



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
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Comments Regarding Proposed U.S.-Republic of Kenya Trade Agreement

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the Office of U.S. Trade Representative (USTR) with respect to a proposed U.S.-Republic of Kenya (Kenya) trade agreement.

CCSI, a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment, including related dispute resolution mechanisms, and the impacts such investment and dispute resolution can have on rights-compliant, inclusive sustainable development in the United States and abroad.

Our comments focus primarily on **investor-state arbitration**, commonly referred to as investor-state dispute settlement or **ISDS**. As explained below, ISDS should be abandoned as a failed experiment of the past. It imposes costs on governance, democratic institutions, and taxpayers that are not offset by demonstrated public benefits. Moreover, its increasingly controversial nature means that it can frustrate negotiations and ratification, threatening to stall progress on other important aspects of a potential agreement.

We also set forth **general principles to guide future elaboration of an investment chapter**. Investment provisions should: (1) strategically support cross-border investment that produces positive development outcomes for the U.S. and Kenya, (2) facilitate and support good governance of investment projects, and (3) enhance cooperation to solve challenges associated with cross-border investment that are not easily solved by any one country acting alone, such as efforts to combat races to the bottom in terms of environmental, labor, and other regulatory standards.

We thank you for your consideration of this submission.

Columbia Center on Sustainable Investment

Comments Regarding Proposed U.S.-Republic of Kenya Trade Agreement

As the U.S. prepares to embark on negotiations with Kenya with the objective of concluding a trade agreement, this comment will specifically focus on the role for and contours of any potential investment provisions or chapter that may be included in any resulting treaty.

The opportunity to provide input to this process is timely, as certain benefits to Kenya and other African states currently granted under the African Growth and Opportunities Act (AGOA), absent Congressional action, will expire in 2025. Thus a trade agreement between the U.S. and Kenya may take on additional importance in influencing and governing trade and investment between the two states. USTR has indicated that its “vision is to conclude an agreement with Kenya that can serve as a model for additional agreements in Africa, leading to a network of agreements that contribute to Africa’s regional integration objectives. In addition, our goal is to conclude an agreement that builds on the objectives of AGOA and will serve as an enduring foundation to expand U.S.-Africa trade and investment across the continent.”¹ Thus, while the focus of this comment is on an agreement with Kenya, it is noted that the upcoming negotiation and any agreement stemming from it may have greater systemic relevance and importance.

I. Overall Objectives

Our comment focuses on two main themes.

- **Investor-state arbitration**, commonly referred to as investor-state dispute settlement or **ISDS**. As explained below, ISDS should be abandoned as a failed experiment of the past. It imposes costs on governance, democratic institutions, and taxpayers that are not offset by demonstrated public benefits. Moreover, its increasingly controversial nature means that it can frustrate negotiations and ratification, threatening to stall progress on other important aspects of a potential agreement.
- **General principles to guide future elaboration of an investment chapter**. Reflecting guidance articulated by Congress in AGOA and other trade promotion legislation, as well as certain existing policies advanced by U.S. agencies to support cross-border investment, we articulate three principles that should guide the formulation of any investment provisions or chapter with Kenya, and illustrate what these principles can mean in practice. The three principles call on any agreement to (1) strategically support cross-border investment that produces positive development outcomes for the U.S. and Kenya, (2) facilitate and support good governance of investment projects, and (3) enhance cooperation to solve challenges associated with cross-border investment that are not

¹ Letter from Ambassador Robert E. Lighthizer to Speaker Nancy Pelosi, dated March 17, 2020 <https://ustr.gov/sites/default/files/2020_Kenya_FTA_Congressional_Notification_Letter-Pelosi.pdf>.

easily solved by any one country acting alone, such as efforts to combat races to the bottom in terms of environmental, labor, and other regulatory standards.

II. A U.S.-Kenya Trade Agreement Should Not Include ISDS²

ISDS, which the U.S. began including in trade and investment treaties in (some form) the 1980s, is now widely discredited. It exposes the U.S. and its treaty partners – and their taxpayers - to a range of potential costs, including costs of litigation and liability, and undue constraints on policy space. Moreover, there is no clear evidence that the costs of ISDS are offset by its hoped-for benefits including, in particular, increases in investment flows that support economic development of the treaty parties, or improvement in the quality of institutions governing investment.³

Consistent with the growing awareness of ISDS's flaws and unmet promises, the U.S. has substantially limited its scope in the United States-Mexico-Canada Agreement (USMCA). We respectfully submit that the U.S. should reaffirm and even expand upon its modern and reasoned rejection of ISDS by fully eliminating that mechanism from the scope of any U.S.-Kenya agreement.⁴ In its place, each treaty party, alone and together, can provide international investors and investments support through:

- efforts to ensure domestic institutions in the U.S. and Kenya are able to effectively offer recourse and relief for government misconduct;
- adopting appropriate mechanisms for state-state consultation and dispute settlement; and
- providing targeted risk insurance or other market-based mechanisms calibrated to promote investment while also avoiding moral hazard and undue risks to taxpayers.

Relying on these dispute settlement options, rather than ISDS, will result in meaningful investment provisions that are consistent with U.S. negotiating objectives.⁵

² If the U.S. retains any form of ISDS, including in the USMCA form, improvements must be made. For a list of suggested improvements please see Annex A to this submission.

³ Other objectives cited by treaty parties include depoliticization of disputes and advancement of the rule of law. For an overview of these objectives, and the lack of evidence showing that ISDS supports their achievement, see, e.g., Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence" (2018) *OECD Working Papers on International Investment*, No. 2018/01 <<https://doi.org/10.1787/e5f85c3d-en>>; Lise Johnson, Brooke Güven and Jesse Coleman, "Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?" (2017) *CCSI Blog Series* <<http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/>>.

⁴ If ISDS is maintained, it will be important to consider limitations on who/what can bring claims, for what causes of action, and for what remedies. Additional reforms are outlined in the Annex to this submission.

⁵ 19 U.S.C. § 4201(b)(4).

This section outlines in more detail the costs of ISDS and questions about its ability to deliver public benefits.

A. Costs of ISDS to U.S. Interests and Objectives

1. Cost: Undue limits on policy space and harm to domestic institutions

ISDS allows multinational enterprises to sue governments for conduct of any official or agency in any branch of government; ISDS enables foreign companies (or domestic companies with foreign shareholders) to challenge state and federal action and inaction, and measures or decisions taken by courts, legislatures, executive officials, and administrative officials or agencies. The scope of potential targets and range of measures that can be challenged is vast. Good faith is not a defense; nor is the fact that the measure was permitted by or even required under domestic statutes or the constitution. When the arbitration tribunals that decide these cases find governments to have breached their treaty obligations, they commonly order the government to pay the company claimants tens of millions of dollars, with awards not infrequently reaching into the hundreds of millions or even billions of dollars.

