while Canada had previously been deterred from doing so by two threats of ISDS under NAFTA.[51] It is known that tobacco products are addictive and seriously harmful, and that plain packaging measures encourage more people to quit smoking and fewer people to start.[52] If plain packaging measures are not implemented, more harm to health will occur than if they were implemented, meaning that the enjoyment of the right to health is reduced. Although the respondent states eventually won the tobacco cases, while the cases were pending, plain packaging measures were deterred or modified in other states.[53]

There is similar evidence that regulatory chill may occur or has already occurred in relation to state efforts to decarbonize their energy sources in response to human rights obligations associated with climate change.[54] Around 40% of all ICSID cases concern the energy sector or extractive industries.[55] Companies such as RWE and Uniper have started challenging government measures aimed at addressing climate change and fulfilling state obligations under the Paris Agreement.[56] In this context, members of the Dutch government have noted that 'further intervention in the coal sector entails major legal risks in the context of pending claims'.[57] The ISDS provisions in the Energy Charter Treaty (ECT) are causing states such as Denmark, New Zealand and France to set less ambitious climate

[47] Toby Landau, quoted in Jess Hill, 'ISDS: The Devil in the Trade Deal', Background Briefing, ABC Radio National Australia (26 July 2015), http://www.abc.net.au/radionational/programs/back groundbriefing/isds-the-devil-in-the-trade-deal/6634538 (accessed 2 August 2023).

[48] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

[49] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

[50] Tienhaara (2018), note 43, 238, citing Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge: Cambridge University Press, 2014) 114 andLukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect' (2014) 5:2 *European Journal of Risk Regulation* 242, 244; Eric Crosbie, Robert Eckford and Stella Bialous, 'Containing Diffusion: The Tobacco Industry's Multipronged Trade Strategy to Block Tobacco Standardised Packaging' (2019) 28:2 *Tobacco Control* 195, 204.

[51] Krzysztof Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71 *International Organization* 559, 568.

[52] WHO, 'Evidence Brief: Plain Packaging of Tobacco Products: Measures to Decrease Smoking Initiation and Increase Cessation' (2014).

[53] Including Chile, Guatemala, Honduras and Mexico: Jennifer L Tobin, 'The Social Cost of International Investment Agreements: The Case of Cigarette Packaging' (2018) 32 *Ethics & International Affairs* 153, 160–162.

[54] Baldon Avocats, 'Summary Note on Regulatory Chill' (2022), https://www.exitect.org/sites/default/files/2022-06/Summary_Note_on_Regulatory_Chill.pdf (accessed 2 August 2023) 25-31.

[55] Tienhaara, note 43, 231.

[56] *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.

[57] 'European Energy Groups Seek €4bn Damages Over Fossil Fuel Projects', *Financial Times* (21 February 2022), https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab (accessed 2 August 2023), citing Stef Blok et al, 'Schriftelijke antwoorden op vragen gesteld tijdens de eerste termijn van de begrotingsbehandeling van Economische Zaken en Klimaat 2022 op 3 november 2021', https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z19314&did=2021D41482 (accessed 2 August 2023).

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commitments, such as phasing out oil and gas exploration in 2050 rather than 2030 in order not to challenge existing rights.[58]

The regulatory chill hypothesis is not without its critics,[59] and there are studies indicating that the correlation between ISDS and the chilling of human rights and environmental regulation is not straightforward.[60] However, empirical studies are lagging behind recent developments in the realm of climate change, where states are increasingly recognizing that the ECT is having a chilling effect on the climate change measures required to meet state obligations under the Paris Agreement.[61] Investment dispute arbitrators have also acknowledged the existence of regulatory chill,[62] as have states.[63] Canada now routinely vets regulatory proposals on environmental protection for potential investment disputes, and government officials 'acknowledged that the financial risks of ISDS influence government decision-making'.[64] Investment arbitration lawyers have spoken openly about threatening arbitration as a 'lobbying tool' employed to 'change behaviour'.[65] Companies have lobbied for the continued inclusion of ISDS in trade and investment agreements due to its potential as a 'deterrent'.[66]

Crippling Mega Awards

The high actual and potential costs of ISDS mean that states may be forced to prioritize investment treaty obligations over human rights and environment obligations, leading to reduced human rights enjoyment for individuals and communities. The phenomenon of huge compensation awards being increasingly handed down by investment tribunals has come under scrutiny.[67] Tribunals routinely use the Discounted Cash Flow (DCF) method and

[58] Elizabeth Meager, 'Cop26 Targets Pushed Back Under Threat of Being Sued', *Capital Monitor* (14 January 2022, updated 2 August 2022), https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/ (accessed 2 August 2023).

[59] Stephan W Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24:5 *Journal of International Arbitration* 469; Nikos Lavranos, 'After Philip Morris II: The "Regulatory Chill" Argument Failed – Yet Again', *Kluwer Arbitration Blog* (18 August 2016), http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/ (accessed 2 August 2023); European Federation for Investment Law and Arbitration (EFILA), 'A Response to the Criticism Against ISDS' (17 May 2015), https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf (accessed 2 August 2023).

[60] Tarald Laudal Berge and Axel Berger, 'Do Investor–State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity' (2021) 12:1 *Journal of International Dispute Settlement* 1.

[61] Judith van de Hulsbeek, 'Minister Jetten: Nederland Stapt Uit Omstreden Energieverdrag', *NOS Nieuws* (18 October 2022), https://nos.nl/artikel/2448937-minister-jetten-nederland-stapt-uit-omstreden-energieverdrag (accessed 2 August 2023).

[62] *Bilcon of Delaware et al v The Government of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, para 51.

[63] UNCITRAL, Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) UN Doc A/CN.9/970 (9 April 2019), para 36.

[64] Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (26 September 2017), https://www.iisd.org/itn/en/2017/09/26/investment-treaties-internal-vetting-regulatory-proposals-case-study-from-canada-gus-van-harten-dayna-nadine-scott/ (accessed 2 August 2023).

[65] Peter Kirby of Fasken Martineau, quoted in Pia Eberhardt, 'The Zombie ISDS: Rebranded as ICS, Rights for Corporations to Sue States Refuse to Die' (Corporate Europe Observatory et al, 2016) 13.

