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WILL THE RIGHT TO A HEALTHY ENVIRONMENT TRANSFORM TRANSNATIONAL DISPUTE RESOLUTION

This panel was convened on Thursday, March 30, 2023 at 9:00 a.m. by its moderator Justin Jacinto of Curtis, Mallet-Prevost, Colt & Mosle LLP, who introduced the panelists: Marie-Claire Cordonier Segger of the University of Cambridge; Victoria Gama of Verisk Maplecroft; and Samuel Wordsworth KC of Essex Court Chambers.

Introductory Remarks by Justin Jacinto*

We are here with a lot to talk about today and I would like to get us to the conversation from our wonderful panelists on this topic as quickly as possible. I will do introductions unjustifiably briefly for each of them, but you have access to their profiles. Professor Marie-Claire Cordonier Segger is a Visiting Chair in Sustainable Development Law at the University of Cambridge and a Professor of International Law at the University of Victoria in Canada. She is very widely published on the topic of sustainable development law generally.

We have also Samuel Wordsworth KC. Sam is a leading specialist in public international law and international arbitration. He frequently acts for states before international tribunals, including the International Court of Justice. His cases include some that are the most relevant to the issues we are discussing: the *Mox Plant* case, the *Kishenganga* case, the *Silala River* case, the *Road* case, and the *Coastal States* rights case.

We also have Victoria Gama. She is a senior human rights analyst at Verisk Maplecroft. She has a background in human rights and in her current role advises companies on identifying and addressing human rights risks relevant to their operations. She brings a very interesting perspective to today's discussion.

I think some of you know a lot about this topic already, but some additional background would likely be helpful. We found someone very qualified to provide that background on the right to a healthy environment, and that is Professor David Boyd of the University of British Columbia. He was not able to join us today, but has prepared some comments that we will show in a moment. He was, as some of you know, the UN Special Rapporteur on Human Rights and the Environment and was absolutely instrumental in having the right to a healthy environment recognized as a human right. Let us now have him give us that background.

Remarks by David Boyd*

Hello, I am Dr. David Boyd, the United Nations Special Rapporteur on Human Rights and the Environment. Delighted to be joining you for this event on the "Right to a Healthy Environment and Transnational Dispute Resolution."

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As you all know, in October of 2021, the UN Human Rights Council adopted a resolution recognizing the right to a clean, healthy, and sustainable environment, and that was followed in July of 2022 by a similar resolution from the General Assembly. These resolutions mark a landmark in the recognition of the right to a healthy environment, but this is not a new right. It has been, since the 1970s, included in more than 100 constitutions, more than 100 environmental laws, and there are more than 130 parties to regional agreements that recognize this human right. In total, 156 of the UN's 193 member states recognize in law the right to a healthy environment, and there is a bill in Canada that will boost that number to 157 in the coming months.

The right to a healthy environment at the domestic level has already proven to be a catalyst for changes in environmental legislation to make those laws and policies stronger, to improve the implementation and enforcement of those laws and policies, to put a focus on populations that may be particularly vulnerable to climate and environmental harm, and so we have a good understanding of what the right to a healthy environment means based on these decades of experience at the national and regional levels.

It is quite appropriate that I am recording this video on March 29, a historic day for the pursuit of climate justice. The United Nations General Assembly has adopted, by consensus, a resolution requesting an advisory opinion from the International Court of Justice on state obligations related to climate change, and that resolution specifically refers to both of those UN resolutions on the right to a clean, healthy, and sustainable environment.

As well, the Grand Chamber of the European Court of Human Rights has heard its first two cases on climate change and human rights today, and the Grand Chamber specifically asked the parties about the implications of the UN recognition of the right to a clean, healthy, and sustainable environment for its decisions.

This right in a very short period of time has gained unprecedented global prominence. It is being mainstreamed in all kinds of places. For example, it was included in the outcome document from Sharm el-Sheikh at the Climate Conference, COP27, last year. It was at the heart of unprecedented changes in the way we attempt to protect, conserve, and restore biodiversity through the inclusion of this right in particular but, more broadly, a human rights-based approach in the Kunming-Montreal Global Biodiversity Framework. It is currently included in the draft of the new Global Treaty on Business and Human Rights, and parties are pushing for its inclusion in the plastic pollution treaty that is under negotiation and the pandemic prevention, preparedness, and response treaty that is under negotiation.

The right to a clean, healthy, and sustainable environment can be used as both a shield to defend government action and a sword to attack government action. For example, France successfully defended laws restricting hydraulic fracturing for fossil fuels and prohibiting the export of pesticides not approved for use in the European Union in part by referring to the constitutional right to a healthy environment, which was recognized in France in 2004 and also the government's obligations to respect, protect, and fulfill this right.