The fact that governments can be sued is not inherently problematic; indeed, it is essential for government accountability. U.S. law offers many tools for private litigants to bring claims against the government for wrongful conduct and harm. But citizens, legislators, and judicial decisionmakers strive to ensure substantive standards and procedural rules permitting those suits are carefully calibrated to strike a proper balance between public and private rights and interests, and ensure that the government has adequate flexibility to regulate in the public interest. That calibration is an ongoing exercise, evolving based on, among other things, new insights and information about the effects of different laws and policies; new challenges, issues, and technologies; and changes in societal preferences and priorities.

With ISDS, however, power of domestic individuals and institutions to establish (and continue to examine and adjust) the proper role of government in society is shifted to arbitral tribunals.⁶ And although Congress has directed negotiators to ensure that investment treaties do not grant foreign investors greater substantive rights than otherwise available under U.S. domestic law,⁷ tribunals are not effectively controlled by those constraints. When interpreting treaty language, ISDS tribunals are not bound by the intent of the parties to those treaties, or the U.S.'s desire to tether the international standards to domestic ones. Indeed, in some cases, tribunals have shown considerable willingness to demonstrate their freedom depart from the treaty parties' expressed positions.⁸ Moreover, the awards they issue are enforceable through international treaties⁹ in

⁶ Id.

⁷ 19 U.S.C. § 4201(b)(4).

⁸ See, e.g., cases discussed in Lise Johnson, *New Weaknesses: Despite a Major Win, Arbitration Decisions in 2014 Increase the U.S.'s Future Exposure to Litigation and Liability* (CCSI 2015), <http://ccsi.columbia.edu/files/2014/03/Brief-on-US-cases-Jan-14.pdf>.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3 (the New York Convention); Convention on the Settlement of Investment Disputes, March 18, 1965, 575 UNTS 159 (the

processes that are designed to limit the role of domestic courts and the relevance of domestic law and policy considerations.¹⁰ In his dissenting opinion in *BG Group plc v. Republic of Argentina*, Chief Justice John Roberts noted the extraordinary power held by arbitration tribunals to “review [a state’s] public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary...a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts.”¹¹

Even though language in U.S. treaties may look similar to standards familiar in U.S. law, the treaty provisions have been interpreted and applied to grant foreign investors greater protections than domestic law offers, creating a situation whereby covered foreign investors and foreign-owned businesses enjoy more extensive privileges than other individuals and entities in the U.S. For example, though language on indirect expropriation in modern U.S. investment treaties mirrors the *Penn Central* test the U.S. Supreme Court has developed to assess whether there has been a taking under the Fifth Amendment of the U.S. Constitution, the way that the investment treaty provision has been interpreted and applied is not tied to or limited by jurisprudence of U.S. courts. Consequently, the line that ISDS tribunals draw between legitimate regulatory conduct and expropriation requiring compensation can look considerably different – and less deferential to governments’ regulatory powers – than the line drawn under U.S. law.¹²

Similar comparisons could be made for other substantive standards included in U.S. investment treaties. The “fair and equitable treatment” standard, for example, is frequently interpreted and applied to condemn state behavior beyond the customary international law minimum standard of treatment, and empowers ISDS tribunals to engage in *Lochner*-type judicial scrutiny of economic regulations that have been largely discredited in the U.S. since the 1930s. Similarly, the non-discrimination standards in U.S. treaties have been interpreted to go well beyond prohibitions on discrimination under U.S. law,¹³ and can entail more searching scrutiny of agency action, and order significantly different remedies, than would be permitted in U.S. courts.¹⁴ Thus, the ISDS mechanism gives rise to difficult and systemic challenges in terms of implementing a “no greater

Washington Convention).

¹⁰ See generally Lise Johnson, Lisa Sachs and Jeffrey Sachs, “Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law” (May 2015) CCSI Policy Paper < <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf>>.

¹¹ 572 U.S. 25 (2014).

¹² U.S. jurisprudence on indirect expropriation has developed in a way to be relatively protective of government regulatory powers. Indirect or regulatory takings claims have a relatively low success rate. See, e.g., Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas, Making or Breaking the Takings Claim*, 102 Iowa Law Review 1847 (2017) (finding a 1.6% success rate for “*Lucas*-type” takings claims, in which the government is alleged to have wiped out all economically beneficial or productive use of land); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, William & Mary Law Review 35 (2016) (categorizing different types of takings cases, finding low-success rates across the different categories (i.e., *Lucas*, *Penn-Central*, exaction, and other), albeit with some variations, and concluding that the “courts almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings”); Adam R. Pomeroy, *Penn Central After 35 Years: A Three-Part Balancing Test or a One Strike Rule?*, 22 Federal Circuit Bar Journal 677, 692 (2013) (finding a roughly 12% success rate for cases decided on the merits; the success rate drops to 4% when considering cases that were dismissed on jurisdictional grounds).

¹³ *Id.*

¹⁴ *Id.* See also *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015.

rights” policy. This, in turn, places undue limits on domestic policy space and frustrates the role of domestic institutions in establishing and refining the legal norms that govern interactions between businesses, citizens, and the government. As Ambassador Lighthizer has stated:

We’ve had situations where real regulation which should be in place which is bipartisan, in everybody’s interest, has not been put in place because of fears of ISDS ... Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze. So a U.S. person goes into a court system, goes through the system and they’re stuck with what they get. A foreign national can do that and then at the end of the day say ‘I want three guys in London to say we’re going to overrule the entire US system.’¹⁵

While this comment focuses on how ISDS produces and magnifies tensions between U.S. law and international investment law under U.S. treaties, it is also important to note that similar concerns arise with respect to Kenya and other actual or potential treaty partners. When treaties are concluded that give certain actors – namely covered foreign investors – a dispute settlement mechanism and associated substantive protections that are removed from the domestic context and exceed those available to other actors in the country, those treaties create inequalities in terms of legal and political power. Those inequalities, in turn, can undermine the rule of law and trust in domestic institutions, outcomes that are contrary to and threaten to undermine U.S. support for and engagement with Kenya on broader governance and development initiatives.¹⁶

