Chapter 3.6
Investment Law, Environment, and Climate Change

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A. INTRODUCTION

Traditionally, investment protection instruments focused on protecting foreign investors and their investments in the host state. The range of protection includes substantive protections ensuring that the foreign investor receives treatment equal to national investors and treatment no less than what other foreign investors would receive. Other examples of substantive protection include the prohibition of unlawful expropriation, full protection and security, as well as fair and equitable treatment. While the underlying goal of the host states in concluding instruments of investment protection was to attract foreign investors and thereby increase their economic development, over time, the balance between the host state and its right to regulate in the public interest collided with the standards of protection.

The main form of procedural protection given to foreign investors is the right to bring claims against acts of the host state before an international arbitral tribunal under the requirements set out in the respective international instrument, i.e. a bilateral investment treaty (BIT) or an international investment agreement (IIA). To compare, the national investors can bring claims against their government acts before national courts, while foreign investors also have the right to bring claims before international tribunals. Over time, the tribunals interpreted the standards of investment protection in an isolated manner. The tension increased with the increased pressure on the state to enact measures to deal with environmental degradation and climate change. International soft law instruments prescribe national regulation as the primary way of dealing with the adverse impacts of climate change, the adverse social and environmental impact of investments, and the adverse impact on human rights protection. However, when using national regulation to address these issues, the host states are experiencing the threat of investor claims against diverse types of regulatory change.

This chapter will explore the current framework of sustainable development as the umbrella for climate change, adverse social and environmental impact, and human rights violations (Part B). It will then identify the tension between enforceability of sustainable development in investment practice with the existing, status quo, of regulating and protecting direct foreign investment (FDI) (Part C). The tension primarily includes the lack of a coherent framework for sustainable development and, consequently, the lack of integration in interpretation and decision-making. Finally, the chapter will elaborate on prominent proposals for addressing the challenges of achieving sustainable development within the ISDS system (Part D).

B. THE INTERNATIONAL FRAMEWORK OF SUSTAINABLE DEVELOPMENT

The international framework of sustainable development combines three principal chapters of international law: international environmental law, international economic law, and international human rights law. The concept of sustainable development traces back to the nineteenth century, with nature management treaties and river treaties prescribing provisions against pollution.[1] The concept fully emerged on the international scene through the UN's work, dominated primarily by soft-law instruments adopted over the last five decades. In its early conceptions, investment protection focused on minimizing risks and maximizing benefits for foreign investors and capital importing countries. In such a constellation, international investment law on one side, and sustainable development, environmental law, and climate change on the other side have a limited relationship, if any. As global society recognized the adverse social and environmental impact of commercial and investment activities, so grew public concerns encompassing political, environmental, human rights, sustainable development, and climate change concerns.

I. A Brief Summary of the Evolution of Sustainable Development in the Work of the UN

UN efforts in sustainable development began in 1972 when the first leading international environmental UN conference took place in Sweden, the **Stockholm Conference**.[2] The Conference Report outlined 26 environmental, social, and economic development principles to maintain a balance with nature, ensure appropriate boundaries to human activity to reduce pollution, address overuse of natural resources, and prevent irreversible damage to the ecosystem.[3] The Stockholm Conference was a turning point in the development of actions to protect the environment while simultaneously ensuring economic development for the benefit of people.[4]

In 1983, the UN General Assembly adopted Resolution 38/16, *Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond*.[5] With the Resolution, the General Assembly established the World Commission on Environment and Development as a special commission to produce a report on the environment and global issues in 2000 and beyond.[6] The

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1 Schrijver, *2019 AIIB Law Lecture: The Rise of Sustainable Development in International Investment Law*, AAIB Yearbook of International Law 2020, Vol. 3, p. 299.

2 See https://sustainabledevelopment.un.org/milestones/humanenvironment.

3 Stockholm Conference Report, ¶¶ 1-7, 3-6. The Conference Report further outlined a robust set of recommendations for States to implement on an international and national level and for the UN to coordinate, monitor, and implement. The Stockholm Conference Report set out a recommendation to set up a United Nations Environment Program (UNEP). For further details see Stockholm Conference Report, p. 29. Further information on UNEP is also available at https://www.unep.org/.

4 A/CONF.48/14/REV.1 - Report of the United Nations Conference on Human Environment, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1, hereinafter referred to as the Stockholm Conference Report.

5 The full text of the Resolution available at http://www.un-documents.net/a38r161.htm.

6 See *Development and International Economic Co-Operation: Environment*, Report of the World Commission on Environment and Development, Note by the Secretary General, A/42/427 dated 4 August 1987, ¶1, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/42/427&Lang=E.

report – known as the **Brundtland Report** – marked the second important milestone in the UN's efforts toward sustainable development.[7] It called for "*a new approach in which all nations aim at a type of development that integrates production with resource conservation and enhancement, and that links to the provision for all of an adequate livelihood base and equitable access to resources.*"[8]

The next milestone in the UN efforts was the adoption of **Agenda 21** to offer a framework for global cooperation among states and the adoption of national guidelines.[9] Agenda 21 noted the importance of investment for economic growth to meet sustainable development aims. Specifically, Agenda 21 noted that investment is "*crucial„ for the developing countries' ability to achieve economic growth while simultaneously ensuring the welfare of their population and meeting their basic needs sustainably*."[10] Agenda 21 outlined the need for a healthy investment climate to promote sustainable development as crucial for increased investment, efficiently mobilizing, and using domestic resources.[11]

Over the next decade, various UN bodies and agencies continued to refine the framework of sustainable development. An essential milestone was the World Summit on Sustainable Development in 2002 in Johannesburg, South Africa (JPOI). The **Johannesburg Declaration on Sustainable Development** acknowledged the opportunities for sustainable development opened up by investment flows. At the outset, the Johannesburg Declaration recognized the uneven distribution of costs and benefits of globalization between developed and developing countries and the associated risks of the continued deepening of such global disparities.[12] Consequently, the Johannesburg Declaration outlines specific action items for fundamental progress towards sustainable development.[13]

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7 World Commission on Environment and Development, Report of the World Commission on Environment and Development: "Our Common Future"", 1987 [Brundtland Report], Oxford Univ. Press 1987, https://digitallibrary.un.org/record/139811.

8 Brundtland Report, Chapter 1, ¶47.

9 UN, United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 [Agenda 21], available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

10 Agenda 21, ¶ 2.23.

11 Agenda 21, ¶. 2.23 and 2.31.

12 *See* Report of the World Summit on Sustainable Development, ¶ 14-15, U.N. Doc. A/CONF.199/20 (4 September 2002).

13 See Resolution 2, *Plan of Implementation of the World Summit on Sustainable Development*. Resolution 2 adopted at the World Summit on Sustainable Development outlines a *Plan of Implementation* encompassing, among other items, poverty eradication, protection and management of natural resource base of economic and social development, and health and sustainable development. At the domestic level, the *Plan of Implementation* emphasizes enabling investment as the basis for sustainable development. The *Plan of Implementation* refers to specific investment areas, such as increasing production and eco-efficiency and sustainable eco-tourism. See Resolution 2, *Plan of Implementation of the World Summit on Sustainable Development,* and, U.N. Doc. A/CONF.199/20 (4 September 2002), Annex, ¶4, as well as *Section III,* ¶16.

The **Marrakech Process** of 2003[14] marked the beginning of the development of the 10-Year Framework of Programmes on SCP (10YFP), which was finalized in the **Rio Declaration on Environment and Development**[15] adopted at the UN Conference on Sustainable Development held in Rio in 2012.[16] In the Rio Declaration, Member States reaffirmed their commitment "*to phase out harmful and inefficient fossil fuel subsidies that encourage wasteful consumption and undermine sustainable development*" and invite others "*to consider rationalizing inefficient fossil fuel subsidies.*"[17]

The UN adopted the **2030 Agenda** in 2015. It embodies **17 Sustainable Development Goals**, thereby setting a globally recognized framework. The 2030 Agenda is a comprehensive framework that builds upon the previous work of the UN while at the same time framing the relevant issues as 17 Sustainable Development Goals (SDGs), accompanied by 169 specific targets.[18]

II. Sustainable Development Goals (SDGs)

UN SDGs have five main characteristics: (1) they are integrated and indivisible, resulting in the absence of hierarchy in their presentation or addressing; (2) they are primarily individual states' responsibility, despite the recognition of their global and sub-regional impact and effects; (3) they concern all states, irrespective of their development level; (4) they emphasize different positions of states and, therefore, the priority for achievement in the states varies; and (5) they are a result of an inclusive and open process.[19] 2030 Agenda emphasizes the role of each country to define and implement cohesive, sustainable development strategies.[20] Simultaneously, the international economic environment should support and enable such national efforts through coherent and mutually supportive world trade, monetary and financial systems, and strengthened and enhanced global economic governance.[21] While the goal is to foster a dynamic and well-functioning business sector, it is essential to protect labour rights, health, and environmental standards under international standards, agreements, and initiatives

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14 For details on the Marrakech Process, see https://sustainabledevelopment.un.org/topics/sustainableconsumptionandproduction/process.