Similarly, Costa Rica used the right to a healthy environment as a key element of its defense in cases challenging a ban on offshore oil and gas development and a ban on open-pit metal mining. Costa Rica succeeded in both domestic litigation at its constitutional court and in cases brought pursuant to international investment and trade treaties through international arbitration.

On the other hand, civil society, Indigenous peoples, and communities have used the right to a healthy environment as a sword to challenge inadequate climate action; the failure to improve air and water quality; the creation of sacrifice zones where intense pollution is permitted by placing investors' interests ahead of human health, human rights, and the environment; the failure to protect and conserve biodiversity; and the failure to limit the environmental impacts of industrial agriculture. When these cases fail in domestic courts, they are increasingly being brought to regional

human rights courts and tribunals resulting in an unprecedented convergence of environmental law and human rights law. For example, we are waiting for a landmark decision from the Inter-American Court of Human Rights in a case called *Community of La Oroya v. Peru*, a case in which the court will apply the right to a healthy environment in the context of industrial air pollution and toxic substances. And also we have the trio of cases that are before the Grand Chamber of the European Court of Human Rights on climate change and human rights that I mentioned earlier.

The final point I would like to make in this brief video is that the recognition of the right to a clean, healthy, and sustainable environment also really highlights the fact that we have built a global economy based on the exploitation of both people and nature, and in the face of an unprecedented global environmental crisis, the right to a healthy environment highlights that business as usual is incompatible with the full enjoyment of this human right. And to give this a specific example in the context of transnational dispute resolution, I believe that the right to a healthy environment will not only be used by states in defending themselves in the context of investor claims made pursuant to investor-state dispute settlement mechanisms but will also contribute and is contributing to undermining public confidence and support for those trade and investment treaties and in particular the dispute settlement mechanisms because of the complete failure to recognize the states' abilities to protect human rights, to take action to protect the climate, and protect the environment.

And so these UN resolutions, while they may seem abstract, are having already, within a short period of time, global implications, both at the domestic level and also at the international level. I look forward to hearing the outcomes of your conversation today, and I wish you a productive and thought-provoking event. Thank you very much.

Justin Jacinto

Thank you to David. I think that is a very helpful and enthusiastic introduction to the topic, and on that note, I will turn to our panelists, starting with Marie-Claire.

Remarks by Marie-Claire Cordonier Segger*

One of my colleagues' PowerPoints is up in front of us. It is going to be wonderful. Thank you. It is a pleasure to be here with you today. I see John Knox, professor, who has also held an incredibly important role in promoting the right to a healthy, clean, sustainable environment, and also my valued mentor, and Sir Chris Greenwood, among other leaders in our group, and I cannot think of a better set of minds to be joining us today to think about these important issues.

We live in a complex and globalized economy, one that is linked by a web of national authorities, such as World Trade Organization, UNCITRAL, and ICSID, and also an increasingly fragmented and proliferate network of regional and bilateral economic accords—340-plus regional trade agreements, 548 more, over 2,290 bilateral investment treaties, and at least 324 trade investment accords linking the global economy. The map shows marine traffic density, which I think is just one useful indication.

At the same time, we face rising global, social, and ecological risks, a series of shocks to our world economy, including the pandemic itself, and science warning of intensifying human development pressures, and a shattering of planetary boundaries. It is a fragile economy to try to help solve some of these problems.

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The global challenges that we face, which David referred to briefly in his video, include climate change with existential risks, 37 percent of global populations suffering heatwaves and extreme impacts, devastating droughts, floods, and forest wildfires, which will rise exponentially if current projections are kept on course.

Again, if you look at the maps and think about where your country is and where your community is, this is a very sobering set of risks to be facing. Human rights are at stake, and so are millions of other species of non-humans.

At the same time and directly relevant to those species, we face loss of biodiversity and ecosystems that the human population depends on, with over a million animal and plant species threatened with extinction within only a few years. And our oceans and fresh water resources are degrading, affecting the lives and human rights of many more.

In that context, concerns have been raised that trade and investment flows can exacerbate rights violations and environmental degradation. Trade is said to embody 17 to 30 percent of biodiversity loss, up to 38 percent of global problematic labor, and between 23 and 30 percent of global greenhouse gas emissions.

The international responses to these complex challenges, these global wicked problems, are increasing in severity and impact, but the risks are not actually surprises. For over three-quarters of a century, since the UN has existed and even before, we have been struggling to find solutions to these problems. As David just mentioned, in July 2022, the UN Global General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right that is related to other rights and existing international law. It remains to be seen whether recognition of this right will significantly change how environmental sustainability considerations are addressed in transnational dispute resolution, and that is, of course, the focus of our conversation here.