Other potential costs to the U.S. and its treaty counterparty, Kenya, include potentially crippling compensation awards and excessive costs of arbitration. In terms of the size of awards, tribunals have ordered governments sums that are shockingly disproportionate to both the amount of the investors’ investment, and the ability of the host state to pay the award. In one recent dispute against Pakistan, for instance, the tribunal awarded the investor nearly USD 6 billion as “compensation” for the government’s decision not to go ahead with a mining project that offered the country questionable domestic benefits. As a proportion of GDP, the award would be comparable to a USD 410 billion award against the United States.¹⁷

In terms of the costs of arbitration, an individual dispute, on average, now cost states more than USD 5 million in legal fees and costs to defend; some vastly exceed that sum. Australia recently spent approximately USD 16 million defending itself in a claim brought by Philip Morris.¹⁸ Despite the tribunal’s finding of abuse of process on the part of the claimant, Philip Morris was ordered to bear only 50% of the defense costs.¹⁹ This outcome is not uncommon - even when a

¹⁵ Ambassador Robert E. Lighthizer, Testimony before House Ways and Means Committee (March 21, 2018).

¹⁶ See Lise Johnson, Lisa Sachs, and Nathan Lobel, “Aligning International Investment Agreements with the Sustainable Development Goals,” 58 *Columbia Journal of Transnational Law* 101, 124-130 (2019).

¹⁷ This is based on US GDP in 2018, USD 20.54 trillion. The award against Pakistan represented roughly 2 percent of its GDP.

¹⁸ Jarrod Hepburn, “Final Costs Details are Released in Philip Morris v. Australia Following Request by IAREporter,” IAREporter (Mar. 21, 2019) <<https://www.iareporter.com/articles/final-costs-details-are-released-in-philip-morris-v-australia-following-request-by-iareporter/>>.

¹⁹ Id.

state prevails on the merits, tribunals commonly require them to bear (most of) those costs.²⁰ Tribunals alone cost on average USD 933,000 per case.²¹ Again, even when the state wins, it is commonly ordered by the tribunal to pay half of the arbitrators' fees.

This exposure to liability and arbitration costs is unjustified for both the United States and Kenya. In an era when governments must be particularly careful in terms of how they spend their public resources, and concerns about inequality heightened, such excessive transfers to individual companies, law firms, and individual arbitrators are unsupportable.

B. Purported Benefits of ISDS to U.S. Interests and Objectives

1. Impacts on investment flows and outcomes

The costs of ISDS, which subsidize the risk that U.S. firms incur in deciding to invest abroad (without any requirements as to how such subsidized investment may or must impact the U.S. economy or U.S. objectives), are clear and their benefits are less so. After more than ten years of scholarly and practical inquiry, there is no strong evidence that trade and investment agreements impact investment flows. The various empirical studies examining trends in foreign direct investment (FDI) flows establish no clear statistical relationship between signing a treaty and receiving increased investment,²² or in a states' ability to retain such investment.²³ Similarly, a survey of in-house counsel in large U.S. multinationals revealed that investment agreements do not play a significant role in foreign investment decisions.²⁴ Some of the largest cross-border investment flows take place in the absence of treaties, including between the U.S. and China, India, Brazil, and the United Kingdom.

While it is well-known that international investment – including FDI into the United States or by U.S. outward investors – can produce wide-ranging benefits (e.g., bringing jobs, technology, know-how, and capital across borders), it is also well-known that those positive effects do not always materialize.²⁵ Research indicates that in certain contexts FDI can crowd-out domestic

²⁰ Susan Frank, "Arbitration Costs: Myths and Realities in Investment Treaty Arbitration" (2019) Oxford University Press.

²¹ Matthew Hodgson and Alistair Campbell, 'Damages and Costs in Investment Treaty Arbitration Revisited' Allen & Overy (14 December 2017).

²² See, e.g., Axel Berger et al., "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the Black Box," 10 *International Economics and Economic Policy* 247 (2013); Karl Sauvant and Lisa Sachs, eds., *The Effect of Treaties on Foreign Direct Investments* (New York: Oxford University Press 2009).

²³ Maria Borgia, Perla Ibarlucea Flores, Monika Sztajerowska, "Drivers of divestment decisions of multinational enterprises: A cross-country firm-level perspective" (OECD Working Papers on international Investment 2019/03) <<https://doi.org/10.1787/5a376df4-en>> (finding that "the overall effect of IIAs appears mixed and relatively small" and that "these types of provisions do not appear to have a significant impact on the divestment probability of firms located in 41 selected OECD countries and G20 economies studied").

²⁴ Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," 51 *Virginia Journal of International Law* 397 (2010).

²⁵ Critically, not all studies on investment flows are of the same quality. Lauge N. Poulsen discusses a number of them and their results in Lauge N. Poulsen, "The Importance of BITs for Foreign Direct Investment and Political

firms,²⁶ contribute to inequality,²⁷ worsen problems of corruption,²⁸ facilitate tax evasion and avoidance,²⁹ and generate food insecurity.³⁰ FDI may also exacerbate environmental challenges and/or discourage environmental policymaking.³¹ Overall, depending on factors such as the type of investment, motive for investing overseas, the corporate culture of the investor, and the institutional and regulatory framework of the home and host countries, FDI can result in economic, environmental and social impacts that are either positive or negative for the host country and its citizens; and, when the outcomes are negative, the foreign origin of capital can make it difficult to secure redress for harms caused.³²

Risk Insurance: Revisiting the Evidence,” in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Policy* 2009-2010 (Oxford University Press, 2010) 539-574 (hereafter, Poulsen, “The Importance of BITs”). Most studies on the connection between investment treaties and investment flows have looked specifically at whether the conclusion of such treaties had an impact on flows of foreign direct investment (FDI) (as opposed to other types of international investment). As has been remarked by several scholars, these types of studies are problematic for a number of reasons, including that data on FDI flows is often inaccurate or inadequately disaggregated, and that, even if one were to find correlation between investment treaties and FDI flows, it would be extremely difficult to establish that the treaties actually caused those investments. (See, e.g., Lauge N. Poulsen, “The Importance of BITs”; Emma Aisbett, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus causation” in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 395; Jason W. Yackee, “Bilateral Investment Treaties, Credible Commitment, and The Rule of (International) Law: Do BITs promote foreign direct investment?” 42 *Law and Society Review* 805 (2008)).