15 Rio Declaration on Environment and Development, available at http://un-documents.net/rio-dec.htm.

16 United Nations Conference on Sustainable Development, Rio+20 [Rio Declaration 2012], available at https://sustainabledevelopment.un.org/rio20.html.

17 Rio Declaration, ¶225 reaffirms the commitment, as contained in document A/CONF.216/5, and highlights that the programmes included in the 10-year framework are voluntary. Three years after adopting the 10YFP at Rio, the First Global Meeting of the 10YFP took place at the UN Headquarters in May 2015.

18 UN A/Res/70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (2015) [2030 Agenda], available at https://sdgs.un.org/2030agenda.

19 Viñuales, J. E., *Foreign Investment and the Environment in International Law: the Current State of Play*, C-EENRG Working Papers, 2016-1. pp.1-42. Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge, p. 5.

20 Agenda 2030, ¶63.

21 Agenda 2030, ¶63.

The most challenging element of the SDGs is integrating the environmental, developmental, and human rights concerns into one comprehensive and effective international law system.[22] To align financing flows and policies with the SDGs' economic, social and environmental priorities, in 2015, the heads of state and government adopted the Addis Ababa Action at the Third International Conference on Financing for Development, held in Addis Ababa, Ethiopia.[23] The **Addis Ababa Agenda** mentions the role of investment, including foreign direct investment, as vital in achieving the national development goals.[24] At the same time, it recognizes investment gaps in critical sectors for sustainable development, further highlighting that foreign direct investment is concentrated in a few sectors in many developing countries and often bypasses countries most in need.[25] As part of the offered solutions, the Addis Ababa Agenda indicates a "*resolve to adopt and implement **investment promotion** regimes for least developed countries*" (emphasis added) and to "*offer advisory support in investment-related dispute resolution.*"[26] Professor Viñuales sees the reference to FDI in the Addis Ababa Agenda as "*perhaps the most significant recognition*" of the synergy between foreign investment and sustainable development.[27] Thus, it is not surprising that there is a movement towards re-establishing international investment agreements as vehicles for promoting sustainable development, encompassing an environmental and social dimension alongside the economic one.[28]

III. International Treaties Addressing Sustainable Development

To date, there is no international treaty on sustainable development or a treaty that balances sustainable development and FDI.[29] A number of international treaties address social and environmental elements of SDGs. The following sections summarize such essential instruments: the Paris Agreement, the work on a treaty addressing the right to development, the human rights protection

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22 Schrijver, p. 299. Unlike Vinuales who identified five elements of SDGs, Schrijver identified seven: 1) sustainable use of natural resources, 2) sound macroeconomic development, 3) environment conservation, 4) equity both between current and future generations, but also equity for and among the people living now, 5) the element of time – short term and long term, 6) human rights, and 7) public participation and justice for all.

23 174 United Nations member states sent delegations; 28 heads of State, vice presidents and heads of government attended. Governments were joined by the heads of the United Nations, the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO), prominent business and civil society leaders, and other stakeholders. The agreement is a follow-up to the 2002 Monterrey Consensus and the 2008 Doha Declaration on Financing for Development. The full text of the Addis Ababa Agenda is available at https://sustainabledevelopment.un.org/frameworks/addisababaactionagenda.

24 Addis Ababa Agenda, ¶¶35, 45.

25 Addis Ababa Agenda, ¶¶35, 46.

26 Addis Ababa Agenda, ¶46.

27 Viñuales, p. 12

28 Choudhury, *International Investment Law and Noneconomic Issues*, *Vanderbilt Journal of Transnational Law* 2020, Vol. 53, p. 4.

29 The OECD attempted to introduce a Multilateral Agreement on Investment (MAI), which ultimately failed.

in relation to transnational companies, and a set of international agreements addressing environmental protection.

1. The Paris Agreement

The Paris Agreement is a legally binding international treaty on climate change adopted at COP 21 in Paris on 12 December 2015. It entered into force on 4 November 2016. Its goals set out States' commitment to limit global warming to 2°C above pre-industrial levels and their best efforts to limit it to well below 1.5°C,[30] as well as to make '*finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*.'[31] With 196 Parties voting in favor of its adoption, the Paris Agreement is the first binding agreement that brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects. Achieving these goals requires a transition toward low-emission investment.

2. The Treaty on the Right to Development

While the UN has not produced a binding international treaty addressing elements of sustainable development, in 2020, the Working Group on the Right to Development produced a draft convention on the right to development.[32] The Preamble recalls several international declarations, resolutions, and agendas on sustainable development, from the Rio Declaration to the 2030 Agenda and the Paris Agreement. Article 3 of the Draft Convention lists general principles, including the States' right to regulate to achieve sustainable development on their territory. Article 22 of the Draft Convention focuses exclusively on sustainable development by prescribing an obligation on the State parties to, individually or jointly, ensure that national or international laws, policies, and practices contribute to sustainable development, and to ensure that their decisions and actions do not compromise the ability of future generations to realize their right to development.[33] More generally, the Draft Convention captures the right to development in an international treaty not by creating new concepts but by building on the existing human rights treaties, concepts, norms, rights or obligations.[34] The work is ongoing; some have expressed concerns regarding the instrument's effectiveness.[35]

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30 Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (Paris Agreement), Art. 2(1)(a).

31 Id., Art. 2(1)(c).

32 A/HRC/WG.2/21/2, *Draft Convention on the Right to Development*, Human Rights Council, Working Group on the Right to Development, 4-8 May 2020.

33 Art. 22(b) of the Draft Convention reflects the theory of intergenerational justice. See further, e.g., J.C. Tremmel, *A Theory of Intergenerational Justice*, Earthscan, 2009.

34 Draft Convention on the Right to Development, with commentaries in A/HRC/WG.2/21/2/Add.1, 20 January 2020.

35 See e.g., Schrijver, *A New Convention on the Human Right to Development: Putting the Cart Before the Horse?,* Netherlands Quarterly of Human Rights 2020, Vol. 38, No. 2, pp. 84-93.

3. Treaty on Human Rights and Transnational Companies

At its 26th session, on 26 June 2014, the UN Human Rights Council adopted Resolution 26/9 by which it decided *"to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises concerning human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."* The open-ended intergovernmental working group has had seven sessions so far and produced a draft of a legally binding instrument to regulate the activities of transnational corporations and other business enterprises. The Third Revised Draft acknowledges that all business enterprises can foster sustainable development through increased productivity aligned with relevant international standards and agreements.

4. International Environmental Agreements

An international treaty on sustainable development or a treaty that balances sustainable development and foreign direct investment is yet to emerge.[36] Nonetheless, several multilateral environmental agreements have been negotiated over time. Table 1 in the Annex provides an overview of notable examples covering the period from the Stockholm Conference in 1972 to 2015.

IV. Soft Law Instruments Concerning Sustainable Development

In parallel to the UN's efforts on sustainable development, international organizations focused on providing guiding principles to regulate the adverse social and environmental impact of the private sector involved in commercial and FDI activities. The following sections briefly describe the most important initiatives: the UN Global Compact, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinationals. These instruments address, to a varying degree, the environmental and social dimension of private sector FDI activities, and prescribing standards of behavior and business conduct. Their impact in the ISDS context is indirect but not insignificant. They are referenced, although infrequently, in new generation BIT treaties further discussed in Section D.