[66] Arthur Nelsen, 'TTIP: Chevron Lobbied for Controversial Legal Right as "Environmental Deterrent"', *The Guardian* (26 April 2016), https://www.theguardian.com/environment/2016/apr/26/ttip-chevron-lobbied-for-controversial-legal-right-as-environmental-deterrent (accessed 2 August 2023).

[67] Jonathan Bonnitcha and Sarah Brewin, 'Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?' *IISD Policy Brief* (IISD, December 2020), https://www.iisd.org/publications/compensation-under-investment-treaties (accessed 2 August 2023); Paparinskis, note 8.

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compound interest to calculate damages, which takes into account the potential lost profits of an investment, while other factors such as 'equitable, moral or even legal considerations' play no role.[68] Scholars have identified several 'mega-awards', where the compensation amount reaches approximately 2 per cent of the GDP of the respondent state.[69] Compensation is not the only cost of investment arbitration. Defence of ISDS claims costs governments an average of US$4.7 million per case, and from 2017 the mean amount awarded to a successful claimant was US$315.5 million.[70] If a state is facing a huge compensation award (or multiple such awards, in many cases), yet it is already struggling to meet its human rights obligations due to poverty and lack of resources, then it may have to allocate funds away from budgetary areas such as health and sanitation, education and housing. Reduced spending in these areas is likely to have a negative impact on the realization of human rights, and thereby remove or reduce individuals' enjoyment of human rights. The potential for huge compensation awards also adds to the pressure on states not to trigger investor state arbitration, contributing to the regulatory chill issue set out above.

There are a number of examples of strikingly high compensation awards (the 'mega-awards') that have been handed down by arbitral tribunals, including over 50 known cases where the compensation awarded was over US$100 million, and eight cases where over US $1 billion was awarded.[71] Of these awards of over US$1 billion, all of the respondent states were from the Global South, with the exception only of Russia.[72] The ability of the respondent state to pay the compensation award is not taken into account by tribunals in the determination of the amount, even where paying the award would be crippling.[73] In the *Tethyan v Pakistan* case, the investor was awarded US$5.9 billion including interest, even though the investor had only invested US$220 million in the project. [74] The total amount owed by Pakistan to Tethyan was brought to US$11 billion by a commercial arbitration award.[75] The ICSID award alone almost equated to the US$6 billion bail-out loan that Pakistan negotiated with the IMF in 2018, in circumstances where the state is in a deepening economic crisis and has a crushing debt burden.[76] IISD's Jeffrey Sachs gave expert evidence that enforcement of the 'staggering' award would have 'devastating and dire consequences on Pakistan and its people'.[77] In March 2022, Pakistan came to a

[68] Toni Marzal, 'Critique of Valuation in the Calculation of Damages in Investor–State Dispute Settlement' in Geoff Gordon and Isabel Feichtner (eds), *Constitutions of Value: Law, Governance, and Political Ecology* (Abingdon: Routledge, 2023) 191.

[69] 'TCC v Pakistan (USD 5.84 billion), Occidental v Ecuador (USD 2.3 billion),10 Yukos v Russia (USD 50 billion), ConocoPhillips v Venezuela (USD 8.7 billion)', Toni Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2021) 22 *The Journal of World Investment & Trade* 249, 251.

[70] Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration' (BIICL 2021) 10, 28.

[71] Bonnitcha and Brewin, note 67, 1.

[72] Jonathan Bonnitcha and Sarah Brewin, 'Compensation Under Investment Treaties', *IISD Best Practices Series* (IISD, November 2020), https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf (accessed 2 August 2023), 38.

[73] Paparinskis, note 8, 1247; ibid, 31.

[74] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1 (12 June 2019), Award.

[75] *Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 (Comm).

[76] Caroline Davies, 'Pakistan IMF: Crucial Bailout Deal Eludes Negotiators', *BBC News* (10 February 2023), https://www.bbc.com/news/world-asia-64449037 (accessed 2 August 2023).

[77] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, United States District Court for the District of Columbia, Case No. 1:19-cv-02424 (TNM), Expert Report by Professor Jeffrey D Sachs, Director of the Centre for Sustainable Development at Columbia University, para 39.

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settlement agreement with Tethyan/Barrick Gold to restart the project,[78] reflecting the immense pressure placed on Pakistan by the arbitral awards.

In *ConocoPhillips v Venezuela*, an ICSID tribunal awarded US$8.7 billion plus interest to the investor for the expropriation of three oilfield investments, one year after awarding US $2 billion in a separate contract-based claim.[79] These awards also come in the context of Venezuela's ongoing economic crisis and widespread poverty, including a week-long country-wide blackout.[80] In *Unión Fenosa Gas v Egypt*, the claimant was awarded US $2.013 billion, plus interest, which was over 12% of Egypt's budget for health and education.[81]

Third-Party Rights

The third example of adverse impacts of ISDS concerns the potential for ISDS awards to directly affect the rights of individuals and communities. Although most claimants only seek monetary compensation in ISDS and this is all that is typically awarded, depending on the wording of the investment treaty or contract, tribunals may hand down awards that directly impact the human rights of non-parties to the arbitration. This is even though the rights of third parties are typically considered to be extraneous to investment disputes.[82] In at least one case,[83] an ISDS award has directly removed or reduced the enjoyment of individuals' right to remedy for human rights abuses. In *Chevron v Ecuador*, the tribunal declared that the Lago Agrio judgment of the Ecuadorian Court of Appeal was obtained by corruption and ordered that Ecuador 'remove the status of enforceability' of the award and preclude the plaintiffs from enforcing it, and to compensate Chevron more than US$70 million.[84] The Lago Agrio award was an award for US$9.5 billion in compensation for the devastating pollution of large swathes of the Amazon rainforest and ongoing health and environmental issues faced by the affected community.[85] This has left the affected community without an

[78] Barrick, 'Barrick, Pakistan and Balochistan Agree in Principle to Restart Reko Diq Project' (20 March 2022), https://www.barrick.com/English/news/news-details/2022/barrick-pakistan-and-balochistan-agree-in-principle-to-restart-reko-diq-project/default.aspx (accessed 2 August 2023).