²⁶ The literature on impacts is too voluminous to cite here. Nevertheless, some research highlighting challenges and complexities in terms of effects on the host country’s domestic industry include the following: Sarianna Lundan, Tilo Halaszovich and Fabienne Fortanier, “North-South FDI and Economic Growth in the Host Country: The Effects of Formal and Informal Institutional Distance” (*Investment Conference*, 2015) available at investmentconference.info/wp.../Lundan_North-South_FDI_and_economic_growth.pdf; Nigel Driffield and Dylan Hughes, “Foreign and Domestic Investment: Regional Development or Crowding Out?” 37 *Regional Studies* 277 (2003); George Chen, Yao Yao and Julien Malizard, “Does FDI Crowd In or Crowd Out Private Domestic Investment in China? The Effect of Entry Mode,” 61 *Economic Modelling* 409 (2017). Some of the negative impacts of FDI may be felt in the short term, with positive effects materializing over the longer term. See Jennifer W. Spencer, “The Impact of Multinational Enterprise Strategy on Indigenous Enterprises: Horizontal Spillovers and Crowding Out in Developing Countries,” 33 *Academy of Management Review* 341 (2008).

²⁷ Florence Jaumotte, Subir Lall and Chris Papageorgiou, “Rising Income Inequality: Technology or Trade and Financial Globalization?” (2008) IMF Working Papers 08/185.

²⁸ See, e.g., Hassen A. Wako, *FDI, Institutions, Economic Growth and Industrialization in Sub-Saharan Africa* (Vienna Investment Conference, 2016).

²⁹ See, e.g., Sung Jin Park, et al., “Is Foreign Direct Investment Effective from the Perspective of Tax Avoidance? An Analysis of Tax Avoidance Through the International Transfer Pricing Behaviors of Korean Corporations,” 32 *The Journal of Applied Business Research* 917 (2016).

³⁰ Andreea Michalache-O’Keef and Quan Li, “Modernization vs. Dependency Revisited: Effects of FDI on Food Security in Less Developed Countries,” 55 *International Studies Quarterly* 71 (2011); Mehdi Ben Slimane, Marilyne Huchet-Bourdon, Habib Zitouna, “The role of sectoral FDI in promoting agricultural production and improving food security,” 145 *International Economics* 50 (2015).

³¹ See, among others, Matthew Cole and Per Fredricksson, “Institutionalized Pollution Havens,” 68 *Ecological Economics* 1239 (2008); Matthew Cole, Robert Elliott and Per. Fredriksson, “Endogenous Pollution Havens: Does FDI Influence Environmental Regulations?” 108 *Scand. J. of Economics* 157 (2006); Kozluk and Timiliotis, “Do Environmental Policies Affect Global Value Chains?” (n 26); Yuquing Xing and Charles D. Kolstad, “Do Lax Environmental Regulations Attract Foreign Investment?” 21 *Environmental and Resource Economics* 1 (2002).

³² On this point, see, for example, Office of the UN High Commissioner for Human Rights, *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking* (The Laboratory for

Even less certain than outcomes for host countries is the extent to which this type of unconditional, subsidized risk insurance provided for through investment protections and ISDS benefits home countries. What benefits does the U.S. receive as a result of supporting outward investment through investment treaties and ISDS? While outward investment can improve the competitiveness of U.S. firms and result in increased capital income and tax revenues in the U.S., it can also result in outsourcing of jobs and tax structuring to decrease tax liabilities, and a race to the bottom in terms of labor or environmental protections or tax treatment to try to retain investment in the U.S.

Other U.S. initiatives to support outward investment into Kenya and other developing countries in Africa and elsewhere recognize these complexities related to the drivers of FDI, outcomes from FDI in home and host countries, and the advantages and disadvantages of different policy interventions for shaping investment flows and effects. The U.S. Development Finance Corporation (DFC), which provides U.S.-supported financial products, technical assistance, and political risk insurance to qualifying U.S. outward investors, has developed policies and tools to help ensure that it supports sustainable development in developing countries, does not cause loss of domestic jobs in the U.S., minimizes expenditure of U.S. tax revenue, and avoids creating moral hazard.³³

Given both the uncertain relationship between

- ISDS and investment flows, and
- investment flows and investment outcomes,

it is therefore critically important to move away from the blunt weapon of ISDS and seize this opportunity to design an investment agreement that is smart in the types of investment it seeks to promote, thoughtful in terms of the outcomes it seeks to achieve, and strategic in how it seeks to advance its aims. These criteria could be advanced through innovations in the text as well as institutions created by the agreement to support the treaty's effective implementation.³⁴

2. Impacts on domestic rule of law

In addition to promoting investment, ISDS has often been cited as a tool that can be used to improve the rule of law and good governance in treaty parties by holding governments

Advanced Research on the Global Economy and LSE Human Rights, 2016) 18; OHCHR, Progress Report of the United Nations High Commissioner for Human Rights on Legal Options and Practical Measures To Improve Access to Remedy for Victims of Business-Related Human Rights Abuses, UN doc A/HRC/29/39 (May 7, 2015), available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>.

³³ U.S. International Development Finance Corporation, *Eligibility Checklist* <<https://www.dfc.gov/what-we-offer-eligibility/eligibility-checklist>> (accessed April 24, 2020). These policies were developed by the DFC's predecessor, the Overseas Private Investment Corporation (OPIC). See Lise Johnson, Lisa Sachs, and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals," 58 *Columbia Journal of Transnational Law* 101, 116-122 (2019).

³⁴ Lise Johnson, Lisa Sachs, and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals," 58 *Columbia Journal of Transnational Law* 101, 122-124 (2019) (suggesting approaches that could be taken).

accountable for abuses of authority.³⁵ Yet, while theoretically plausible, evidence of these effects remains lacking.³⁶

Instead, studies examining the issue have found that BITs and ISDS claims may negatively affect investment governance and the rule of law.³⁷ One possible reason for this outcome is that ISDS may reduce governments' incentives to improve their domestic governance. To the extent that ISDS reduces risks for investors to invest overseas in jurisdictions with little respect for the rule of law, governments may not face pressures to improve their investment climate and ensure that there are rules and systems in place enabling constituents, generally, to hold the government to account.