1. The UN Global Compact

As proclaimed on its website, the UN Global Compact is "*the world's largest corporate sustainability initiative*, with a mission to *mobilize a global movement of sustainable companies and stakeholders to create the world we want."*[37] To achieve this, the UN Global Compact encourages the companies to "*do business responsibly by aligning their strategies and operation with Ten Principles on human rights, labor, environment, and anti-corruption,* and *take strategic action to advance broader societal goals, such as the SDGs, with an emphasis on collaboration and innovation*."[38]

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[36] The OECD attempted to introduce a Multilateral Agreement on Investment (MAI), which ultimately failed. [this is already in note 29???]

[37] See https://www.unglobalcompact.org/what-is-gc.

[38] See https://www.unglobalcompact.org/what-is-gc/mission.

2. UN Guiding Principles Human Rights and Business

In 2011, the UN Human Rights Council unanimously endorsed the **UN Guiding Principles on Business and Human Rights** (UN Guiding Principles). The UN Guiding Principles adopted a three-pillar approach: protect – embodying the states' duty to protect human rights, respect – embedding the corporate responsibility to respect human rights, and remedy – embodying access to remedy for victims of business-related abuse.[39] Although the UN Guiding Principles do not directly address sustainable development, business enterprises can successfully implement a measure of their corporate responsibility to respect all internationally recognized human rights if they integrate climate change considerations into their human rights due diligence processes.[40]

3. OECD Guidelines

The **OECD Guidelines for Multinational Enterprises** (OECD Guidelines) are recommendations to and for governments and multinational enterprises.[41] They provide non-binding principles and standards for responsible business conduct in a global context aligned with applicable laws and internationally recognized standards. The OECD Guidelines express the shared values of the governments from which a large share of international foreign direct investment originates, and which are home to many of the largest multinational enterprises.

The OECD Guidelines expressly recognize that Principle 25 of the Rio Declaration emphasizes a *"precautionary approach*" without directly addressing enterprises.[42] Therefore, the purpose of the Guidelines is to recommend how companies implement the precautionary approach on an enterprise level.[43] Concerning MNEs' activities in developing countries, the Guidelines emphasize that the potential for "*demonstration effect*" should be considered, especially given the MNEs' access to innovative technologies and operating procedures.[44] Consequently, a meaningful way to build

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39 See https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/. The full text of the Guiding Principles, including unofficial translations, is available at https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/text-of-the-guiding-principles/. As for their general principles, the Guiding Principles prescribe that "the role of the business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and respect human rights." The Guiding Principles are all-inclusive and applicable to "all […] business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure."

40 See Climate Change and the UNGP, available at https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx. Although the website states that the Working Group on Business and Human Rights will develop an Information Note on what all three pillars entail for States and business enterprises with regard to climate change, such Note has not been made public yet.

41 OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing 2011, [OECD Guidelines], http://dx.doi.org/10.1787/9789264115415-en, Concepts and Principles, 17.

42 OECD Guidelines, Environment Chapter, Commentary on the Environment, ¶68, 45.

43 OECD Guidelines, Environment Chapter, Commentary on the Environment, ¶70, 46.

44 OECD Guidelines, Environment Chapter, Commentary on the Environment, ¶72, 46.

international investment activities is to ensure that the environment in the countries in which MNEs operate benefits from available and innovative technologies and practices.[45]

C. CHALLENGES FOR INVESTMENT LAW

Sustainable development integrates economic, environmental, developmental, social, and governance dimensions. It has a basis in various sources of international law, including treaties and soft law instruments. Each element of sustainable development poses a challenge for the investment protection system within its respective regulatory and conceptual framework. Challenges can be found in the interpretation of the existing framework of investment protection where regulatory measures impact investments, and in the context of envisaging new instruments to deal with the issue more appropriately. Ultimately, host states and home states have to find a way to balance investors' expectations, encourage and attract green investments, and safeguard the right to regulate.

I. Lack of Coherent Regulation and Integration

International treaties traditionally focused on investment protection; therefore, it is not surprising that they do not incorporate standards that investments must comply with social and environmental standards.[46] To address investment impact beyond purely economic and financial elements, there is a trend towards recognizing the need to expand the regulatory space of states for public policies and to subject foreign investors to a set of duties or obligations, such as compliance with labor standards, corporate social responsibilities, promotion of sustainable development, and public health.[47]

Achieving greenhouse gas (GHG) emissions reduction as set out in the Paris Agreement requires a fundamental societal change encapsulating all aspects of life. In terms of investment protection, there are two elements of that process. First, there is a need to preserve the right of the states to regulate to achieve their respective net-zero targets. Such regulation may include phasing out coal and fossil fuel-based industries, but it may also include adopting other measures related to GHG emissions, such as waste management and biodiversity protection. Second, the states need to attract responsible, green investments. The science of climate change demonstrates that achieving net-zero emissions is not a one-sided problem. Accordingly, it does not have a one-sided solution.

Regulatory changes for water, food, energy, and waste are fundamental in achieving SDGs. Several studies concerning the trends of sustainable development protection in ISDS show an increase trend in cases seeking compensation for environment-related matters such as regulation of landfills, waste treatment, garbage collection, pesticides/chemicals, energy efficiency, emissions reduction, and biodiversity. It is clear that SDG-related regulatory measures have already impacted

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45 OECD Guidelines, Environment Chapter, Commentary on the Environment, ¶72, 46.

46 Cotula, *Foreign Investment, Law and Sustainable Development: a Handbook on Agriculture and Extractive Industries* (2nd ed, Natural Resource Issues no. 31. IIED, London, 2016), p. 31.

47 Schrijver, p. 302.

existing investments, leading to investor-state cases dealing with various aspects of the problem, as outlined in the following section.

1. Overview of ISDS and ECT Cases 2010 – 2018

In 2018, the International Institute for Sustainable Development (IISD) issued a report summarizing key cases concerning international investment law and sustainable development from 2010 to 2018.[48] The cases revolve around a broad range of environmental, climate change, and human rights aspects in investment law disputes under relevant instruments, such as applicable BITs and the Energy Charter Treaty. In the majority of the cases, investors brought claims against government public policy measures (e.g., health, environment protection) alleging violations of two investment protection standards: fair and equitable treatment (FET), and the protection of investors' legitimate expectations vs. indirect expropriation. Apart from the discussions on substantive investment protection standards, the cases also bring forward procedural aspects, such as the scope of *amicus curiae* and public participation, more broadly, especially concerning indigenous communities,[49] and counterclaims by states.

For the present chapter, *Bear Creek v Peru*, *Urbaser v Argentina, Burlington v Ecuador, Churchill Mining v Indonesia, Pac Rim Cayman LLC v El Salvador*, and *Bilcon v Canada* are of particular interest. They range from 2015 to 2018, thus making them particularly relevant to the ongoing debate in search of a balance between investment protection standards and sustainable development. In addition, the most recent case in *Eco Oro v Columbia* is of relevance, although not covered in the IISD report. Lastly, a series of cases under the Energy Charter Treaty (ECT) are noteworthy, especially the recent cases against Spain.

a. Amicus Curiae & Public Participation in General: Bear Creek v Peru & Pac Rim Cayman LLC v El Salvador

Bear Creek v Peru[50] concerns a Canadian company with an investment in Peru for the development of the Santa Ana silver mine, near the border with Bolivia. Since the mine is near the border, the Peruvian constitution requires a special authorization for mining operations. Bear Creek obtained authorization to acquire, own and operate the mining concessions in 2007. The company engaged in exploration work in the Santa Ana mine and subsequently conducted an environmental and social impact assessment (ESA). Although Peruvian authorities approved the assessment, they instructed the investor to implement community participation mechanisms in the context of the ESA. Local communities strongly opposed the development of the Santa Ana mine and started public and increasingly violent protests against the work. They were concerned about the negative affect of

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48 Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s,* in Bernasconi-Osterwalder and Dietrich Brau (eds.), International Institute for Sustainable Development 2018, available at https://www.iisd.org/publications/international-investment-law-and-sustainable-development-key-cases-2010s.

49 On this subject, see also Chapter 3.3.

50 *Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21 (Bear Creek v. Peru), https://www.italaw.com/cases/2848.

the mining work on their land, their water and, consequently, their cultural identity. In an attempt to deal with the social unrest, the newly elected government in 2011 revoked the initial authorization for the mining concession and shut down the project.

In August 2014, Bear Creek filed a claim against Peru under the Canada–Peru Free Trade Agreement (FTA) arguing that the decision in 2011 was unreasonable and discriminatory, resulting in unlawful expropriation, violating the FET standard in the FTA, and failing to grant full protection and security. For the present chapter, the importance of the decision concerns the public participation in the context of foreign investment in two aspects.