[79] Gregg Coughlin, 'ICSID Tribunal Awards ConocoPhillios USD 8.7 Billion Plus Interest in Dispute With Venezuela', *IISD Investment Treaty News* (23 April 2019), https://www.iisd.org/itn/en/2019/04/23/icsid-tribunal-awards-conocophillips-usd-8-7-billion-plus-interest-dispute-venezuela-gregg-coughlin (accessed 2 August 2023).

[80] 'Venezuela's Slow Economic Recovery Leaves Poorest Behind', *BBC News* (4 February 2023), https://www.bbc.com/news/world-latin-america-64466400 (accessed 2 August 2023).

[81] Ahram Online, 'Egypt Implements 2018/19 Budget With More Expenditures on Health, Education' (1 July 2018), https://english.ahram.org.eg/NewsContent/3/12/305965/Business/Economy/Egypt-implements–budget-with-more-expenditures-on.aspx, (accessed 2 August 2023); Bonnitcha and Brewin (November 2020), note 72, 31.

[82] Nicolas M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 *American Journal of International Law Unbound* 16.

[83] It has also been suggested that investment arbitration could be used to challenge judgments of the Supreme Court of Korea ordering Japanese companies to compensate victims of forced labour during World War II. Vid Prislan, 'Challenging Domestic Judgments Through Investment Arbitration: Implications for the Forced Labour Litigation in Korea?' (2021) 11 *Asian Journal of International Law* 89.

[84] '[T]he Tribunal does not consider that it has the power to annul the Lago Agrio Judgment as regards its lack of "correctness" … It does, however, have the power to order the Respondent to take steps to secure that result'. *Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II)*, PCA Case No. 2009-23 (30 August 2018), Second Partial Award on Track II, paras 9.14, 10.13.

[85] For an overview of the complex facts and legal proceedings in this case, see Sarah Joseph, 'Protracted Lawfare: The Tale of Chevron Texaco in the Amazon' (2012) 3 *Journal of Human Rights and the Environment* 70 and Diane Desierto, 'From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investors' Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims' *EJIL:Talk!* (13 September 2018), https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/ (accessed 2 August 2023).

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effective remedy for the human rights abuses perpetrated by Chevron/Texaco.[86] This controversial award has been criticized as potentially exceeding the arbitrators' authority,[87] and is the only known case in which a tribunal has handed down this kind of decision. However, it is a notable case that demonstrates the possibility of such an outcome. The arbitrators and counsel involved in the case were high profile, highly respected arbitration practitioners whose reasoning should be considered as plausible, and attempts to set the award aside have failed.[88] It appears that Shell has pursued a similar strategy in Nigeria, although the case was discontinued and details are not public.[89] While this type of award may not occur frequently in the scheme of investment arbitration, businesses should be alive to the fact that seeking an order that prevents victims of human rights abuses from obtaining a remedy may cause adverse human rights impacts.

International Investment Law and Human Rights

It could be argued that concerns about the potential adverse impacts of ISDS are addressed by the ways that human rights are dealt with within the investment law system, for example through treaty provisions referring to human rights or tribunals taking human rights into account in their deliberations. Reform efforts are also currently being undertaken to address concerns about human rights and investment law. This section considers whether the adverse human rights impacts set out above are adequately mitigated by the current or potentially reformed features of investment law.

An increasing number of investment treaties refer to human rights or related areas in some way. If a treaty provides an avenue for parties and tribunals to bring human rights considerations into the determination of the dispute, this could potentially mitigate the adverse human rights impacts outlined above. For example, if a treaty carves out a human rights-related area such as health or the environment from its purview, then in theory a state should not be deterred from bringing such measures by the prospect of a foreign investor bringing arbitration under that treaty. The idea that treaties should contain binding obligations for investors has also been much discussed, although this academic discussion has yet to see much impact in practice.[90] Until recently, very few investment treaties contained references to human rights or related topics, whereas there are now over 50 investment treaties that do so.[91] A full review of these provisions and their impact is beyond the scope of this article. However, scholars have shown that human rights references in investment treaties tend to be weak and the vast majority of bilateral

[86] Lorenzo Pellegrini et al, 'International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case From the Ecuadorian Amazon' (2020) 23 *Journal of International Economic Law* 455, 464–465.

[87] Lise Johnson, 'Case Note: How Chevron v Ecuador is Pushing the Boundaries of Arbitral Authority', *IISD Investment Treaty News* (13 April 2012), https://www.iisd.org/itn/en/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority (accessed 2 August 2023).

[88] *The Republic of Ecuador v Chevron Corporation (USA) and Texaco Petroleum Company*, District Court of the Hague, C/09/570029 / HA ZA 19-268 (16 September 2020) and (28 June 2022).

[89] *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria (II)*, ICSID Case No. ARB/21/7; Lisa Bohmer, 'Shell Lodges ICSID Claim Against Nigeria', *IA Reporter* (11 February 2021), https://www.iareporter.com/articles/shell-lodges-icsid-claim-against-nigeria/ (accessed 2 August 2023).

[90] Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (London: Bloomsbury, 2021); Nicolas M Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 *Business and Human Rights Journal* 375; Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5 *Business and Human Rights Journal* 105.

[91] Choudhury, note 1, 97.

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investment treaties currently in force make no mention at all of human rights.[92] It has also been shown in practice that a carve-out does not necessarily protect host states from being held liable for regulating in carved-out areas.[93] Furthermore, the fragmented nature of the investment law regime often provides for ways around more stringent provisions. For example, foreign investors are often able to restructure through different jurisdictions to take advantage of a more favourable treaty.[94]

Along with the rise in investment treaties that refer to human rights or related issues, an increasing amount of tribunals are dealing directly with international human rights law in their deliberations.[95] Some of the harm set out above could potentially be mitigated if investment tribunals were well placed to take human rights considerations into account in determining disputes. While the increasing interaction between the human rights and investment law regimes is a positive development from the scenario where they were fragmented and human rights were considered irrelevant to investment arbitration,[96] significant problems with the human rights analysis in investment awards remain. Tribunals may present disputes as only concerning legal or procedural issues with the behaviour of the state, claiming that they are not passing judgment on a state's wish to protect human or environmental rights.[97] However, such a precise distinction between substantive and procedural complaints is artificial,[98] as ISDS awards that ignore human rights and environmental concerns nevertheless render state action on these issues 'significantly more costly'.[99]

Scholars have shown that when facing human rights issues, investment tribunals have not been inclined to delve into detailed human rights discussions, interpreting their jurisdiction narrowly to issues arising directly from the investment or considering that the parties have not sufficiently elaborated on the human rights issues raised.[100] In *Urbaser v Argentina*, the tribunal did engage in a relatively extensive discussion of the UNGPs and whether the investor had human rights obligations.[101] Although this award signals some

[92] Ibid; Abdurrahman Erol, 'A Noble Effort or Window Dressing? Computational Analysis of Human Rights-Related Investor Obligations in International Investment Agreements' (2022) 15:1 *Erasmus Law Review* 12.