The Global Policy Agenda on that sustainable aspect of the human rights is especially explained to us through seventeen Sustainable Development Goals (SDGs), also adopted by the UN, and the 169 targets, measurable with indicators, that set up a framework to facilitate international cooperation and action. It is not my focus here, but there are hundreds of treaties that help to deliver on these different Sustainable Development Goals, and there is binding law that we can query and assist in implementation and compliance.

At the same time, international and transnational dispute settlement across many courts and tribunals is directly relevant to many of these goals and to the increasingly recognized right that is our focus today, not just state to state with advisory opinions such as the one that was determined yesterday to be requested of the International Court of Justice (ICJ) on climate justice with the South Pacific students, but also, of course, there we have seen in the International Tribunal on the Law of the Sea a further advisory opinion coming forward and the World Trade Organization and our free trade agreements.

There are also state to other disputes that are perhaps—and I will nod especially to my mentor here—even more relevant. If you have a human rights concern, you should be looking at human rights tribunals as a good place to bring it, and it is very important to take into account that that structure of international law exists with special understandings of these rights in those courts. We see some of those cases and advisory opinion requests going forward even now. David is involved in the one for the Inter-American Human Rights Court, for example.

As a way of indefinitely recognizing that this international and transnational disputes universe is much broader than investment law or trade law, I would call our attention to some of the significant ICJ decisions, ITLOS cases, as well as the relevant World Trade Organization (WTO) cases, where environmental concerns and this right to a sustainable environment have not been raised by the parties but have been at consideration as the subject matter of the dispute. What we have seen is a hesitance—and I will get to that—to raise human rights issues at all in the World Trade

Organization, perhaps understandably. There are also bilateral and regional trade tribunals, regional human rights cases, and of course, investment disputes, which my colleague will discuss further.

The guidance we have been given for the sustainable aspect of that right is guidance that would not surprise us. In the SDGs, we are meant to promote a universal, rules-based, open, non-discriminatory, and equitable trading system under the WTO. It is meant to contribute to sustainable development, and in taking that into account, we can look at the assessments that have been carried out by states, identifying both material and normative impacts of trade and investment agreements prior to the treaties being agreed or updated.

We can identify especially three main tensions in the weight of assessments that have been done, impact assessments on human rights, environment, sustainability impact assessments: tension one, which is that obligations can constrain the adoption and implementation of new regulations to meet other international treaty commitments on sustainable development—and I would posit also to deliver on more recognized human right that is the subject of our tribunal today; tension two, pre-existing social and environmental challenges that can directly or indirectly be exacerbated by growing trade investment flows occasioned by the treaty; and tension three, actually incentivizing economic growth of an unsustainable nature, as David mentioned. Then the question becomes how are our structures of trade dispute settlement and trade decision making changing in order to try to take into account some of those tensions that have been identified in the assessments as well as the concerns in the academic literature by the civil society organizations, by our UN Human Rights Rapporteur and others?

We have seen sustainable development recognized as an objective of the WTO, and the *Shrimp* panel case, for example, has shown us that there are ways that it can influence and be taken into account by the WTO appellate body and panel.

But trade investment law governs different scales and scopes, and the devil is in the details. It remains open in the WTO, what specific provisions and measures can be enacted to actually ensure that there is a better fit and a better respect for the right to a clean, healthy, and sustainable environment. Dispute settlement experiences to date reveal limited scope for WTO members to bring human rights-based arguments at all, and the members themselves do not choose. For example, in the *EC–Asbestos* case, between asbestos and its substitutes, was it really a like product if it is a carcinogen or not? They did not use the right to health to make their argument. They have been hesitant in the *Brazil-Retreaded Tires* case, even in the *U.S.-Clove Cigarettes* case, when the right to health could have been raised. In the *EC Seal* case, a little more recently, we did see Indigenous rights come up but as part of a finding of fact.

I will come to a final point here, which is that we do not just need to look at the global level. If we even just look at the treaty text as an indicator of some of the trade tribunal findings that remain to be queried, we can see many regional trade and investment agreements that are actually testing diverse trade and economic innovations, trying to change their treaties to better coincide with and take into account the measures that can be taken to contribute to that sustainable and healthy and clean environment.

This is just the beginning of that research, and it maps regional trade investment agreements to the different Sustainable Development Goals. You can find provisions in the treaties that actually directly refer to poverty, hunger, health, gender equity, clean energy especially, as well as climate change, biodiversity, and oceans, which I mentioned at the beginning.