The first is the requirement placed on an investor to obtain a *social license to operate* the investment. This concerns the public consultation process and involvement of the local communities in the concession granting process. The tribunal was not unanimous on this matter. The tribunal accepted, in principle, the concept of social license, but focused on determining if it amounted to a legal obligation.[51] In that context, the majority was of the view that it is the state's obligation to set the proper procedural framework to ensure such participation and thereby elevate the concept to a legal obligation.[52] However, the concept of social license expresses the acceptance of a local population concerning an economic project based on their perception and opinions. Although it did not have a legal ground in national law, one dissenting arbitrator argued that the investor plays a key role in the process of obtaining such license. They relied on the International Labor Organization (ILO) Convention 169 Concerning Indigenous and Tribal Peoples and concluded that it had legal effects on foreign investors as well, thereby continuing the trend in *Urbaser* and the trend in commercial and investment activities of transnational companies regarding violation of human rights and environmental protection.

The second aspect concerns amicus curiae submissions. Specifically, the tribunal received three amicus curiae briefs filed by a Peruvian human rights organization, a Peruvian lawyer, and an American think tank. The tribunal accepted the former two but rejected the latter one on the grounds that it failed to show contribution of any further information or arguments that would assist the tribunal.[53]

In *Pac Rim v. El Salvador*,[54] a Canadian company sought to invest in El Salvador, and acquired mining licenses between 2002 and 2008 to conduct exploratory and pre-mining activities in various concession areas. The result of the exploratory work was rather successful, as Pac Rim discovered high-grade gold reserves in the El Dorado project. Consequently, in 2004, Pac Rim's subsidiary applied for the necessary exploitation concessions. The project received strong public opposition from civil society organizations concerned that mining operations would contaminate a major source of drinking water. Consequently, after amendments to the mining law, and considering the strong

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51 ¶408.

52 ¶412.

53 Procedural Order No. 6, ¶38.

54 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Pac Rim v. El Salvador), https://www.italaw.com/cases/783.

public backlash, El Salvador's authorities refused to grant the concession. Pac Rim brought a claim under the CAFTA and El Salvador's Investment Law alleging a breach of the country's obligations under national and international law. The tribunal granted jurisdiction based on El Salvador's national law, and ultimately rejected Pac Rim's claims, awarding US$ 8 million to El Salvador.

The *Pac Rim* tribunal received amicus curiae submissions from the Centre for International Environmental Law (CIEL), six local communities, and other organizations, all in support of El Salvador's decision to deny the mining concession. They outlined the human right to a healthy environment and the potential risks to this right stemming from the mining project's impact on the local population and the environment. They further stressed the importance of public participation as an element of sustainable development, in both the exercise of the state's sovereignty in managing its natural resources, and the right of people to participate in the decisions that affect them. The tribunal declined to the consider the amicus curiae submissions for two reasons. First, the disputing parties did not consent to disclose factual evidence to CIEL, and second, to decide the case, the tribunal did not need to consider the CIEL's arguments and found that it would be inappropriate to decide otherwise.[55]

The tribunal in *Crystallex v. Venezuela* held that a foreign investor is not and cannot be "entitled" or "have a right" to an exploitation permit.[56] The state's prerogative to grant or deny permits over its natural resources is an essential element of its sovereignty, while the conditions for granting such a permit are vital in ensuring that the investment activities comply with sustainable development goals. However, the tribunal also held that, should states decide to deny or revoke permits or licenses for environmental reasons, they should do so based on technical studies and scientific research (i.e., objective standards). Otherwise, they risk their behavior becoming arbitrary and, as a result, a breach of the FET standard.

b. Counterclaims: Urbaser v Argentina & Burlington v Ecuador

The Urbaser decision[57] is relevant for several reasons. First, it is the first time that an arbitral tribunal found it has jurisdiction over a state's counterclaims for violation of human rights. Second, the tribunal recognized the interplay between foreign investment and human rights both in a normative context and in the context of accountability of corporations. Both aspects are relevant and feed into the ongoing debate concerning the state's right to a counterclaim and emerging investor obligations. Nonetheless, the tribunal's decision is subject to the specific wording of the Argentina – Spain BIT, as elaborated further.

Urbaser was a shareholder of the holder of a concession for water and sewage services in the Province of Buenos Aires. In 2001-2002 Argentina took emergency measures to deal with an economic crisis that caused financial hardship for the concessionaire leading to its insolvency.

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55 ¶3.30.

56 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 (*Crystallex v. Venezuela*), https://www.italaw.com/cases/1530.

57 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26 (Urbaser v. Argentina), https://www.italaw.com/cases/1144.

Urbaser initiated proceedings against Argentina under the Argentina – Spain BIT alleging a breach of the BIT's prohibition against adopting unjustified or discriminatory measures, and the obligations to afford fair and equitable treatment (FET), and not to expropriate unlawfully. Argentina filed a counterclaim arguing, among other things, that it is entitled to damages as Urbaser violated their commitment and obligations under international law based on the human right to water.[58]

The *Urbaser* tribunal accepted jurisdiction over Argentina's human rights counterclaim, setting a precedent on the matter. There were four distinct grounds for this decision. First, the Argentina-Spain BIT contained a broad dispute settlement clause, which the tribunal interpreted to provide both parties with a right to fail a claim. Consequently, it would be unfair that the one bringing a claim would prevent the other party from raising a claim.[59] Second, the tribunal did not accept Urbaser's arguments on lack of consent to the possibility of a counterclaim. Third, Argentina filed the claim in time, as the counterclaim can be submitted no later than together with the counter memorial. Fourth, the tribunal found a direct factual and legal connection between the claimant's claim and the counterclaim.[60] Notwithstanding the positive decision on jurisdiction, the tribunal ultimately dismissed the counterclaim on the merits. On the point of applicable law, the tribunal considered that the BIT is not isolated and should not be considered as an isolated set of rules of international law for "the sole purpose of protecting investments through rights exclusively granted to investors."[61] The tribunal further accepted the argument that corporations can be subjected to international law obligations,[62] given recent developments in international law on corporate liability for human rights violations.[63] While the tribunal determined that the right to water and sanitation is part of human rights and sets a corresponding obligation on the states to ensure safe and clean drinking water and sewage treatment, it could not find such an obligation for the investor.[64] For a positive obligation for the investor to exist, it should be either stipulated in the BIT or be a general principle of international law, both of which were found absent in the given case.[65] Ultimately, although the concession project was a contribution to securing the population's access to water, it was the primary duty of the state, i.e. Argentina, to exercise authority over the investor to ensure and preserve such a right.[66]

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58 ¶1165.

59 ¶1144.

60 ¶1151.

61 ¶1189

62 ¶1194

63 ¶1195.

64 ¶1205 – 1206.

65 ¶1207. The tribunal noted that the outcome might not necessarily be the same if the question concerned a *negative* obligation, i.e., an obligation to abstain from certain behavior. See further, ¶1210.

66 ¶1212.

c. Responsible Investment and Investor Obligations: Churchill Mining v Indonesia

In addition to Urbaser, another noteworthy case on the question of responsible investment and investor obligations is *Churchill Mining v Indonesia*.[67]

Churchill Mining PLC, a UK-based company, and Planet Mining Ltd., an Australia-based company, jointly with Indonesian partners, developed a mining project in the East Kutai Coal Project (EKCP) on the island of Kalimantan in Indonesia. The region contains one of the largest coal deposits on the planet. In 2010, following a recommendation of the Indonesian Ministry of Forestry, the Regent of East Kutai revoked the mining licenses alleging forgery.[68] The two investors brought claims under the UK-Indonesia and the Australia-Indonesia BIT, respectively, leading to consolidation of the two cases. The tribunal found that it has jurisdiction and proceeded with the decision on the merits, ultimately finding that documents had indeed been forged to obtain mining rights.[69] Although the tribunal could not determine the source of the forgery, it indicated that the claimants' local business partner was likely the source. The claimants, in the tribunals reasoning, failed to exercise due diligence in carrying out the investment. The claimants filed for an annulment of the award, but the annulment committee dismissed the application.[70]

Apart from the evolving concept of investor rights, the *Churchill Mining* case is relevant in understanding the scope of investor obligations and duties beyond liabilities for human rights and environmental harm. Relying on the *Minnotte v Poland* case, the *Churchill Mining* tribunal classified the situation as the "head-in-the-sand problem" in which investors are aware of the problems in the conduct of their business partners but still choose not to take any action.[71] More specifically, the circumstances of the case indicated investors' "conscious disregard" or "wilful blindness" with regard to a serious problem, and a case of failing to take due care.[72] The tribunal found that the investors acted negligently, leading to inadmissibility of their claims.