[93] *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No. ARB/16/41 (9 September 2021), Decision on Jurisdiction, Liability and Quantum, paras 826–837; J Benton Heath, 'Eco Oro and the Twilight of Policy Exceptionalism', *IISD Investment Treaty News* (20 December 2021), https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism (accessed 2 August 2023).

[94] Anil Yilmaz, *The Nationality of Corporate Investors Under International Investment Law* (London: Bloomsbury, 2020).

[95] Silvia Steininger, 'What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 *Leiden Journal of International Law* 33.

[96] Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy et al (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009). But see critique of the 'widely accepted approach that seeks to fit international human rights law into the existing structure of ISDS', Surya Deva and Tara Van Ho, 'Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor–State Dispute Settlement Mechanism' (2023) 24 *Journal of World Investment and Trade* 398.

[97] *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No. ARB/17/14 (23 August 2022), Final Award, paras 10–11.

[98] 'The total lack of consideration of any environmental and health impact of the project in the Award is a deafening silence and one that does violence to the core of any environmental law', Alessandra Arcuri, 'On How the ECT Fuels the Fossil Fuel Economy: Rockhopper v Italy as a Case Study' (2023) 7:1 *Europe and the World: A Law Review* 1, 19.

[99] Toni Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award', *EJIL Talk!* (19 January 2023), https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award (accessed 2 August 2023).

[100] De Brabandere, note 42, 645; see also Barnali Choudhury, 'International Economic Law and Non-Economic Issues' (2020) 53 *Vanderbilt Journal of Transnational Law* 1; Lorenzo Cotula and Nicholas Perrone, 'Reforming Investor–State Dispute Settlement: What About Third-Party Rights?', *IIED* (February 2019), https://pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf (accessed 2 August 2023).

[101] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26 (8 December 2016) Award, paras 1187–1220.

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progress in tribunals' willingness to take human rights issues into account, the tribunal's analysis of human rights issues have been critiqued by human rights scholars as not being situated in wider human rights debates and lacking doctrinal support,[102] and not necessarily 'in line with the current conception of the human rights obligations of foreign investors'.[103] This aligns with concerns that 'investment tribunals are not well placed to consider human rights issues'.[104] Tribunal members tend to be experts in private international law or commercial law rather than public international law and international human rights law (IHRL)[105] and '[u]northodox and inconsistent interpretations of IHRL could be detrimental to the legitimacy of both' international investment law and IHRL.[106]

Where amicus curiae submissions of NGOs and community representatives raise human rights, such arguments are often rejected as irrelevant to the dispute.[107] For example, in *Biwater Gauff v Tanzania*, amici curiae submitted, among other things, that the responsibility of the investor should be 'assessed in the context of sustainable development and human rights', but the Tribunal only noted the submission as 'useful' and proceeded to ignore the human rights context in its legal analysis.[108] Doctrine on abuse of rights, unmeritorious and vexatious claims is also unlikely to prevent the adverse impacts of ISDS in many cases, as regulatory chill, mega-awards and impacts on the human rights of third parties can occur even when a claimant brings a valid claim.

The investment law regime has been under scrutiny for some time and there are several reform efforts underway to address the many critiques of its legitimacy. A full review of all reform efforts, as well as a discussion on whether reform of international investment law is desirable or would only serve to superficially legitimize a system that is fundamentally inequitable,[109] are beyond the scope of this article.[110] However, a brief look at current

[102] Markus Krajewski, 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice', *Yearbook on International Investment Law & Policy 2017* (Oxford: Oxford University Press, 2019), 177–193; Edward Guntrip, 'Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of Urbaser v. Argentina' (2018) 1 *Brill Open Law* 37.

[103] De Brabandere, note 42, 626–627.

[104] Choudhury, note 1, 118. Choudhury also suggests reforms to overcome these concerns: Choudhury, note 100, 63.

[105] Choudhury, note 1; Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 *Review of International Political Economy* 600, 615; Celine Tan, 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law' in Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Cheltenham: Edward Elgar, 2015) 167–168.

[106] Edward Guntrip, 'A Host State Human Rights Counterclaim in Investment Arbitration', Submission to Crowd-drafting: Designing a Human Rights-Compatible International Investment Agreement, Session at the United Nations Forum on Business and Human Rights 2018, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission7.pdf (accessed 2 August 2023), 2.

[107] Maxime Somda, 'Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A Smokescreen Against Third Parties?', *IISD* (23 April 2019), https://www.iisd.org/itn/en/2019/04/23/protecting-social-rights-using-the-amicus-curiae-procedure-in-investment-arbitration-a-smokescreen-against-third-parties-maxime-somda (accessed 2 August 2023).

[108] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July 2008) Award, para 392; Emma Aisbett et al, *Rethinking International Investment Governance: Principles for the 21st Century* (CCSI Books, 2018), https://scholarship.law.columbia.edu/sustainable_investment_books/1/ (accessed 2 August 2023) 63.

[109] 'The system reinvents itself each time criticisms come to the forefront and assumes a new form thereby quelling any incipient rebellion', Muthucumaraswamy Sornarajah, 'Resistance to Dominance in International Investment Law' in Julian Chaisse et al (eds), *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) 2145.

[110] For comprehensive discussion and critique of reforms to international investment law, see the following issues of Volume 24 of the *Journal of World Investment and Trade*: 'Critiques of Investment Arbitration Reform' edited by Gus Van Harten and Anil Yilmaz Vastardis and 'Reform and Retrenchment in International Investment Law' edited by James Thuo Gathii and Harrison Otieno Mbori.