A second reason why ISDS may negatively affect the rule of law and good governance at the domestic level is that it only amplifies the voice and interests of covered investors, potentially at the expense of other stakeholders.³⁸ It provides covered investors access to privileged and powerful protections and legal mechanisms to challenge state conduct that negatively impacts the rights or expectations of their investments. These enhanced protections and powers, in turn, threaten core aspects of the rule of law including principles of equality before the law, and efforts to ensure responsive, inclusive, participatory, and representative decision-making.³⁹

III. An Investment Chapter in a U.S.-Kenya Agreement can be an opportunity to advance U.S. and Kenyan objectives

The U.S. and Kenya should take this opportunity to build on progress made with the USMCA and to design investment provisions that: (1) promote and channel investments that contribute to development objectives within both treaty-parties, and withhold benefits from investments that do not achieve, or undermine, these goals, (2) foster responsible governance at the national level and (3) promote international cooperation to overcome transnational and collective action challenges, which will improve investment governance for both treaty parties.

³⁵ See, e.g., Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan Schill ed., 2010).

³⁶ See Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence" at 55-69 (2018) *OECD Working Papers on International Investment*, No. 2018/01 <<https://doi.org/10.1787/e5f85c3d-en>>.

³⁷ See, e.g., MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE (2018); see also, Gulnaz Sharafutdinova & Karen Dawisha, *The Escape from Institution-Building in a Globalized World: Lessons from Russia*, 15 PERSP. ON POL. 361 (2017) (discussing international arbitration, not limited to treaty-based arbitration).

³⁸ Lisa Sachs & Lise Johnson, "Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities" (April 2019) CCSI Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452136>.

³⁹ Id.

A. Protecting Investors and Investments that Advance Treaty-Party Objectives

A U.S.-Kenya agreement could be an opportunity to promote and advance the kinds of investment that lead to sustainable economic development in both treaty parties. In order to do so certain investment provisions should be refined, when compared to existing U.S. treaties, to ensure that treaty-based advantages are granted to investors meeting these criteria, and withheld from those that do not.

For example, definitions of “investor” and “investment” could be more closely aligned with the approach taken by the U.S. DFC, which provides an extensive list of eligibility requirements for U.S. outward investors to benefit from the government’s backing and support. These include equity requirements, the “track-record” of the investor, compliance with environmental and social policies and procedures throughout the life of the project, and ensuring that investors actually contribute to sustainable development (measured by growth, innovation and inclusion factors) based on scores of a performance measurement tool.⁴⁰

1. Promoting Economic Linkages with the Local Economy

Local content policies include those that govern investors and investments that aim to actively embed foreign investment in, and cause spillovers into and linkages with, the domestic economy.⁴¹ They can include: (1) basic local content requirements (e.g. measures that require or encourage investors/investments to use a certain amount or proportion of local resources (including labor, services, materials and parts) when producing goods or providing services; (2) export restraints: measures such as quantitative restrictions, export taxes, licenses, or other restraints used to require or encourage domestic value-addition; (3) joint venture requirements: measures requiring foreign investors to partner with domestic firms or other entities such as research institutions; (4) local management requirements: measures requiring nationals to be on boards or in senior management; (5) local equity requirements: measures that require firms to have a certain share of domestic ownership; (6) location requirements: measures requiring companies to locate their global or regional headquarters in the host state, or to establish operations in a particular location in the host state; and (7) technology transfer requirements.

When designed and implemented well, performance requirements can be used combat market failures and leverage FDI to maximize potential but otherwise unrealized benefits from FDI; some investment treaties, including ones concluded by the US in the past, however, have imposed broad and blanket bans on such measures. Rather than crafting investment treaties anticipatorily strip governments’ policy toolboxes, another approach would be to permit these measures while providing platforms for engagement and continued learning regarding their

⁴⁰ U.S. International Development Finance Corporation, *Eligibility Checklist* <<https://www.dfc.gov/what-we-offer-eligibility/eligibility-checklist>> (accessed April 24, 2020).

⁴¹ For a discussion of the points raised in this section see Lise Johnson, “Space for Local Content Policies and Strategies: A crucial time to revisit an old debate” (July 2016) <<https://academiccommons.columbia.edu/doi/10.7916/D8V40VRC>>

advantages and disadvantages in different contexts, for different stakeholders, and for different policy objectives.

B. Foster Responsible Governance at the National Level: Sustainability Impact Assessments

Given the intent for a U.S.-Kenya agreement to effect changes in investment flows and practices, the U.S. and Kenya should assess the projected environmental, social, economic, and human rights impacts of the investment agreement and the FDI that it is supporting. It will be important to assess impacts not only before negotiating and concluding the agreement, but also how any impacts may develop throughout the life of the agreement such that appropriate policy responses can be developed and implemented.

Such an impact assessment could also map legal gaps between the U.S. and Kenya both on the books and as enforced. U.S. trade and investment agreements have historically incorporated state-state cooperation in relevant sectors and issue areas to attempt to address any gaps that are found. However studies, including government audits, have found that these provisions are not always effective, or as effective as they could be.

C. Promote International Cooperation to Overcome Transnational and Collective Action Challenges

1. Overcoming Barriers to Lasting Investment: Opportunities for Exchange and Ombuds Offices

Barriers to investment are multi-faceted and may result from: explicit public policies (e.g. restrictions on investment in physical locations or sectors; tax treatment); softer barriers (e.g. legal, economic, or political uncertainty); information asymmetries; linguistic differences; geographical distances; and geographical features, among other factors.

Addressing these issues can be done unilaterally, but in many cases states can benefit from cooperation with other states. Such bilateral work may, for example, be facilitated through political dialogues and exchanges among private sector, government, civil society and other relevant actors. They can also be advanced through more institutional mechanisms, such as a treaty-based ombuds office that can help to address investment issues that may arise between the parties or with respect to specific investors or groups of investors. Various states have begun to implement treaty-based or more general investment ombuds or similar offices in order to address hurdles and problems surrounding investment projects or processes, or that arise after an investment project has been initiated but can threaten its survival.⁴² These mechanisms can be used to address complaints by investors about conduct by governments, as well as complaints by civil society organizations about conduct of governments or investors related to investment projects or policies.

⁴² E.g. Brazil, South Korea, Bosnia & Herzegovina, and Peru.

Through such an ombuds office or otherwise, states can jointly pursue tools and agreements related to risk mitigation and economic and political cooperation to attract and channel specific types of FDI. These can focus on helping investors better identify cross-border opportunities; raise concerns that allow policy-makers to understand and address investment impediments or barriers; or facilitate or provide technical, financial or other treatment (including on a special and differential treatment basis) to aid public investments in infrastructure that enable private sector investment. Moreover, these tools can be used to

2. Combatting Races to the Bottom and Protecting Jobs in U.S. States and Localities

As borders open, interjurisdictional competitions for capital can and do develop. This can, for example, put pressure on U.S. states and localities to offer even more generous investment incentives to retain or attract investment. These incentives can create strains on state and local budgets that are often not recouped from the benefits of the relevant investment for decades, or ever.