In *Metal-Tech v. Uzbekistan,* the tribunal declined jurisdiction since it found corruption related to the investor's investment in Uzbekistan.[73]

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67 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40 (Churchill Mining v. Indonesia), https://www.italaw.com/cases/1479.

68 ¶35-36, Decision on Jurisdiction.

69 ¶528, Final award.

70 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, supra* note 67.

71 ¶506, Final award.

72 ¶¶504-506, Final award.

73 *Metal-Tech Ltd. v. Republic of Uzbekistan,* ICSID Case No ARB/10/3 (Metal-Tech v. Uzbekistan), https://www.italaw.com/cases/2272.

d. The Right to Regulate: Bilcon v Canada

As much as *Phillip Morris v Uruguay* [you did not discuss this case yet] was a step in the direction of a better balance between investment protection and protection of public interest, *Clayton/Bilcon v Canada* is a step in the opposite direction. The *Bilcon* tribunal displayed a lack of deference concerning the government's action seeking to strengthen environmental protection.

The investors – the Clayton family group and Bilcon of Delaware – concluded a partnership agreement with a Nova Scotia company, to develop and operate a quarry and a marine terminal in the Canadian province of Nova Scotia at Whites Point in Digby Neck. The project required permits and approval to conduct blasting operations. From 2003, the Governments of Canada and Nova Scotia jointly conducted a lengthy environment assessment. During the process, it became clear that there was widespread public concern and potentially significant adverse environmental impact. Thus, the governments referred the case to a Joint Review Panel, for a review of the project. The JRP's mandate included an objective assessment concerning the project's potential adverse environmental impact, mitigation measures, as well as the effects on the human environment, and the traditional lifestyle, values and culture of the indigenous population. The JRP recommended rejection of the project due to significant and adverse environmental effects on the community core values. Consequently, in 2007 the Governments of Canada and Nova Scotia rejected the project.

Bilcon initiated arbitration under NAFTA against Canada alleging that it applied its environmental regulatory regime in an arbitrary, discriminatory, and unfair manner. The majority of the tribunal held in favor of the investor, finding that the JRP process was arbitrary in creating the standard of "core community values", and it breached the investor's legitimate expectations based on federal and provincial law. The tribunal agreed that JRP had used more strict criteria than those imposed on Canadian investors in like circumstances. Canada's appointed arbitrator issued a dissenting opinion, disagreeing with the majority's findings on the minimum standard of treatment, and violation of the national treatment standard. After the award was issued, Canada's set aside request was unsuccessful. The Federal Court of Canada has only a limited ability to review arbitration awards, notwithstanding the Court's reasoning that the arbitral award raises public policy concerns, including Canada's right to regulate environmental matters, possibly leading to regulatory chill in the environmental assessment process.

e. Eco Oro v Columbia

In December 2021, the tribunal *in Eco Oro v. Republic of Colombia* issued its Decision on Jurisdiction, Liability, and Directions on Quantum.[74] The decision is particularly relevant not only for its length – 400-plus pages – but also the consequences. It produced two dissenting opinions and stirred ongoing debates on the impact of investment law on environment protection efforts.

To briefly summarize the background of the case, Eco Oro is a Canadian mining company with rights to explore and, conditionally, exploit deposits in Colombia based on a concession contract

[74] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, https://www.italaw.com/cases/6320.

with the Colombian government. Exploitation activities are subject to regulatory approvals, including an environmental license. The concession occupied a part of the Paramo de Santurban, a high-altitude wetland region that plays an essential role in the water cycle and serves as an important carbon sink. While Eco Oro was in the process of preparing their concession activities, there was an ongoing political struggle among the Colombian authorities concerning the appropriate way to balance foreign investment in the mining industry with safeguards for the environment and protection and preservation of the Paramo. The debate encompassed not only Colombian authorities, but also the broader public, including conservation advocates, mine workers, and local residents.

The central piece of the debate concerned the delineation of the Paramo region and its wetlands. While the concession area concerns the Paramo the region, it is inconclusive to what extent there is overlap. In 2014, Colombian authorities adopted a 2007 study according to which 55% of the wetlands overlapped with the concession. However, the Colombian Constitutional Court invalidated this resolution due to lack of public consultation. The matter was still ongoing at the time of the final award in *Eco Oro.* The 2014 resolution prompted Eco Oro to initiate arbitration proceedings against Colombia, based on the Colombia-Canada Free Trade Agreement (FTA).

The FTA contains an environmental exception in Article 2201(3) prescribing that nothing in the FTA's investment chapter "shall be construed to prevent a Party from adopting or enforcing measures necessary" to protect the environment, as long as such measures do not amount to arbitrary discrimination or a disguised restraint on trade or investment. The tribunal found that Colombia's measures served the purpose of environmental protection and were non-discriminatory as they affected both domestic companies and foreign investors. However, instead of addressing whether the measures were indeed necessary to protect the environment, the tribunal dismissed the FTA's environmental exception altogether, holding that "even if the exception applies to a measure, this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation." That very reasoning stirred strong criticism. The tribunal did not identify the source of the compensation obligation. With the exception of expropriation cases, a compensation obligation exists only if a State breached an international law obligation or BIT provisions. The exceptions in the FTA served the very purpose of preventing a finding of a breach as long as a measure falls within the scope of the exception. The tribunal's reasoning is even more puzzling, given that the majority of the tribunal agreed that the regulations were non-discriminatory, that there was no expropriation, and that the courts were accessible and involved in attempting to address the matter.

f. Cases Under the Energy Charter Treaty (ECT)

The debate around investment law and the combat against climate change is most evident in the energy industry. As evidenced in various reports, to effectively reach the Paris Agreement goals, states will need to transition to green energy sources, primarily renewable energy sources. Such an endeavor will entail wide ranging changes to the energy regulatory framework to phase out fossil fuel-based energy sources and incentivize and subsidize renewable energy. The ECT takes a principal place in this context. The ECT is a multilateral treaty signed in 1994 with the goal of facilitating cross-border investments in energy projects and energy-related transactions by providing

a set of substantive investment protections. The ECT member states are also signatories to the Paris Agreement and members of the UNPCC. Thus, they have a dual obligation or international commitment. On one side, to provide protection for energy-based investments; on the other side to undertake regulatory policies to reach their net-zero commitments under the Paris Agreement and other climate change related instruments. The problem is the fact that, as it currently stands, the ECT does not differentiate between energy sources, protecting both fossil fuel and green investments. Since 2011, there is a wave of ECT case, reaching 145 as of December 2021. [update]

A recent Climate Change Counsel report of the ECT cases analyses 64 decisions in relation to climate change.[75] In a nutshell, ECT tribunals did not show deference to climate change frameworks, although they did engage with matters concerning environmental law and regulatory shifts related to states' efforts in combating climate change. The experience from these "regulatory cases" may offer insight into the "phase-out cases" under the ECT, the most recent example being a case filed against the Netherlands in 2021.[76] The report is timely as it feeds into the evolving debate on these issues, as well as the ongoing ECT modernization process. Concerning the latter, to respond to criticisms of the ECT, the member states launched a round of negotiations to revise the provisions of the treaty as far as they relate to sustainable development, investment protection favoring green investment, and corporate social responsibility. The negotiation process, unlike that of the UNCITRAL Working Group III, is confidential. The status, progress, and chances of success, of the discussions is not available to the public. The EU, a central player in the ECT framework and a main driver of the negotiation process, released its proposals for the reform process.[77] According to the information available on the Energy Charter Treaty's website, there have been 11 rounds of negotiations, with the negotiation process expected to end in June 2022. [update] The negotiations encompassed substantive provisions, such as changing the definition of investment and investor with a special focus on defining economic activity in the energy sector, the denial of benefits clause, introducing a right to regulate, fair and equitable treatment, as well as indirect expropriation.[78]

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75 The full text of the report is available at *https://www.climatechangecounsel.com/projects-3* (further referenced as ***the Climate Change Counsel ECT Report***).