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reform efforts shows that these reforms are predominantly procedural and do not address the core concerns that give rise to the human rights issues above. UNCITRAL Working Group III has been working since 2017 on possible reform of ISDS, and has produced several reports setting out draft provisions for structural reform, such as a permanent first instance and appeal investment court with full-time judges and non-structural reforms addressing arbitrator appointments, exhaustion of local remedies, frivolous claims, costs management, third-party funding and a multi-lateral instrument on ISDS reform.[111] The European Union (EU) has been a strong advocate for the development of a Multilateral Investment Court/Tribunal,[112] which would in principle address some concerns about ISDS such as the impartiality of arbitrators, lack of oversight via a substantive appeal process and non-transparency of proceedings. However, the Working Group has limited itself to discussing only procedural issues with ISDS, rather than substantive and human rights-related issues such as regulatory chill,[113] mega-awards[114] and the rights of third parties.[115]

The UN Working Group and several Special Rapporteurs have pointed out that purely procedural reforms fail to 'remedy the power imbalance between investors and states'.[116] Many scholars have advocated that fundamental and substantive reform that takes into account the human rights obligations of investors and states is needed to address the incompatibility of ISDS with international human rights law.[117] Without substantive changes to the regime, such as reforms that would meaningfully protect state regulatory space, prevent crippling mega-awards and ensure that the rights of non-parties are upheld, there remains the danger that current reform efforts will only replicate the adverse impacts set out above while providing a veneer of legitimacy to a harmful regime.

The UNGPs, ISDS and the Responsibility to Avoid Causing or Contributing to Adverse Human Rights Impacts

Businesses have a responsibility to avoid causing or contributing to adverse human rights impacts, and to prevent, mitigate and address impacts that are directly linked to their operations.[118] Based on the analysis above, a business's engagement with ISDS may cause or contribute to adverse human rights impacts by deterring states from taking human rights action, impairing a state's ability to fulfil its human rights obligations due to the cost of an extremely high compensation award or directly affecting the right of harmed individuals to

[111] UNCITRAL Working Group III, 'Investor–State Dispute Settlement Reform', https://uncitral.un.org/en/reformoptions (accessed 2 August 2023).

[112] European Commission, 'Multilateral Investment Court Project', https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en (accessed 2 August 2023).

[113] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)' (9 April 2019) A/CN.9/970, paras 26–27, 34–35.

[114] Jonathan Bonnitcha et al, 'Damages and ISDS Reform: Between Procedure and Substance' (2021) 14:2 *Journal of International Dispute Settlement* 213.

[115] The Working Group only briefly touches on participation of third parties. UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)' (9 April 2019) A/CN.9/970, paras 31–33.

[116] Surya Deva, Saad Alfarargi, David R Boyd, Juan Pablo Bohoslavsky, Victoria Lucia Tauli-Corpuz, Livingstone Sewanyana and Leo Heller, 'Letter to UNCITRAL Working Group III' (7 March 2019), https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf (accessed 2 August 2023).

[117] Alessandra Arcuri and Federica Violi, 'Human Rights and Investor–State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same?' (2019) 3 *Diritti umani e diritto internazionale, Rivista quadrimestrale* 579; Emma Aisbett et al, note 108, 62–63; Erasmus Institute for Public Knowledge, 'Open Letter on the Asymmetry of ISDS', https://www.eur.nl/en/news/erasmus-institute-public-knowledge (accessed 2 August 2023).

[118] UNGPs, note 3, Principle 13.

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a remedy. Businesses, therefore, have a responsibility to prevent, mitigate and redress such impacts.

The three examples of adverse human rights impacts set out above raise the question of causation, because the potential adverse impact is at some distance from the conduct of the business. There is no settled meaning of the terms 'cause', 'contribute to' and 'directly linked to' (referred to by Van Ho as 'participation terms') in the UNGPs.[119] Under the current guidance on how participation terms should be interpreted, the Office of the High Commissioner for Human Rights emphasizes that the term 'cause' means that a business's activities 'on their own' remove or reduce a person's ability to enjoy a human right.[120] The potential adverse human rights impacts of ISDS are not caused by businesses alone, but through engagement in a mechanism set up by states and international organizations. The harms set out in the first two examples also involve state actors making decisions to regulate and allocate funds towards fulfilling their human rights obligations, and the third example involves judicial interpretation. Engaging in harmful ISDS may, therefore, be considered to *contribute to* removing or reducing the ability of individuals to enjoy human rights, rather than *causing.* As argued by Birchall, the concept of adverse human rights impacts encompasses 'all acts that "reduce" rights enjoyment, including by contributing to that reduction', even where a state also has an obligation to fulfil the human rights in question.[121] Van Ho proposes that the participation terms be understood in relation to the power and independence of a business to facilitate or prevent abuse.[122] Although it is beyond the scope of this article to fully apply such a system to the concepts at hand,[123] it is useful to consider that businesses have total power over whether the ISDS mechanism is engaged with at all and once arbitration is underway, they exercise some control over the potential adverse impacts through how they engage with the arbitration.

In addition to being contrary to the responsibility to avoid causing or contributing to adverse human rights impacts, ignoring the potential adverse human rights impacts of ISDS is arguably contrary to the spirit of the UNGPs. The UNGPs state that businesses should, in all contexts, comply with internationally recognized human rights wherever they operate, seek ways to uphold human rights when faced with conflicting requirements, and treat human rights compliance as a legal compliance issue.[124] Further, businesses 'should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes'[125] – an exhortation that speaks to all three examples of human rights impacts set out above. The following section explores how HRDD and human rights impact assessment (HRIA) processes could be used to identify, prevent and mitigate potential human rights impacts arising from the decision to bring an ISDS claim.

[119] Van Ho, note 21, 627.

[120] OHCHR, 'Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (12 June 2017), https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf (accessed 2 August 2023) 5.

[121] Birchall, note 5, 131–132.

[122] Van Ho, note 21, 647–654.

[123] Further research could also shed light on whether businesses should use HRDD to investigate whether they are *directly linked to* adverse human rights impacts through business partners that engage in ISDS. This has been argued in relation to SLAPP suits. Jacob Bogart, 'Human Rights Due Diligence as a Tool to Counter the Rise of SLAPP Suits', *Opinio Juris* (23 February 2023), http://opiniojuris.org/2023/02/23/human-rights-due-diligence-as-a-tool-to-counter-the-rise-of-slapp-suits/ (accessed 2 August 2023).