We have seen some pathways now in our trade treaties, some experiments at the regional and bilateral level, looking carefully at the actual trade tribunal decisions that are coming out and whether these are in any way taken into account. We have seen exceptions for sustainability measures, Article 20-style but others as well, interpretive statements under NAFTA. We have seen

environmental and sustainable development cooperation mechanisms that run alongside or even are integrated into the treaties, some of which are subject to dispute settlement, some not. We have seen trade and investment enhancement measures for sustainable goods and services. I think that is the most exciting area that deserves more research actually, where we look at how the trade or investment treaty can promote more sustainable goods and services that other treaties are strongly, strongly encouraging and asking for renewable energy, for example, for solutions through those goods and services.

We have also seen process innovations, and I will focus on one here in the interest of time. Trade and investment arbitration tribunals. Would they be able to look at the implications of a trade treaty for the right to a clean and healthy environment? It might be more useful and more likely that they would if expert panels, fact-finding missions, consultations, receptivity to amicus curia briefs, transparency and public participation for hearings, publication of awards, or also some of the new innovations of net zero or green arbitration codes and policies are being adopted in these structures.

I will conclude with an invitation that we do start looking at how international economic law can respect the human right for a clean, healthy, and sustainable environment. We do this through the arbitrations and advisory opinions and courts and tribunal disputes, not just the ones on the economy but also the ones on human rights and also the international law and international law of the sea, places where we can go to solve these disputes. We also look carefully, however, at the broader society. The law will not solve all of these problems for us, not even close. I would say we are actually still just moving from being part of the problem to hopefully being part of the solution. Awareness, education, career skills for our graduates, research and knowledge, especially in shaping trade and investment in sustainable industries, and independent advice to our international economic law and policy leaders is needed very urgently.

I am going to conclude with a quote from the book that I think resulted in my invitation to join you today: "The rules that facilitate trade investment could defend the interests of Hermes, Greek god of commerce, and thieves, or learn to draw inspiration from Athena, the goddess of justice, wisdom, and the crafts." Thank you.

Justin Jacinto

Thank you, Marie-Claire. Sam, your turn.

Remarks by Samuel Wordsworth KC*

Thank you very much, Justin. Professor Cordonier Segger just suggested that trade and investment treaties may be exciting. That is a rather nice thought. It reminds me a bit of last night when I ordered a crab sandwich, and the waitress said, "Awesome!" And you think, "Well, maybe. Perhaps, maybe not."

Anyway, a first and obvious point which is that the jurisdiction of investment treaty tribunals is confined to investment disputes, and naturally, tribunals have been very concerned to ensure that they have remained within those confines. But given that so many investor-state dispute settlement (ISDS) cases concern the environment, there is some real scope for this human right gaining some purchase in this area. There are various examples where ISDS tribunals have considered that they can allow some form of human rights law in ISDS cases. One thinks of *CMS*, *Suez*, *Continental Casualty*, *Al Warraq*, *Tulip*, *Urbaser*, *and Rousalis*, and I am sure there are many more.

* Essex Court Chambers.

Against that backdrop, I want to touch on six potential entry points for the right to a healthy environment in the context of ISDS, although it is necessary to say a word first on applicable law. If a given investment treaty has an applicable law clause that allows a tribunal to apply the host state's national laws and/or international law, there may at least, in theory, be some scope for direct application of the right to the extent that it forms part of international law or part of the applicable domestic law. Otherwise—and I think rather more likely—the rights may play a role in the application of the substantive provisions in a given investment treaty, as in the *Al Warraq* case, or in their interpretation, where account is taken, of course, of relevant rules of international law applicable in the relations between the parties, under VCLT Article 31(3)(c). And *Strabag v. Poland* is an example.

Of course, there is an immediate question as to whether the right to a healthy environment has customary status, and an ISDS tribunal would need to be persuaded of that in the same way as any other tribunal applying international law. It would likely be an uphill struggle, at least at the moment, and all the more so when it comes to giving specific content to the right that we see recognized in last July's General Assembly resolution; and one thinks of the rigor applied by David Caron and his colleagues in the *Glamis Gold* case, when they were looking at the question of giving specific content to the minimum standard of treatment as a matter of customary international law.

The unanimous General Assembly resolution could be deployed as evidence of *opinio juris* of states consistent, for example, with nuclear weapons in the *Chagos* advisory opinion, although a considerable number of the speeches by delegates in the General Assembly in favor of the resolution described it as a political rather than a legal affirmation of the right to a healthy environment, but who knows what the court is going to be saying when it comes to the forthcoming advisory opinion on climate change. In fact, if anyone is interested, I will be taking $10 bets after the session that we will see a reference in the opinion to an emerging rule of customary international law or something similar, and I will be very interested, indeed, to see whether Judge Greenwood takes me up on that offer.