76 The Climate Change Counsel ECT Report, p.

77 The EU Commission's proposal for ECT reform is available at *https://policy.trade.ec.europa.eu/news_en*. The main criticism is that the ECT in its current form and the modernized ECT will undermine the EU's efforts in combating climate change. Moreover, some have also expressed concerns that the modernization process will undermine the COP26 outcome in tackling climate change. See, for example, Institute for Sustainable Development and Client Earth 2020 filed a brief to the European Com mission, available at *https://www.iisd.org/projects/energy-charter-treaty*.

78 Further information available at *https://www.energychartertreaty.org/modernisation-of-the-treaty/*. For debate on ECT modernization process, see Kluwer Arbitration Blog on ECT Modernization available at *http://arbitrationblog.kluwerarbitration.com/category/ect-modernisation/*.

2. The Conceptual Framework of ISDS & ECT Cases

While national law is essential in addressing social and environmental issues stemming from foreign investments, so is aligning international treaties with sustainable development.[79] International investment treaties should attract green investments, require the integration of standards of responsible business conduct, and promote conditioning foreign investments on adherence with those standards.[80] However, a coherent framework to integrate sustainable development concerns is still absent. As scholars emphasize, there is a "disordered patchwork of all kinds of international norms in a wide variety of sources with an unequal status, ranging from treaties through judicial decisions to a host of non-binding normative guidelines."[81] To provide more coherence, some scholars advocate for the integrative function of sustainable development as a normative concept. A starting point are international investment agreements, as the primary global norm supplier in the investment governance system. Compatibility of the foreign investment system is, of course, desirable. [82] However, it is not sufficient.

Studies of human rights and environment-related investment arbitration decisions show that investment arbitration compromised sustainable development goals on several occasions.[83] Overall, the studies shows that despite high profile cases affirming states' public interest regulatory power, such as *Philip Morris*[84] or *Urbaser*[85], there are cases going in the opposite direction, such as *Bilcon*.[86] The balance favors the latter group, i.e., the number of cases denying or limiting the state's public interest regulatory powers is higher than the number of cases affirming such powers. As Professor Choudhury emphasizes, *"incorporating human rights, environmental, or other develop-*

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79 Cotula, p. 31.

80 *Id*. See further, Francesca Romanin Jacur, *The Vattenfall v Germany Dipsutes: Finding a Balance Between Energy Investments and Public Concerns*, in Y. Levashova et al. (eds.), *Bridging the Gap Between International Investment Law and the Environment*, Legal Perspectives on Global Challenges, Eleven International Publishing 2015, pp. 339-356.

81 Schrijver, p. 308.

82 Schrijver, p. 309. See further, for example, Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) *The Journal of World Invesment& Trade*, 15(5-6).

83 Choudhury, p. 35 [„The compromises to development ideals also persist despite states statistically "winning" investment arbitrations more often than investors. While these wins could suggest that state regulatory powers are adequately protected by investment arbitration, these statistical wins are actually a misnomer. In actuality, states do not "win" investment arbitrations as they are only entitled to cost awards. Moreover, in some instances, cost awards do not fully cover the litigation and opportunity costs states have faced in defending investment arbitrations, particularly those that have challenged human rights or environmental-oriented regulations."].

84 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), https://www.italaw.com/cases/460.

85 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, https://www.italaw.com/cases/1144.

86 *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, https://www.italaw.com/cases/1588.

ment-related rules of international law as part of an effort of the systemic integration of international law or as a source of international law is unlikely to enable tribunals to resolve pronounced conflicts between investment treaty obligations and non-economic issues in favor of the latter."[87] These studies show similar results in the tribunals' approach to dealing with non-economic issues under the sustainable development umbrella, i.e. environmental and social issues. The most effective classification of these awards is that suggested by Professor Viñuales, i.e. differentiating between tribunals taking the traditional approach and tribunals taking a progressive approach, i.e. two approaches on different sides of the spectrum, with the upgraded traditional approach in the middle.

According to Professor Viñuales, the essential characteristic of the traditional approach is suspicion against environmental measures as "unilateral protectionism in disguise," leading to a subordinated treatment of environmental considerations.[88] The conflict between domestic law and international investment law is treated as a legitimacy conflict. A notable example of this approach is *Tecmed v. Mexico*.[89] Contrary to the traditionalist view, the essential characteristic of the progressive approach is the treatment of domestic environmental measures as required or justified under international environmental treaties, and as such, equal to other international norms, including international investment norms. The conflict is treated as a normative conflict, defeating suspicion and mistrust towards domestic environmental regulation.[90] The moderate approach or the upgraded traditional approach, as Professor Viñuales characterizes it, still sees the conflict between domestic environmental regulation and international investment law as a legitimacy conflict. The difference, however, is in the expanded importance of environmental regulation through the interpretation of substantive protections and police powers.[91] A notable example of this approach is *Clayton and Bilcon v. Canada*.[92]

Professor Viñuales' analysis of these decisions boils down to three main approaches of arbitral tribunal decision-making processes: the reference to environmental considerations as a matter of

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87 Choudhury, p. 40.

88 Viñuales, pp. 22-23 [„assessment of genuinely environmental and even internationally-induced measures, with the unfortunate result that environmental considerations remained legally subordinated to purely economic considerations."].

89 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Tecmed v Mexico), 43 I.L.M. 133 (2004), https://www.italaw.com/cases/1087. Other notable examples of this approach are *S.D. Myers v. Canada, Metalclad v. Mexico*, and *CDSE v. Costa Rica*.

90 Viñuales, p. 24 [„This view would, in fact, apply a different set of conflict rules to different types of conflicts ('legitimacy' and 'normative' conflicts) and, more generally, defuse the suspicion and mistrust that some tribunals still see, despite the rise of environmental awareness at the global level, as the starting-point in the analysis of environmental regulation."].

91 Viñuales, p. 25 [„This upgraded approach has been confirmed by recent developments. Importantly, the reasoning of investment tribunals integrates environmental considerations in an increasingly clear and open form, even when the relevant environmental measures are found to be in breach of investment law."].

92 *Clayton and Bilcon v. Canada*, *supra* note 86.. Other notable examples include *Unglaube v. Costa Rica*, *Perenco v. Ecuador*, and specific aspects of two pending disputes in *Spence International Investments v. Costa Rica*.

course, as an obvious reference point, when discussing the operation of common legal concepts of foreign investment law; the inclusion of obiter dicta highlighting the importance of environmental considerations; and the use of some techniques tailored to address the specificities of environmental disputes to stress the normality of resorting to such techniques.[93] He concludes that it is possible to *"infer from several recent decisions a jurisprudential line suggesting that environmental considerations are now normalized or 'mainstreamed' in the reasoning of investment tribunals".*[94]

However, whenever BITs set out substantive investment protections in broad terms, there is a concern regarding the impact of investment arbitration on the host states' right to regulate and undertake measures in the public interest. Such situations are often referred to as "regulatory chill" because far-reaching investor rights can discourage – chill – a host state government from taking desirable steps in the direction of better environmental and social protection. The critique is that the tribunals in these cases do not adequately consider the state's interests while providing extensive protection of the investors.[95] Specifically, the tribunals fail to balance the broad standards of protection adequately with the state's interests to regulate the public interest.[96] As some authors have pointed out, host states are currently facing the risk that pretty much any new law or regulation that is in any way onerous for any foreign investors will be attached with an arbitration claim, causing the regulatory chill – the decision not to adopt new rules to avoid costly arbitration claims.[97] Regulatory chill is particularly concerning when it undermines or completely prevents host state efforts to achieve the Paris Agreement and SDGs through regulatory action. Moreover, host states may find themselves in a direct conflict between broad investor protection and their obligations to enact measures in compliance with other environment-focused international treaties.[98]

In summary, the need for an increased regulatory response to cut greenhouse gas emissions, protect biodiversity, and ensure access to clean air, water, and protection of other national resources

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93 Viñuales, p. 26.

94 *Id.*, p. 35.

95 Emmert and Esenkulova, *Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?* (15 September 2018), available at https://ssrn.com/abstract=3260265, pp. 3-4. See also, Masumy, *ICSID Tribunals Fail to Address the Imbalance Between Sustainable Development Principles and Investment Protections*, 20 December 2021, available at https://www.iisd.org/itn/en/2021/12/20/icsid-tribunals-fail-to-address-the-imbalance-between-sustainable-development-principles-and-investment-protections/.