[124] UNGPs, note 3, Principle 23.

[125] UNGPs, note 3, Commentary to Principle 11. See also Nora Mardirossian and Lise Johnson, 'Children's Cereal Company v Mexico & the Corporate Use of Investor–State Dispute Settlement to Influence Policymaking' (30 November 2021), https://ccsi.columbia.edu/news/childrens-cereal-company-v-mexico-corporate-use-investor-state-dispute-settlement-influence (accessed 2 August 2023).

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IV. How to Proceed? The Potential of Human Rights Due Diligence

Given that it is possible that ISDS can cause human rights impacts, businesses have a responsibility to identify, prevent, mitigate and account for these impacts.[126] According to the UNGPs, in order to fulfil this responsibility, businesses should conduct HRDD, which 'comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances … to meet its responsibility to respect human rights'[127] and includes 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[128] HRDD is by no means the best or the only tool for dealing with the human rights issues set out above. There are several problems with HRDD, including that the business has control over the process and can be selective as to what it considers to be relevant, and there is the danger of corporations using HRDD as a tick-box exercise to create the impression of human rights compliance while nothing changes.[129] However, HRDD is one component of the corporate responsibility question and considering HRDD in this context foregrounds the responsibility of businesses to manage their contribution to the adverse human rights impacts of ISDS. HRDD is increasingly being codified in national and regional laws[130] and is a prominent feature of the draft business and human rights treaty.[131] HRDD 'carries an inherent degree of flexibility'[132] and could be seen as 'a standard of conduct required by all persons within a business enterprise at all times in order to avoid risks to stakeholders'.[133] Arguably, the decision to bring an ISDS case falls under the broad concept of a 'business activity' and is therefore contemplated by the UNGPs.[134] Although this contention seems yet to be explored in practice, Shift[135] defines 'business activity' as '[e]verything that a company does in the course of fulfilling the strategy, purpose, objectives and decisions of the business. This may include activities such as … the activities of legal and financial functions'.[136] The following sections briefly set out an overview of what HRDD entails, and some considerations for how HRDD processes could include assessment of a business's engagement with ISDS. This section is not intended to give detailed instructions for how such an assessment should be carried out, but rather to introduce the idea as a starting point for further exploration.

[126] UNGPs, note 3, Principle 15(b).

[127] OHCHR, note 4, 6.

[128] UNGPs, note 3, Principle 17.

[129] For criticism of HRDD, see, e.g., Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36:2 *Leiden Journal of International Law* 389; Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20:1 *Melbourne Journal of International Law* 221.

[130] Duty of Vigilance Act 2017 (France), Child Labour Due Diligence Act 2019 (The Netherlands), Corporate Due Diligence in Supply Chains Act 2021 (Germany) and Transparency Act 2021 (Norway); Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. See Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 *Netherlands International Law Review* 455, 461.

[131] OEIGWG Chairmanship, 'Third Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', art 6.

[132] Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 *Business and Human Rights Journal* 93, 108.

[133] Robert McCorquodale and Cristina Blanco-Vizarreta, 'Guiding Principle 17: Human Rights Due Diligence' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham: Edward Elgar, 2023) 17.06.

[134] UNGPs, note 3, Principle 17(a).

[135] A leading centre of expertise on the UNGPs, formerly chaired by the late Professor John Ruggie.

[136] Shift and Mazars LLP, 'UN Guiding Principles Reporting Framework Glossary: Business Activities', https://www.ungpreporting.org/glossary/business-activities/ (accessed 2 August 2023).

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Assessing the Human Rights Impacts of ISDS

HRIA is defined as 'a process for identifying, understanding, assessing and addressing the adverse effects of the business project or activities on the human rights enjoyment of impacted rights-holders'.[137] Guidance on how HRDD and HRIA should be conducted has been developed by the Organisation for Economic Cooperation and Development[138] as well as national human rights institutions such as the Danish Institute for Human Rights[139] and organizations such as Shift[140] and BSR.[141] As the idea of including legal decisions such as the decision to bring an ISDS claim has not been part of the HRDD discussion to date, these documents do not provide any specific guidance on what this could look like. However, they do consider HRDD at the 'corporate' level, which could be considered to include decision-making of the corporation regarding taking legal action and formulating a case.[142] The corporate level HRIA identifies risks across all operations as well as the management system via desk research and interviews with key experts.[143]

The Colombia Centre for Sustainable Investment (CCSI) has developed the Four Pillar Framework designed to 'support companies in their efforts to align their practices with the Sustainable Development Goals'.[144] Standard 21 is the Litigation Standard, whereby companies are expected to 'prevent and eliminate litigation activities which limit access to justice to victims of human rights impacts and which chill public participation and speech of critical individuals or groups, including by exploiting power and resource asymmetries'.[145] While Standard 21 is predominantly focused on litigation strategies aimed at suppressing the activities of human rights defenders, CCSI also considers investment arbitration as potentially problematic, noting that businesses have used ISDS 'to challenge the adoption of robust regulation that would protect human rights or the environment while regulating the conduct of business'.[146]

CCSI provides guidance for companies in regard to how to ensure their litigation/arbitration strategies align with their human rights responsibilities, recommending the following steps: adopt a policy centred on a public commitment to responsible engagement with litigation and embed it into governance and management systems; assess actual and potential impacts; set targets and take action; establish and participate in effective grievance mechanisms and provide or enable remedy; and track and disclose performance against the standard.[147] The policy adopted should align with international human rights standards and require the company not to engage in legal action that stands in contrast with their human rights responsibilities.[148] Assessing the impacts involves reviewing the company's history to assess how its prior, current and prospective

[137] Danish Institute for Human Rights, 'Human Rights Impact Assessment: Guidance and Toolbox: Welcome and Introduction' (2020), https://www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox/introduction-human-rights-impact-assessment (accessed 2 August 2023) 7–8.

[138] OECD, 'Due Diligence Guidance for Responsible Business Conduct' (2018).

[139] Danish Institute for Human Rights, note 137.

[140] Shift, 'Human Rights Due Diligence in High-Risk Circumstances' (2015), https://shiftproject.org/resource/human-rights-due-diligence-in-high-risk-circumstances/ (accessed 2 August 2023).