Anyway, six potential entry points into the world of ISDS, and the first concerns potential claims by investors, what David Boyd just described as the sword. Think of a case like *Allard v. Barbados*, where a claimant who has invested in an ecotourism site contends that the state has acted inconsistently with prior representations to protect the natural environment of the site, thus, breaching the fair and equitable treatment (FET) provision in the treaty. Of course, this is hugely fact-dependent, and in *Allard*, the tribunal held that Barbados' statements could not be characterized as representations capable of creating legitimate expectations, but the General Assembly's recognition of a right to a healthy environment, in particular, if the host state in the case voted in favor of that resolution, could assist the investor in establishing the existence of the legitimate expectation, potentially, even in the absence of specific representations, although, of course, the investor is going to have a more uphill task in that case.

Likewise, the General Assembly's recognition of the right and the evidence of state conduct inconsistent with the right could assist in the formulation of a claim based on arbitrariness.

Another possible claim, although undoubtedly all the more challenging, could arise where an investor saw its investment, say a beachside hotel complex, adversely impacted due to sea level rise or some other impact of climate change. Of course, this is going to encounter the familiar problems of causation, which we have seen in climate change cases, but as to the substantive protections in an investment treaty, one could see arguments under the FET standard based on an interpretation that takes into account the right to a healthy environment or, indeed, by reference to the full protection and security standard, which is, of course, focused on physical protection. And an argument could be mounted as to a failure of due diligence by the host state if it is doing little or nothing to protect the environment or address climate change. Of course, this would all be extremely difficult,

but perhaps we should be welcoming the potential exercise of compulsory jurisdiction on these all important issues, even if the forum is not an obvious or easy fit.

The next potential entry point concerns jurisdiction, and whereas it is very common in an investment treaty, there is a requirement that the investment must be made in accordance with or in compliance with laws of the host state, there is a potential argument that this requirement would not be met, whether there is domestic law implementing the right to a healthy environment. The investment cuts across that right. Support for that could be found in a case like *Cortec v. Kenya* where the tribunal observed that the text and purpose of the bilateral investment treaty (BIT) and ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws, fundamental to protecting public interests, such as the environment. Now, of course, that case concerned a failure to comply with Kenya's specific regulatory regime and the obligation to carry out an EIA, and given the approach of past tribunals to this particular issue, the success of the argument is very likely going to turn on the significance and the legal effects of the right to a healthy environment in the applicable domestic law.

Third entry point, which is defending a claim, David Boyd's shield, and that is a much more obvious entry point for the right as a tool in the defense of a host state's acts that have been taken in protection of the environment, and one thinks of the potential role that the right might have played in the *RWE v. Netherlands* case. That is the ECT claim concerning a decision to phase out coal by the year 2030, and one thinks also of *Vattenfall*.

Adoption of a measure with some reference to an international law right to a healthy environment would be a strong counter to an allegation of arbitrariness. Also, as recently emphasized by Federico Ortino, when addressing claims under the FET standard, cases like *Saluka* identify the need to weigh the claimant's reasonable and legitimate expectations, on the one hand, and the respondent's legitimate regulatory interest, on the other. In undertaking that balancing exercise, a tribunal may be persuaded that the nascent right to a healthy environment justifies or, indeed, requires states to take a different course of action when it comes to regulation of industries that have harmful impacts on the environment. As always, each case is going to turn on its particular facts, but as a general proposition, the General Assembly's recognition of the right to a healthy environment may have carved out a little more regulatory space for states to act in.

More broadly, the very fact of the General Assembly's resolution and the attention that it is accorded may play an important role in tempering an investor's legitimate expectations, that is, its reasonable expectations. Support for that can be found in *Continental Casualty* and also the *Urbaser* case, where the tribunal held in paragraph 624, "Respondent rightly recalls that the Province had to guarantee the continuation of the water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which the Claimants should frame their expectations." Obviously a different right, but you see the way that the human right impacts on the potential scope of the investors' legitimate expectations.

Similarly, with respect to expropriation claims, the existence of the right will likely feature and may assist in defenses based on the exercise of police powers, and there is no shortage of examples where the right could have played a role. One thinks of *Chemtura*, *Methanex*, or, more recently, the 2021 award in *Eco Moro Minerals v. Columbia*, where a majority held that Colombia's decision to prohibit mining activities in sensitive wetland was motivated by the importance of protecting the environment, and hence, there was a legitimate case of exercise of police powers.