96 Emmert and Esenkulova, pp. 3-4.

97 Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, Lewis & Clark Law Review 2013, Vol. 17, p. 527. See further, Greenwood, p. 318; Johnson and Guven, *International Investment Agreements: Impacts on Climate Change Policies in India, China and Beyond,* in Ackerman et al. (eds.), *Trade in the Balance: Reconciling Trade and Climate Policy* (Trustees of Boston University, 2016).

98 Greenwood, pp. 317 - 318 ["As states amend their regulatory regimes to meet their Paris Agreement obligations, we are likely to see an increase in environmentally based counterclaims. ... Private investment is likely to play a key role in a country achieving its low carbon goals, but changes to a country's regulatory framework will inevitably have an impact on investments in the country, as will changes in policy resulting from countries seeking to reach net zero emissions by 2050."].

is at odds with FDI protection. Foreign investments are not a goal in and of itself; instead, foreign investments, at least conceptually, are supposed to support the economic development of the host state. A state aims to attract foreign investments as an element of the overall economic development plan. Foreign investments can and should have positive externalities – transfer of knowledge, know-how, technology. Invariably, foreign investments also have negative externalities – either directly through adverse social and environmental impacts, or indirectly through regulatory chill. The older generations of BITs did not consider the need to balance the competing interests of foreign investors with host states' need to regulate in the public interest. Hence, the broad language of the BITs that leads to somewhat inconsistent and contradictory analysis and outcomes. It is not surprising that newer generations of BITs aim to provide such balance.

D. POSSIBLE WAYS OF ADDRESSING THE PROBLEM

There is a need for a modern legal framework for investment that provides protection of foreign investor rights and adequately addresses the investments' broader social, economic, and environmental effects. There is a growing acceptance that foreign investments do not need to be always protected at all cost but that they also have to serve the host state's economic development. The protection of foreign investors and their investments should not be detrimental to the host state's regulatory powers, nor should it be detrimental to global efforts at climate change mitigation and adaptation. Trends in the most recent BITs and free trade- and investment agreements demonstrate possible methods to achieve balance. A shift in the case law further highlights a turn towards a more comprehensive view of the totality of the relationship between the investors, investments, and the state's right to regulate, in particular if such regulation is necessary to meet the Paris Agreement targets.

Achieving balance between investment and sustainable development faces a few obstacles. First is the premise that international investment agreements reflect a "grand bargain," i.e. foreign investment protection in return for economic development.[99] However, both IIAs and their interpretation by arbitral tribunals focused extensively on the protection of investment and not as much on the promotion of economic development or the non-economic elements of development.[100] Some scholars have argued for a different take on the basic premise of IIAs. Specifically, they argue that the purpose of IIAs is not to protect foreign investment in exchange for economic development but to promote economic development.[101] Consequently, a new bargain for the interpretation of IIAs has to be struck: IIAs must leave room to protect development goals and ensure that investors cannot impede important social rights or environmental issues.[102]

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99 Choudhury, p. 5.

100 *Ibid*.

101 *Ibid*.

102 *Ibid*., p. 14, "Indeed, at a minimum the nexus between foreign investment and economic or sustainable development suggests that foreign investment should not impinge on a state's development goals. To be sure, a state's development goals may be myriad, but at their core they must ensure that they enable individuals to enjoy their human rights. Moreover, this will also implicate environmental issues insofar as there is a human right to a healthy environment as well as through the close links between human and

The system of foreign investment law must reconcile the need to protect the investors' rights and mitigate and prevent the adverse impact of those investments in their social, economic, and environmental context. Some have considered the possibility of a multilateral approach as a faster route to achieving the desired balance between protecting investors' rights and safeguarding the state's right to regulate to achieve sustainable development. A global multilateral approach appears more like a dream, rather than a possible reality.[103] The closest to achieving it could potentially be regional investment treaties, combined with bilateral investment treaties. [104] At least some recent changes in new generation BITs and free trade agreements demonstrate a shift towards reaching that balance.

I. Substantive Reforms in BITs

Most newly concluded treaties after 2014 contain a type of provision related to sustainable development. In general, methods to achieve balance encompass a broad range of approaches falling into three main categories: preambular references, substantive provisions, and the refinement of existing standards of substantive protection. There are also examples of innovative approaches, including prescribing investor obligations.

1. Preambular References

Treaties may limit any reference to sustainable development to the preamble, merely giving some guidance for the general interpretation of the treaty. The treaties may reference in the preamble (1) the right to regulate, (2) sustainable development, (3) social investment aspects such as human rights and corporate social responsibility, (4) environmental aspects, such as plant or animal life,

environmental rights."

103 An example of such a multilateral–regional approach is the ASEAN Comprehensive Investment Agreement. The agreement is an example of using GATT-style language to define the framework of the state's right to regulate, among others, when necessary to protect human, animal, or plant life or health. When discussing the appeal of a multilateral approach, one cannot but mention the 1998 Multilateral Agreement on Investment (MAI), chaperoned by the OECD, which ultimately failed due to States' inability to reconcile their diverging socio-political interests. The draft MAI can be found in Frank Emmert (ed.), *World Trade and Investment Law – Documents*, CILP 2018, pp. 155-192, as well as https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.

104 See for example, UNCTAD Reform Package, 2018. From the vast literature on BITs and sustainable development see e.g., Gaukrodger, *The Future of Investment Treaties – Possible Directions*, OECD Working Papers on International Investment 2021/03; UNCTAD, IIA Issues Note: Phase 2 of IIA Reform: Modernizing The Existing Stock of Old-Generation Treaties, June 2017; Rudall, *The Implications of Sustainable Development Goals for Energy Trade and Investment,* in Cima and Moïse Mbengue (eds.), *A Multifaceted Approach to Trade Liberalisation and Investment Protection in the Energy Sector*, Brill 2021; and Salgado Levy, Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective, Groningen Journal of International Law 2015, Vol. 31, No. 1, pp. 59-84. For a view that withdrawal from treaties is another viable option, see Dietrich Brauch, *Reforming International Investment Law for Climate Change Goals*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3692450.

biodiversity, climate change. Out of 2574 registered IIAs, 77 were concluded between 2014 and 2021. Out of these 77, 9 reference all four elements in their preamble.[105]

The approach to the preambular reference varies between BITs. Compare, for example, the wording in the Argentina – Qatar BIT (2016)[106]

> *"encouraging the sustainable development of contracting parties."*

and the Morocco – Nigeria BIT (2016)[107]

> *"Recognizing the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;*
>
> *Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties;*
>
> *Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;*
>
> *Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives and taking into account any asymmetries with respect to the measures in place, the particular need of developing countries to exercise this right;*
>
> *Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investment under this agreement; [...]"*[108]

To what extent such preambular references will have an impact on tribunal decisions is unclear at this stage. Examples of early cases show a varying practice with regard to how much weight is given to the text of the Preamble, depending on the text itself and other circumstances of the case.[109] It seems clear, however, that the wording of the preamble in the Morocco – Nigeria BIT

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105 For detailed mapping, see https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

106 See the treaty for The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3706/argentina---qatar-bit-2016- .

107 See Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016-.

108 *Id.*, emphasis added.

109 This practice is particularly evident in the Energy Charter Treaty (ECT) cases. The ECT contains a reference to environmental protections in its Preamble, and also has a specific provision on environmental issues in its text. The Climate Change Counsel ECT Report demonstrates a reluctance of the ECT tribunals to consider the Preamble in the interpretation and application of the treaty.

may have more impact on the tribunal compared to the text of the preamble of the Argentina – Qatar BIT.

2. Substantive Provisions

Substantive provisions can address (1) health and environment, (2) the right to regulate, (3) corporate social responsibility, and (4) not lowering standards. Out of 77 IIAs concluded between 2014 and 2021, 17 mention all four such clauses.