[141] BSR, 'Conducting an Effective Human Rights Impact Assessment' (March 2013), http://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf (accessed 2 August 2023).

[142] Ibid, 18–19.

[143] Ibid.

[144] Nora Mardirossian et al, *Handbook for SDG-Aligned Food Companies: Four Pillar Framework Standards* (New York: CCSI, 2021) 6.

[145] Ibid, 235.

[146] Ibid, 236.

[147] Ibid, 238–240.

[148] Ibid, 238.

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litigation/arbitration activities align with their commitments and ensuring that the assessment is informed by human rights experts and the views of stakeholders potentially affected by such activities.[149] CCSI also specifically requires companies to fulfil the standard by refraining 'from filing amicus briefs, and investor–state dispute settlement claims that limit access to justice and remedy, including investor–state dispute settlement claims that challenge domestic judgments'.[150]

What Factors Would Indicate that an ISDS Claim May Have an Adverse Impact on Human Rights?

The three non-exhaustive examples of human rights impacts set out in Section III demonstrate that ISDS can have a range of impacts, which should be assessed on a case-by-case basis. In relation to the first example of regulatory chill, the business should assess whether the facts giving rise to the ISDS claim involve human rights or related issues, such as the environment, health, climate change, access to water and other essential services and land rights. If the impugned behaviour of the state was taken in pursuit of its human rights obligations, for example where the Netherlands moved to shut down its coal-fired power plants in response to a court decision setting out its human rights obligations in light of the Paris Agreement,[151] this may be a strong indication that ISDS could have a chilling effect on human rights-related action of the state. Indeed, the threat that ISDS poses to climate policy is becoming widely recognized,[152] including by the EU in its statements regarding withdrawal from the ECT.[153] As a starting point, it could, therefore, be considered that all potential ISDS cases challenging regulation aimed at limiting fossil fuel activities are likely to have adverse human rights impacts. Regarding the second impact of huge compensation awards, a business should consider whether the damages it is requesting may be crippling for the respondent state. While there is no 'established technical meaning' of this term in international law,[154] it could be considered whether the state is experiencing a social or economic crisis or is in severe debt that it is in danger of defaulting, and what is the proportion of the claimed amount to the actual sunk costs of the investment. An analogy could be made to tax abuse, where if 'a state claims that tax abuse has reduced its ability to ensure certain human rights provisions, this would constitute an authoritative argument that the act of tax abuse has contributed to reduced access to that right'.[155] Finally, the impacts of the third example could be assessed by considering whether the human rights of third parties may be affected by the relief requested by the claimant, such as individuals and communities affected by investment projects. If investment-affected individuals have been awarded compensation for harms against them and the ISDS claim seeks to render that decision invalid or unenforceable, then this could indicate that the claim could contribute to adverse human rights impacts.

The responsibility of a business to conduct HRDD and address the impacts identified, and its commercial interest in pursuing a claim, are likely to be at odds. Evidently, not every business

[149] Ibid.
[150] Ibid, 239.
[151] *State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (20 December 2019).
[152] Tienhaara, note 7.
[153] European Commission Directorate-General for Energy, 'European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty' (7 July 2023), https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en (accessed 2 August 2023).
[154] Paparinksis, note 8, 1249.
[155] Birchall, note 5, 132.

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is going to take up its responsibility to conduct HRDD at all, let alone if it is likely to show them that they should not bring an ISDS claim. This article sets out a business's responsibility under the UNGPs, but does not presume that this responsibility will be taken up seriously.[156] However, where the responsibility is taken up, the UNGPs note that businesses should 'draw on internal and/or independent external human rights expertise'[157] including 'individual experts in Government, academic, practitioner and civil society circles'[158] and potentially 'independent external human rights experts, consultancies, law firms and specialized NGOs'.[159] Involving experts external to the business may assist businesses to grapple with tricky questions of causation of harm and where the threshold for prevention and mitigation lies, and undertake a more impartial assessment.[160] It is also critical that HRDD should 'involve meaningful consultation with potentially affected groups and other relevant stakeholders',[161] as rights-holders 'provide crucial information' for identifying, preventing and mitigating human rights impacts.[162] The exercise of involving affected groups in HRDD processes concerning ISDS would be valuable in itself, given that communities affected by investment projects have very limited opportunities to participate in ISDS.[163]

Once the impacts have been identified, the business should take action to prevent, mitigate and address the impacts.[164] Impacts could be prevented or mitigated by not bringing the claim, through how the claim is articulated and the relief sought. If a claim may chill a human rights measure, for example as part of tobacco companies' strategy to prevent health-promoting plain packaging laws globally,[165] then arguably the impact should be prevented by not bringing the case. If the claim otherwise raises human rights issues, the claimant could, depending on the case, potentially mitigate the adverse impacts of regulatory chill by, for example, engaging human rights experts to set out the human rights issues in its memorial so that the tribunal is more likely to take them into account, and agreeing to the intervention and full access of amici curiae with human rights expertise. Adverse impacts of mega-awards could be prevented by ensuring that the damages or other relief sought are not crippling. For example, in *Tethyan v Pakistan*, the claimant could have avoided using the discounted cash flow method to calculate its claim.[166] If the relief sought by a claimant directly impacts the rights of third parties, such as the right of the community to access remedy for human rights abuses in the *Chevron v Ecuador* case, then arguably this impact should be prevented by not seeking this kind of relief. Foreign investors could also address the human rights impacts of ISDS at a systemic level by using their (considerable) leverage to advocate for reform of the international investment law system to better respect human rights and developing

[156] Others have applied themselves to this challenge. Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Abingdon: Routledge, 2016).

[157] UNGPs, note 3, Principle 18.

[158] OHCHR, note 4, 43.

[159] Claire Bright and Céline da Graça Pires, 'Guiding Principle 18: Human Rights Impact Assessments' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham: Edward Elgar, 2023) 18.15.

[160] Although it is not a given that such experts are not contributing to the problem. Surya Deva, 'From "Business or Human Rights" to "Business and Human Rights": What Next?' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenham: Edward Elgar, 2020) 5–6.

[161] UNGPs, note 3, Principle 18.

[162] Claire Bright and Céline da Graça Pires, note 159, 18.17.

[163] Perrone, note 9.

[164] UNGPs, note 3, Principle 13 and Commentary to Principle 19.