Would the right have impacted on the decision in *Rockhopper v. Italy*, assuming that it was accepted as having customary status? Of course, one can say no, because the decisive factor for the tribunal was the positive EIA, according to the project, just four months before the change in the law banning offshore oil production. But it is rare that an award starts with what reads very like an

apology, and one sees the discomfiture of the tribunal in the eventual outcome in the separate opinion of Pierre-Marie Dupuy.

Now, suppose the public outcry that followed the original approval of the project had been accompanied by an assertion by the public of a recognized human right to a healthy environment. Unless account had been taken of that right in the original approval process, a state would surely be able to revisit its approval such that a change in the law could be a valid exercise of police powers; and for the future, I would expect the recognition of the right to encourage tribunals to take more seriously the host state's environmental concerns, even if there is a degree of inconsistency to the state's acts as there was in the *Rockhopper* case.

And to note, the right may, indeed, soon feature as part of the facts underlying a given ISDS dispute. For example, in Australia, the Queensland Land Court issued a landmark judgment in late 2022 recommending the refusal of an application to develop Australia's largest coal mine on the basis that it posed unacceptable climate change risks and unjustifiably impacted various human rights enshrined in the Queensland Human Rights Act. Although that act does not contain a right to a healthy environment, one can easily foresee cases where such a right is invoked in domestic law and where a foreign investor then seeks to challenge an executive or judicial decision made by reference to the right in an ISDS claim.

A quick word on three further potential entry points. Depending on the wording of the given treaty, there may be scope for the right to feature as part of, or most likely in support of, a counterclaim by the host state. The sums awarded in favor of Ecuador in the *Burlington* case and also in favor of Ecuador in the *Perenco* case may be encouraging states to give serious consideration to the filing of environmental counterclaims. The most straightforward cases will be those like *Perenco* and *Burlington*, where there is an environmental law standard, which is applicable through domestic law. This position is obviously going to be more challenging where a state seeks to argue, as in *Urbaser*, that the investor is under an obligation derived from international law. The right to a healthy environment, if it exists under international law, is most obviously the responsibility of states. The General Assembly resolution merely calls upon business enterprises to adopt policies to enhance international cooperation, strengthen capacity building, and continue to share good practice.

But the *Urbaser* case does suggest that there is a distinction when it comes to corporate responsibility between a right that requires positive steps, like the right to water, and human rights that are more the focus of a prohibition, and one may see the right to a healthy environment more in that latter category.

Entry point five is compensation. There may be scope for the right to impact on the quantum of compensation as a part of broader environmental considerations, and I think of the *Unglaube v. Costa Rica* case, where the tribunal considered the fair market value of the property by reference to its highest and best use, which it characterized as usage appropriate to the environmentally sensitive surroundings.

Alternatively, the existence of the right might impact on the willingness of a tribunal toward a DCF damages, as in the *Rockhopper* case, or at least allow for the right to be factored in a way when it comes to fixing the appropriate discount rate.

Finally, the right may play a role where there is express treaty language giving weight to protection of the environment, such as in a preamble or in Article 1010 of the U.S.-Oman free trade agreement, which was at issue in *Al Tamimi and Oman*, which I think is one of Judge Brower's cases, or there may be express wording in a police powers provision in the treaty. And, of course, we have seen in the draft ECT provisions, specific environmental and climate change protections, should that draft ever see the light of day.

A few very brief concluding words, if I may. I think the rights will undoubtedly feature in the arguments made before ISDS tribunals and may over time influence outcomes in a way that is

beneficial to protection of the environment. I see a slightly quizzical eyebrow being raised in the front row, but let us see. It could be said with some force that ISDS tribunals may not be the best fora for clarification of the scope and content of obligations pertaining to human rights and the environment. These subjects are evidently matters of concern to an audience much larger than a host state and an investor who are locked into one particular legal dispute, and so much depends on the identity of the arbitrators, a point that was noted ten years ago by Judge Simma when he was looking at the potential impact of the right to water.

Against that, there may also be an element of *faute de mieux* here. An investor that is truly adversely affected by a host state's inaction on environmental protection or climate change may have no access to any other international forum, and indications from investment treaty tribunals that they take the right seriously could be precisely the sort of benign catalyst that David Boyd had in mind when he said last year that the right is not a magic wand we can use to solve all our challenges but rather a catalyst for better actions. Let us see.

I now hand over to Victoria Gama, who is going to be addressing further the issue of corporate responsibility. Thank you very much.

Remarks by Victoria Gama*

Thank you, Sam, and thank you Justin for the invitation. I will try to keep it as brief as possible.