Investment treaties serve to protect capital moving across borders and can thus exacerbate the problems U.S. states and localities face. Prior to the USMCA, U.S. investment chapters and treaties did not discriminate between sectors of investment. The USMCA still does not discriminate between the quality of investment. These treaties are blunt instruments that could be refined in a U.S.-Kenya agreement in order to better protect U.S. states and localities from races to the bottom.

U.S. trade and investment agreements include provisions restricting certain types of regulatory incentives in order to prevent governments from engaging in races to the bottom in, for example, labor or environmental standards.⁴³ The USMCA also includes provisions that prohibit treaty-parties from failing to enforce anti-corruption laws as encouragement for trade and investment, and explicit requirements that Mexico strengthen protections for freedom of association and collective bargaining in its labor laws,⁴⁴ and also limit preferential treatment in the auto industry to cars built by workers making a specified wage.⁴⁵

⁴³ Lise Johnson & Lisa Sachs, *International Investment Agreements, 2013: A Review of Trends and New Approaches*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2012-2013*, 25, 39-41 (Andrea Bjorklund, ed., 2015). Due to a large stock of older and long-lived international investment agreements (IIAs), only a minority of all IIAs in force contain such labor, human rights, or environmental provisions. Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investment Law Sustainable Development and Responsible Business Conduct: A Fact Finding Survey 5* (OECD Working Papers 2014/1, 2014).

⁴⁴ USMCA, Annex 23-A.

⁴⁵ *Id.* Annex 4-B.

While these types of provisions have rarely been enforced,⁴⁶ the USMCA is an important precedent upon which the U.S. and Kenya could build. An agreement could work to advance and strengthen protections in a wider range of sectors and issues (including by limiting definition of covered investor and investments discussed above). It could also advance climate change mitigation and adaptation by imposing affirmative obligations to cooperation on identifying opportunities for investment in clean technologies; provide, on a special and differential basis, support for qualifying projects; or mandate corporate disclosures of GHGs in exchange for certain benefits or preferences. This kind of cooperation can also help the U.S. to meet its objectives regarding technology transfer contained in the United Nations Framework Convention for Climate Change and the Agreement on Trade Related Aspects of Intellectual Property Rights.⁴⁷

IV. Conclusion

The U.S. and its strategic partner, Kenya, have much to gain through a mutually advantageous trade agreement. In order to do so, it will be critical that the U.S. and Kenya embrace the opportunity to advance a vision of trade and investment that builds upon developments made in recent U.S. agreements, particularly with respect to any investment provisions or chapter. First and foremost, ISDS is an antiquated and controversial mechanism that is ill-suited to the U.S.'s investment objectives. Any investment provisions contained in a U.S.-Kenya agreement should align with a principled approach that (1) promotes and channels investments that contribute to development objectives within both treaty-parties, and withhold benefits from investments that do not achieve, or undermine, these goals, (2) fosters responsible governance at the national level and (3) promotes international cooperation to overcome transnational and collective action challenges, which will improve investment governance for both treaty parties. Such an agreement would be a worthwhile model to advance U.S., and indeed global, investment and development opportunities.

⁴⁶ Even when private parties raise allegations of breach through treaty-based complaint mechanisms, the treaty-parties have almost always declined to engage in formal dispute settlement. Only one labor complaint of the more than 40 raised under NAFTA's labor side agreement and other U.S. trade agreement has reached the dispute settlement phase. Franz Christian Ebert & Pedro A. Villarreal, *The Renegotiated "NAFTA": What Is In It for Labor Rights?* (EJIL: Talk! October 11, 2018).

⁴⁷ Article 66.2 TRIPS.

**ANNEX A:
IF ANY FORM OF ISDS IS RETAINED IN A U.S.-KENYA AGREEMENT,
IMPROVEMENTS MUST BE MADE**

While the U.S.-Mexico relationship in the USMCA made improvements on the investment protections and ISDS mechanism contained in earlier U.S. trade and investment agreements detailed above, there is scope for additional improvements to the extent any form of ISDS provision is retained in a U.S.-Kenya agreement.

Recognizing and safeguarding the rights and interests of non-parties

Disputes between two litigating parties often impact the rights and interests of those not party to the litigation or arbitration. Non-party interests and rights may arise, and have arisen, in ISDS on the basis of a variety of relationships, including: creditors of ISDS claimants;⁴⁸ municipal jurisdictions with interests in land or contracts that are at issue in ISDS cases;⁴⁹ communities impacted by the investment (particularly those contesting the investment via domestic processes);⁵⁰ individuals with competing claims to property in interest;⁵¹ and adverse parties in domestic litigation;⁵² among others. The rights and interests of these non-parties may be triggered in different ways, including: where underlying issues are being heard in different fora (one of which is ISDS);⁵³ when investors challenge domestic court processes or outcomes;⁵⁴ disputes seeking interim or injunctive relief;⁵⁵ among others.

The arbitration rules that are provided for in U.S. trade and investment agreements, including in the USMCA, contain no protections for interested and affected non-parties, even though the litigation positions adopted in and outcomes of ISDS disputes frequently impact the rights and interests of other natural and legal persons.⁵⁶ Under U.S. investment agreements, the only avenue

⁴⁸ *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9 (Decision on Jurisdiction and Liability, 2015)

⁴⁹ *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13 (Award, 2015).

⁵⁰ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2 (Award, 2016; Joint Motion for Stay of the Pending Completion of Settlement Agreement, 2018).

⁵¹ *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

⁵² *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 (Final Award, 2017); *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

⁵³ *TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America*, ICSID Case No. ARB/16/21 (Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 2017); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2 (Award, 2016; Joint Motion for Stay of the Pending Completion of Settlement Agreement, 2018).