[165] Crosbie et al, note 50, 9.

[166] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1 (12 June 2019) Award, para 90.

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principles or guidance for best practices in engaging with ISDS in consultation with experts.

The Limitations of HRDD

There may still be some way to go before a corporate legal advisor would advise a company not to exercise its rights under an investment treaty due to adverse human rights impacts that do not involve a breach of any legal obligation and to which the business's contribution is difficult to quantify. However, even if the claimant conducted HRDD and decided that it should proceed with the claim, there is still value in the exercise of considering the potential human rights impacts of the claim and consulting with experts and stakeholders in this regard, particularly if the process and results of such an inquiry were transparent and accessible to the public. Admittedly, such a level of voluntary moral sensitivity and social responsibility is not often seen in businesses, particularly those that have the multinational character and financial capacity to engage in ISDS. There nevertheless remains value in pondering best case scenarios even if they are not practically likely in the immediate term, because human rights progress by opening up the legal imagination. Furthermore, articulating ideas of what can and should be considered adverse human rights impacts can lead to 'normalizing' this as a part of HRDD, starting with expression in non-binding guidance which over time may firm up into mandatory standards that corporate advisors will be required to follow.

It might be argued that the maxim *ubi jus ibi remedium* (where there is a right there is a remedy) renders the arguments set out in this article unfair. In other words, if a foreign investor's rights under an investment treaty have been breached in some way by the host state, that investor has a right to a remedy and it would be inequitable to argue that the business should choose to forgo this remedy on the basis of adverse human rights impacts. One might also wonder whether to do so would stand in contrast with the fiduciary duties of a company director and there is lack of clarity in this regard.[167] However, expectations of directors are changing, with company law increasingly making space for directors to consider social and environmental factors[168] and a proposal for the Corporate Sustainability Due Diligence Directive in the EU incorporated into the duty of care a duty to take human rights, climate change and environmental consequences into account in decision-making.[169] ISDS is not the only forum available to investors to seek a remedy when they have been wronged. Where their property rights have been violated, investors have access to domestic legal processes, and where applicable, human rights courts and mechanisms.[170] As set out by CCSI, businesses have a responsibility to consider human rights in all litigious activities, and so engagement in domestic litigation should also be assessed for adverse human rights impacts. However, domestic courts[171] are more accessible to communities affected by investment projects and do not generally suffer from the pitfalls

[167] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press, 2021) 370.

[168] Robert McCorquodale and Stuart Neely, 'Directors Duties and Human Rights Impacts: A Comparative Approach' (2022) 22 *Journal of Corporate Law Studies* 605.

[169] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, art 25.

[170] Aisbett et al, note 108, 117.

[171] A 2021 study found that 'evidence does not support the argument that investors need or turn to ISDS because they are unable to get justice before domestic courts'. Maria Rocha, Martin Dietrich Brauch and Tehtena Mebratu-Tsegaye, 'Advocates Say ISDS is Necessary Because Domestic Courts are 'Inadequate', but Claims and Decisions Don't Reveal Systemic Failings', *CCSI* (November 2021), https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont (accessed 2 August 2023) 4.

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of arbitral tribunals set out in Section III such as commercial outlook and potentially biased decision-makers.[172] Furthermore, the HRDD approach is nuanced in that businesses could consider how to prevent or mitigate adverse impacts through the formulation of their claim, rather than foregoing the claim altogether.

V. Conclusion: A Responsibility to Consider the Human Rights Impacts of Investment Arbitration?

This article has sought to demonstrate that ISDS can have adverse impacts on human rights and that businesses, therefore, have a responsibility to avoid causing or contributing to those impacts. It is argued that businesses could prevent and mitigate those impacts through assessing the potential impacts of their engagement with ISDS in HRDD processes including HRIA. The UNGPs are a framework that allows for expansion and creativity in the interpretation of business responsibility to respect human rights. The concept of 'adverse human rights impacts' does not strictly refer to the legalistic concept of human rights violations, but instead encompasses a broader range of harms where enjoyment of human rights is removed or reduced. This term captures corporate behaviour that is not necessarily illegal, but nevertheless contributes to adverse human rights impacts. Three non-exhaustive examples of potential adverse human rights impacts of ISDS include regulatory chill, crippling mega-awards and direct impacts on the rights of third parties. Where an ISDS claim deters a state from taking a measure that fulfils a human rights obligation, such as regulation to combat climate change or revocation of a permit due to human rights abuse by a foreign investor, the rights of individuals may be removed or reduced. Mega-awards, such as awards in the billions of dollars against a state that is in socio-economic crisis, may cripple a respondent state's ability to fulfil its human rights obligations. Where a claimant seeks an award that directly affects the rights of individuals, for example by preventing the enforcement of a domestic court ruling, the right to a remedy for human rights abuses may be adversely impacted. This situation is not mitigated by international investment law through treaty drafting, the reasoning of tribunals, or the reform process that is currently underway. HRDD is therefore put forward as one way that businesses could identify and act so as not to contribute to adverse human rights impacts through their engagement with ISDS. This could be achieved through undertaking a HRIA of the decision to initiate ISDS and how the claim is arbitrated, including consulting with human rights experts and stakeholders relevant to the dispute.

The arguments set out in this article are not without problems, notably the distance of causation between the business's engagement in ISDS and the eventual potential adverse human rights impacts, and the fact that states as the designers of the international investment law regime are better placed to prevent and mitigate such impacts. Some might also consider that too much is already expected of the business and human rights framework, which is not suited to solve all the world's problems. However, HRDD is already a well-supported idea in the business and human rights field and nudging its boundaries adds depth and nuance to the project of preventing corporate human rights abuses. The added value of this argument is the conceptualization of engagement with ISDS as something that potentially triggers adverse human rights impacts and that should at least give pause to company boardrooms. This idea is not aimed so much at miraculous change, but towards developing procedures that force businesses to think differently

[172] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', *Comparative Research in Law & Political Economy, Research Paper 41/2012*, https://digitalcommons.osgoode.yorku.ca/clpe/314/ (accessed 2 August 2023).

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about their impact on society and bring human rights in from the periphery. It is hoped that this article contributes to the project of putting language to the myriad ways that ISDS can harm human rights in a way that should be of concern to the businesses that make use of it.

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