Over the past thirty years or so, companies have increasingly been targeted by transnational litigation in cases involving environmental damage and linking it to a human rights violation. What I would like to do today is to share some evidence of what this trend has looked like so far and what are some of the implications that will come along if, of course, the right to a healthy environment pivots into many different directions.

I will group the key findings into four specific categories. One is that we are likely to see an increase in the success rate of plaintiffs bringing cases on transnational litigation against multinational companies. There is going to be an increase in these kinds of cases but not necessarily on the jurisdiction. We are likely going to see the same number of states looking at these specific cases, and these cases will likely become much more complex. We are likely going to see a shift from direct harm to the right to life, to the right to personal integrity, or to the right to health. In turn, we are going to see an expansion on the industries that will be tackled by these specific violations.

If these changes actually materialize, I believe that, in turn, the incentives from companies will be to push toward more robust ESG standards and legislation and policies, cascading later on into their supply chains as well.

As I mentioned, I will split the opening remarks in two parts. In both cases we will look at key jurisdictions where tort litigation is taking place, what has been the outcome of these cases, and at which point are the industries more at risk of transnational litigation. The ideas that I will share today are premised on a more moderate approach to the right to a healthy environment, one in which plaintiffs are only going to be successfully arguing a violation on the right to health or the right to a healthy environment if they have a link to environmental damage as opposed to more indirect links that were mentioned in the case of climate change.

But before I wrap up and just to spark the conversation, I am going to present to you a more expansive view of what the right to a healthy environment could look like for companies in that case. In the last thirty years or so, we have seen that the victims of environmental damage caused by businesses have increasingly resorted to tribunals in a company's home country by arguing that

* Verisk Maplecroft.

said damage involved human rights violations, bringing the private sector to the fore of the conversation on the link between environmental damage and human rights. Human rights-based litigation has been expansive in the sense of including environmental damage in manmade natural disasters, waste management, and water and soil pollution. In less than ten years in the making, extraterritorial litigation against companies has also included the expansion over climate change and then the difficulty in trying to prove this more indirect and weaker link.

The map that you are currently seeing shows the number of judicial cases that were brought before foreign courts for environmental damage or climate change failure in terms of commitments, and which have actually used a human rights-based approach in the argumentation. Maplecroft Research shows, more or less, twenty-five cases, the ones that you have seen over there, spanning eleven jurisdictions. Some of the key hubs that you might already be aware of include the UK, France, Germany, and the Netherlands, basically linked to the fact that there is a likelihood that they will succeed and receive access to justice as opposed to countries in the Global North.

For some time now, the UK has become the forum of choice for many of these plaintiffs and has been trying to test access to justice in specific cases. One of them is *Lungowe v. Vedanta Resources*, a case that was filed in 2000. Zambians alleged that oil pollution caused by a subsidiary of a mining company was threatening their right to health. The jurisdiction hurdle, always complex, was passed with flying colors. Basically, the Supreme Court decided that if the case was going to be discussed in Zambia, it was likely that the court would not have the resources or the technical knowledge. Regarding the merits, the Supreme Court decided in this case to use the concept of a duty of care and the company's public human rights commitments to preliminarily rule that a company could be held accountable for these human rights commitments. The truth is, unfortunately, we cannot actually get to the merits of the case because it was settled, but we are likely going to see some similar case this time linked to oil and gas companies with the *Okpabi v. Shell*. That is scheduled for trial, I believe, next year.

We are also seeing a fair number of cases in France as a result of the French Duty of Vigilance Act. Under the law, harmed individuals can bring civil lawsuits seeking damages resulting from a company's failure to comply with its vigilance plan. Based on this law, a group of NGOs have sued the French supermarket chain, Casino, for its involvement in the cattle industry in Brazil and Colombia. In these cases, the plaintiffs are alleging that the deforestation in the Amazon is actually harming biodiversity. It is contributing to an increase in carbon monoxide emissions and eventually impacting the right to health. It is aligned with the more expansive view that I was presenting at the very beginning.

Lastly, I need to mention the elephant in the room, which is the United States. As you see, there are six cases, but these cases are either quite old and have been closed or some of them come after the *Kiobel v. Royal Dutch Petroleum* decision of the U.S. Supreme Court. I am not going to tackle that because I know that we have an amazing panel tomorrow looking at this.

As you can see, even though a fair number of cases have been brought forward, we only have a decision on the merits in less than 20 percent of those. Part of this has to do with the fact that a great number of these cases, as I mentioned, have been settled, and the rest, almost 40 percent of those, involve recent cases that are still ongoing.