⁵⁴ *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 (Final Award, 2017); *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

⁵⁵ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

⁵⁶ See e.g. CCSI, IIED, and IISD, “Third-Party Rights in Investor-State Dispute Settlement: Options for Reform” (Submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019)

for third-parties to seek to provide input into an ISDS proceeding is as *amicus curiae*, which is not intended to address the rights or interests of the *amicus*, but to assist the tribunal in its determination of the rights of the parties to the dispute. Moreover, among other deficiencies associated with the *amicus* mechanism, the tribunal has the discretion to determine whether to accept applications to provide input as *amicus*.⁵⁷

Of course, third parties are impacted by proceedings in U.S. domestic courts. As in U.S. treaty practice, U.S. federal and state courts grant participation of *amici* to assist courts in their work. However, in stark contrast to the approach under treaties, those U.S. courts also provide for relatively broad standards of intervention of third parties in certain contexts where the rights of those parties are at stake or stand to be affected by the outcome of a proceeding. The U.S. Federal Rules of Civil Procedure (1) provide a mechanism for mandatory or permissive joinder by interested or affected non-parties, and (2) require dismissal of cases when a non-party's rights will be affected by the dispute resolution proceedings but the non-party cannot join those cases.⁵⁸

We thus urge the U.S. to address this issue within a U.S.-Kenya agreement (and subsequent U.S. treaties) to ensure fairness to non-parties. Specifically, there should at a minimum be a rule mandating dismissal of claims or cases in which (1) the rights or interests of non-parties will be affected by the arbitration, and (2) those non-parties are not willing or able to join the arbitration as parties.⁵⁹

Transparency of ISDS Disputes, Mediation, and Other Settlements

Article 29 of the 2012 U.S. Model Bilateral Investment Treaty, and Article 14.D.8 of the USMCA, facilitate the public's ability to access filings and to view hearings. We agree that public access to all information related to contract and treaty-based ISDS disputes, particularly to information that may impact the rights and interests of non-parties to the dispute, is critically important in the context of democratic accountability and good governance. We take this opportunity to urge the U.S. to exercise its leadership in arbitral transparency by ratifying and acceding to the Mauritius Convention on Transparency.⁶⁰

We note that, in strong contrast to the transparency afforded arbitration processes and awards under U.S. treaties, the U.S. does address transparency surrounding the settlement of ISDS disputes, including settlement agreements arising out of mediation or other alternative dispute resolution. While settlements between parties can be positive outcomes, saving parties time and expenses, and potentially doing much to retain FDI in the host-country, when a government is a

<http://ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-participation-en.pdf> (describing the ways in which third-party rights are impacted by ISDS disputes and possible reform options).

⁵⁷For a discussion of the natural and limitations of the *amicus curiae* mechanism, see *id.* at pp. 5-6.

⁵⁸ US Fed. R. Civ. Proc. R. 19(a) & (b).

⁵⁹ See e.g. CCSI, IIED, and IISD, "Third-Party Rights in Investor-State Dispute Settlement: Options for Reform" (Submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019).

<http://ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-participation-en.pdf>

⁶⁰ United States Convention on Transparency in Treaty-based Investor-State Arbitration, Oct. 18, 2017 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXII-3&chapter=22&clang=en>.

party to such a settlement they can raise threats to democratic accountability, good governance, and the rule of law.⁶¹

As has been recognized by courts and commentators in the context of U.S. domestic litigation, giving the government such broad powers to unilaterally determine what arguments to make and what settlements to adopt can significantly - and negatively - impact the rights and interests of non-parties to the litigation.⁶² The U.S. Chamber of Commerce has highlighted the “sue and settle” problem that arises when governments settle, rather than publicly defend, lawsuits by private parties.⁶³ By entering into settlements, the U.S. Chamber of Commerce states, a government agency commits itself to “legally binding, court-approved settlements negotiated behind closed doors, with no participation by other affected parties or the public,” which allows agencies to avoid the legislatively established norms governing the rulemaking process, frustrating the separation of powers and distorting the priorities and duties of the agency in favor of private outside groups.⁶⁴

As such, in the U.S., various rules and mechanisms exist for public and judicial oversight of settlement agreements, including:

- Statutory requirements that apply prior to the formation of a settlement agreement, such as rules requiring the government to give the public notice of and an opportunity to comment on proposed agreements;
- Rules permitting or giving non-parties the right to intervene in disputes and comment on or object to settlements;⁶⁵
- Requirements for judicial approval of certain proposed agreements;⁶⁶
- Doctrines preventing enforcement of settlement agreements that violate the law.

Existing U.S. treaties and U.S. law do not provide similar rules aimed at protecting non-party rights and interests in the context of proposed settlements, or mechanisms for ensuring public oversight of proposed settlement agreements. Additionally, to the extent decisions to settle involve counterclaims, concerns about settlement are magnified as the rights and interests of non-parties, and how such rights, interests, or potential claims, may be disposed of in the context of a settlement, remain unaddressed and unclear. We urge the U.S. to address these gaps in the context of a U.S.-Kenya agreement and, as applicable, in U.S. domestic law.

⁶¹ Lise Johnson & Brooke Guven, “The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest,” *Investment Treaty News* (March 13, 2017) available at <https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/>; Brooke Guven, “Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes,” CCSI Blog (Jan. 30, 2020) available at <http://ccsi.columbia.edu/2020/01/03/investor-state-mediation-an-opportunity-to-advance-sustainable-outcomes/>.

⁶² See generally, Michael T. Morley, Consent of the Governed or Consent of the Government? The problems with consent decrees in government-defendant cases, 16 *Journal of Constitutional Law* 637, 647–649 (2014).

⁶³ U.S. Chamber of Commerce. (2013, May). *Sue and settle: Regulating behind closed doors*, p. 3. Retrieved from <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREREPORT-Final.pdf>. See also <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

⁶⁴ U.S. Chamber of Commerce, *Sue and settle*, *id.* at 3.

⁶⁵ See, e.g., at the federal level, U.S. Federal Rules of Civil Procedure, Rules 24(a) and 24(b).

⁶⁶ See, e.g., 42 USCS § 9622; *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1435 (6th Cir., 1991).

Transparency of corporate structure and beneficial ownership

The tax planning, regulatory arbitrage, and treaty structuring strategies of multinational corporations often result in complex and non-transparent ownership structures. The pleading standards contained in U.S. investment treaties are limited to the name and address of the claimant and, if a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise.⁶⁷ Rather than requiring the U.S. and Kenya to embark upon costly and wasteful efforts to disentangle corporate ownership structures with each claim, we urge the U.S. to include within its treaties requirements for claimants to fully disclose corporate family structures and beneficial owners. In addition to helping reduce the time and expense of arbitration by clarifying certain issues at the outset of the dispute, such a rule on early disclosure would also likely reduce incentives for companies to abuse the flexibilities afforded by corporate law, and would enable other interested and potentially affected individuals and entities such as creditors and shareholders to be aware of the case.