But in the two cases that courts have sided with companies, they have actually understood that there was no sufficient evidence to determine responsibility and the link between human rights and environmental damage. That proves the difficulties in actually coming up with evidence on that. Even in those cases that judges have sided with plaintiffs, these have not rested on human rights claims. In those, courts have been reluctant to accept human rights arguments in the face of a duty of care for environmental damage, and one of those is *Akpan v. Shell* in the Netherlands. In this

case, the court understood that a tort of negligence could not be characterized as a human rights violation, hitting right in the face of the UN Guiding Principles on Business and Human Rights and, again, proving the difficulties of actually proving the link.

However, it seems that in most of the new cases, there is an upward trend of trying to join environmental damage with human rights. It is likely that we will see new developments in the coming years.

Just a brief note on the industries. No wonder we are talking about these cases involving mining, in the second case on oil and gas, as well because of the high impact of these industries and because normally it is easier to prove the link on that end.

Now let us try to focus on what the recognition of the right to a healthy environment adds to transnational litigation. Understanding where environmental and climate change harms affect populations the most and which location cases of this kind are most likely to appear offers a window of opportunity into how transnational litigation will develop for companies. To do this, what we have done is we have mapped our climate litigation index, which basically comprises 198 countries on the risk of lawsuits being filed against corporations in relation to climate change, against our healthy environment index, one that comprises data on air quality, biodiversity, CO_2 emissions, climate change exposure, deforestation, food security, water pollution, and hazardous waste.

When we take a look at the graph over there, you see that the jurisdictions with a lower healthy environment risk, mainly UK, Australia, France, Germany, the United States, and Canada, entertain the bulk of climate litigation cases. Whereas, countries with the worst track records on environmental performance have fewer cases. What is not explicit here is that there is likely transnational litigation flowing from the latter to the former. As we have seen and discussed, this is a question of access to justice but at the same time is also a question of bringing these claims to the fore and focusing on where headquarters are located, raising publicity over these cases and at the same time creating reputational harms for companies and, in some ways, driving away investors for these developments.

The right to a healthy environment will become even more significant in the United States, Australia, Canada, and the UK, adding pressure for its recognition. If that is the case, it will be incorporated into law, bolstering plaintiff's arguments, and we are likely going to see more successful results for plaintiffs.

Some of the countries that are represented on the visual belong to the Global South, and this is so because the climate litigation index actually does not distinguish between domestic and transnational litigation, but I believe it is worth mentioning some of these because if I were litigating these kind of cases, I would draw on some of the arguments brought in the Global South. You see countries such as India and the Philippines in which they have established track records on judicial activism in public interest environmental cases, having constitutional clauses on the right to environment, same with some Latin American countries, including Colombia, Brazil, Ecuador, and Argentina, more aligned with an understanding of economic, social, and cultural rights.

In terms of jurisdiction, as I mentioned, I do not believe that we are going to see an expansive number of new jurisdictions, but I do believe that we are going to see an increase in the number of these cases. In terms of outcomes, once these cases reach the trial phase, the right to a healthy environment will assist claimants in building more straightforward arguments and more convincing arguments before judges. You do not have to prove that there is a violation to the right to health, to the right of life. Instead, you just go ahead and prove that the rights to your healthy environment has been affected.

Lastly, if we go for or at least try to understand a more expansive view of the right to a healthy environment, it is likely that we are also going to see other sectors in the mix, because the focus will be moved away from oil spills that directly impact a community to cases about greenhouse gas

emissions, loss of biodiversity, or declining services provided by ecosystems, expanding right to other sectors, mainly manufacturing, agriculture, and chemicals production.

As I mentioned at the beginning, I have so far discussed implications for business and national litigation on what I would characterize as a moderate approach. On the contrary, a more radical view would expand on the idea that the right to a healthy environment is more expansive, and this means it entails the right of any person across the globe to an environment that is not affected by climate change or the loss of biodiversity. This interpretation would mean that any person would enjoy standing to bring claims for an infringement of the right to a healthy environment.

For example, say a citizen from the EU is watching TV and finds out about Vaca Muerta in Argentina and the high number of CO_2 emissions that that project would entail and feels that his personal right to a healthy environment is threatened. I know that this might sound far-fetched to some point, but arguments premised on this idea have already been part of the political discourse of many countries involving even trade negotiations, and the case that I mentioned on Casino is along those lines. If this more radical interpretation gets accepted by courts, I believe all bets are off regarding how transnational litigation will actually change because of the right to a healthy environment. Companies could be exposed to an indeterminate liability which could threaten the viability of projects, and countries might actually face economic and development challenges, as people in the world bring cases involving projects in their territory.

Thank you.

Justin Jacinto

Thank you, Victoria. Thank you all for covering these issues in such an interesting way.