Third-Party Funding

Third-party funding in ISDS is a largely unregulated practice in ISDS that is now part of the multilateral reform efforts within UNCITRAL's WGIII. A wide variety of policy issues, many unique to the ISDS context, may arise when third-party funders are introduced into these cases, including impacts on: (1) investor decisions and conduct (including the number of cases, the nature and motives to bring cases, and decisions to remain invested or to divest); (2) the law and outcomes of claims (including the quality of claims, the substantive development of the law, decisions to settle claims); and (3) respondent states and their governance of investment (including regulatory chill and overdeterrence and concentrated impacts on certain types of investment and respondent states).⁶⁸ Because the practice remains largely non-transparent, it is difficult to obtain and assess empirical data on its impacts. In this light, precautionary regulation may be advised, particularly when considering how the U.S. treats the issue of third-party funding in comparable contexts.

As a general matter, U.S. states, along with other common law jurisdictions, historically applied doctrines prohibiting maintenance (the support of a third party's litigation) and champerty (supporting litigation in exchange for a share in the proceeds of the claim). While the strict application of these doctrines has been relaxed in many U.S. jurisdictions, this is not to say that third-party funding in domestic litigation is now unregulated. For example, various states prohibit funders from controlling the management of claims.

However, the ways in which third-party funders and funding are treated generally in U.S. jurisdictions is not the correct inquiry. Rather, the question that is relevant to the ISDS context, where the U.S. federal government is the respondent in any claim, should be how the issue of third-party funding is treated in claims *against the U.S. federal government*.

⁶⁷ U.S.-Mexico-Canada Agreement, Ch.14.D.3(2)(a).

⁶⁸ Brooke Guven & Lise Johnson, "The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement" (May 2019) *CCSI Working Paper 2019* <<http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf>>.

The U.S. Anti-Assignment of Claims Act prohibits “a transfer or assignment of any part of a claim against the United States Government or of an interest in a claim,” as well as “authorization to receive payment for any part of the claim.”⁶⁹ There are exceptions, such as permitting interest in claims to be transferred *after* they have been determined to be valid and *after* the amount owed has been decided.

The Anti-Assignment Act aims to serve several policy objectives:

first, to prevent persons of influence from buying up claims which might then be improperly urged upon Government officials; second, to prevent possible multiple payment of claims and avoid the necessity of the investigation of alleged assignments by permitting the Government to deal only with the original claimant; and third, to preserve for the Government defenses and counterclaims which might not be available against an assignee.⁷⁰

While the Anti-Assignment Act applies broadly across various causes of action, including to prohibit voluntary assignments of indirect takings claims and tort claims, it would not control treaty-based arbitration tribunals or prevent them from permitting investors to assign their ISDS claims to third-party funders. Funders could thus invest in a single claim, or a portfolio of claims, against the U.S. federal government and no regulations (including with respect to transparency, control of the claim, costs and security for costs, or conflicts-of-interest standards) on the practice would clearly apply to the funder or its investment in the claim(s) (in direct contrast to rules that apply to claims by domestic claimants against the U.S. in U.S. courts). The U.S. should take this opportunity to consider how this currently permissive approach aligns with U.S. objectives, as well as U.S. law and policy, and use this opportunity to address any shortcomings or misalignment.

Preventing Abuse of Interim Measures

In a growing number of cases, investor/claimants in investor-state disputes are seeking interim measures of injunctive relief that aim to compel states to halt their own governmental investigations of or claims against the investor relating to the investor’s alleged wrongdoing.⁷¹ In other cases, requests for interim measures of injunctive relief ask for an order compelling the state to halt litigation brought by private parties against the investor, or to stop private parties from collecting sums awarded against the investor through separate legal proceedings.⁷²

⁶⁹ 31 USC § 3727.

⁷⁰ *Kingsbury v. United States* [1977] 563 F.2d 1019, 1024.

⁷¹ See, e.g., Luke Eric Peterson, Analysis: Arbitrators Revoke an Interim Measures Decision, But Continue to Offer Little Explanation for How ‘Procedural Integrity of Arbitration’ Was in Peril, *IA Reporter* (Oct. 18, 2016); Joel Dahlquist, Interim Tax-Related Measures Revealed to Have Been Ordered by Full ICC Tribunal – Constituted on an Expedited Basis – and Later Vacated, *IA Reporter* (March 21, 2016).

⁷² Columbia Center on Sustainable Investment & United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, “Impacts of the International Investment Regime on Access to Justice: Roundtable Outcome Document” (Sept. 2018) < <http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Documents-Final.pdf> >; see e.g. Luke Eric Peterson, “ICSID Tribunal Orders State-Owned Companies to Work to Get Local Court Injunction Lifted,” *IAReporter* (July 20, 2016); Luke Eric Peterson, “In ‘Show Cause’ Proceeding, Chevron

These types of requests can potentially interfere with legitimate government and private actions to hold investors accountable for harms they cause in the host state. Given the persistent challenges that many host countries and communities face in terms of securing relief for injuries caused by projects involving foreign investment,⁷³ giving investors these added tools for avoiding responsibility is particularly problematic.

We urge the U.S., in the U.S.-Kenya context, to seek to prevent investors from abusing requests for interim measures through, for example, bans on such requests or rules requiring imposition of financial penalties on investors who seek to shut down any non-frivolous case or investigation against the investor.

Not Consenting in Advance, or Including Filters to ISDS

There are other procedural mechanisms that can be used to ensure that the U.S. and Kenya retain more control over the ISDS claims that they wish to permit under their treaty, including: (1) state-state filters; and (2) not providing advance content to claims.

The 2012 U.S. Model BIT provides for state-state filters to ensure that only certain tax-related claims may proceed. These kinds of filters help to ensure that treaty-parties have ongoing control over the management of their treaties in ensuring that claims falling within the scope of protection are advanced and clear outliers cannot bring opportunistic or abusive claims under the auspices of the treaty. This model could be more broadly employed to a wider range of sectors (such as those touching upon critical environmental or social issues) or indeed, to all claims.

U.S. treaties include advance consent to investor-state arbitration claims advanced under the treaty. The U.S. and Kenya could provide that treaty-parties, like investors, may consent to arbitrate but need not do so in advance of a factual situation that may result in a claim.

Quantifies Alleged Losses Due to Ecuador's Failure to Block Enforcement of Lago Agrio Judgment," *IAReporter* (Nov. 19, 2013).

⁷³ See, e.g., Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking (The Laboratory for Advanced Research on the Global Economy & the LSE Investment and Human Rights Project, 2016), at 18 (quoting OHCHR Report, UN doc A/HRC/29/39, para 25; *Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses* (May 2014)).