In this respect, the approach in different BITs reflects different policies on these matters. For example, the Morocco – Nigeria BIT sets out a provision dealing with investment and the environment (Art. 13). The clause prescribes, among other elements, that "each Party retains the right to exercise discretion concerning regulatory […] matters and to make decisions regarding the allocation of resources to enforcement for other environmental matters determined to have higher priorities." The clause further prescribes that parties "recognize that each Parry undertakes to respect and observe the social responsibility owed to the other Party." The Morocco-Nigeria BIT also includes provisions on investment, labour, and human rights protection (Art. 15), investor liability (Art. 20), right of the state to regulate (Art. 23), and a provision on corporate social responsibility (Art. 24). In, the Argentina – Qatar BIT undertook a slightly different and less detailed approach to these matters, although it does incorporate a provision on the right to regulate (Art. 10), an obligation of the investor to comply with the law of the host state (Art. 11), and a provision on corporate social responsibility (Art. 12). [include references to the text of the provisions]

3. Refining Substantive Standards of Protection

The third approach includes refining substantive standards of protection, such as fair and equitable treatment and expropriation, while expanding the procedural elements, such as including a right to file counterclaims.

There are, of course, other examples with varying degrees of definition and inclusion of these elements. Differences concern the approach some states have chosen to tie exceptions in their BITs to the specific regulatory power they wish to protect. For example, the Singapore – Viet Nam BIT and the China – Singapore BIT prescribe an exception from the standard of not less favorable treatment than that accorded to the nationals and companies of any third State. Other BITs, such as the Iran – Japan BIT, prescribe general and security exemptions. The EU-Canada Comprehensive Economic and Trade Agreement delineates grounds for the fair and equitable standard but also makes provisions for reviewing the content of the standard if needed. [include references to the text of the provisions + commentaries]

4. Innovative Approaches and Investor Obligations

Notable examples of innovative ways of incorporating sustainable development features and transcribing policy considerations into specific provisions include the approaches taken by Brazil, India, and Morocco.

Brazil has a long-standing tradition of not signing traditional BITs while at the same time receiving FDI. Brazil's policy is focused on investment facilitation and cooperation instead of investment protection through traditional BITs. Since 2015, Brazil signed 7 BITs with Angola, Chile, Colombia, Malawi, Mexico, Mozambique, and Peru. Out of those seven, only two are in force, namely those with Angola and Mexico, respectively. [check if there are any changes] The new investment program focuses on two elements: (a) mechanisms to monitor investment relations and prevent disputes (examples include ombudspersons and joint committees), and (b) adaptable, open-ended, or framework agreements to accommodate the state parties' development needs. [anything else to add?]

India's change in approach is another interesting example. India decided to terminate all of its existing BITs and announce its new model BIT in 2015. [add commentaries] The India Model BIT removed the FET standard and incorporated a provision on the treatment of investors (Art. 3). It further included a chapter on investor obligations, including compliance with laws and corporate social responsibility. Concerning the latter, Art. 12 of the India Model BIT prescribes that "*investors and their enterprises operating within its territory of each party shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies*." Since 2014, India has signed the ASEAN – India Investment Agreement. According to UNCTAD Database, India did not sign other BITs.[110]

Morocco's Model BIT includes a section outlining investor obligations and responsibilities in detail. Apart from the general approach of complying with host state laws and regulations, the section outlines other obligations and responsibilities, such as the obligation for investors to manage and operate their investments under the contracting parties' international obligations in the fields of environment, labour, and human rights (Art. 18.7), and the obligation for investors not to engage in corruption, money laundering, or financing of terrorism, the violation of which will result in the deprivation of the right to have recourse to treaty-based dispute settlement mechanisms (Art. 19). Investors also have a responsibility to contribute to the sustainable development of the host state and the local community, to create employment and human capital formation, and to apply universally recognized norms, such as the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD's Guidelines for Multinational Enterprises (Art. 20).

II. Procedural Reforms in BITs

Procedural elements also have the potential of balancing the right of the state to regulate, obligations of the investors, and the protection of investments. Recent developments in investor-state disputes concerning the environment and other non-economic related issues, amicus curie and participation of third parties, scientific evidence, and states' right to counterclaim are gaining more traction as potential procedural tools. Considering innovative ways to fill in the gaps of the existing framework, some authors suggest mechanisms to increase the presence of sustainable develop-

110 For details, see Chapter 4.3.

ment-related arguments in ISDS. Examples include the increased role of public interest attorneys, amicus briefs, and the right to counterclaim.

1. Amicus Curiae and Public Attorney Briefs

One approach to address sustainable development concerns is through *amicus curiae* submissions.[111] The ICSID Rules of Procedure for Arbitration Proceedings, after the 2006 amendments, encapsulate the possibility of amicus curie briefs in Rule 37(2).

An example of a successful intervention of amicus curiae was in *AES Summit v Hungary* in 2010. The EU Commission requested and, after agreement of the parties, was allowed to file observations regarding the application of EU competition and antitrust laws.[112] More recent examples of amicus curiae include *von Pezold and Others v. Zimbabwe* from 2015.[113] However, the review of arbitral awards also indicates a situation where amicus curiae briefs did not contribute to the tribunal's consideration of environmental rights due to the amicus' limited participation.[114] Instead, in line with some institutional rules, the tribunals may request an independent expert or otherwise seek scientific evidence.[115] In terms of climate change-related cases, a recent proposal is for the use of the Climate, Biodiversity, Natural Resources and Health- or *CBNH Test*.[116] The test encompasses four criteria to assess whether a state should compensate the investor for the adverse financial consequences of a new measure or policy:

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111 From the vast literature on *amicus curiae* and public participation in ISDS cases see Lin, *Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration*, International Community Law Review 2017, Vol. 19, No. 2-3, pp. 270-301; Eric De Brabandere, *Amicus Curiae Intervention: From NAFTA to the Intra-EU Saga,* in Ruiz Fabri and Stoppioni (eds.), International Investment Law: An Analysis of the Major Decisions, Edward Elgar 2022, pp. 193-209; Alvarez and Kazeem, *Measuring public participation in International Investment Treaty Law: A Study of the Latin American Extractive Industries*, in Alvarez et al. (eds.), *International Arbitration in Latin America: Energy and Natural Resources Disputes*, Kluwer Law International 2021; Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations* (2013) Transnational Dispute Management 2013, Vol. 10, No. 1; Brickhill and du Plessis, *Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration* (*Piero Foresti v South Africa*), South African Journal on Human Rights 2011, Vol. 27, No. 1, pp. 152-166.

112 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, https://www.italaw.com/cases/193, at ¶ 8.2.

113 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, https://www.italaw.com/cases/1472.

114 Choudhury, p. 58.

115 *Id.*, p. 57 [„A second realization from the review of arbitral awards was that, faced with scientific evidence, tribunals were more amenable to considering non-economic issues. Perhaps this is because scientific evidence "provides a putatively objective basis for assessing the reasonableness of state measures alleged to harm investors' rights."].

116 Castineira and Lehmann, *After Vattenfall: A Science-Based Proposal to Account for Climate Change and Biodiversity in Energy Arbitrations*, in Scherer (ed.), ASA Bulletin 2021, Vol. 39, No. 2, pp. 286-305.

- Is the measure reasonably expected to mitigate the effects of climate change?
- Is the measure reasonably expected to protect biodiversity?
- Is the measure reasonably expected to rely on available natural resources?
- Is the measure reasonably expected to protect human life or health?[117]

Similar to the role of an amicus is the role of public attorneys to represent sustainable development interests. The inspiration for the proposal comes from the role of the Advocate General at the European Court of Justice (ECJ), a kind of public or EU common interest attorney, whose recommendations the ECJ follows in 80% of the cases.[118] While the current ISDS system does not have a framework to facilitate such a role, a potential substitute could be the appointment of experts – either tribunal-appointed experts or party-appointed experts – to analyse the public interest dimension.[119]

One could go a step further and suggest that states form an interdisciplinary department to analyse the cases and assist the legal teams in making their arguments inclusive of environmental protection, social, and economic considerations. The adverse impact of investments may be diverse and cover a broad range of social, economic, and environmental issues. Moreover, assessment of these issues may require expertise beyond that of the lawyers and require scientific analysis to fully capture the scope, intensity, duration of adverse impact, and the impact of various scenarios. Hence, to help a tribunal to make an informed decision and adequately balance the interests of states and foreign investors, a state may need to appoint an expert team, rather than just a legal team. A more financially prudent and environmentally responsible way to go about this would be to have an administrative body tasked with the same thing but already at the stage when an investment is first contemplated or approved. The body should be a mandatory part of the investor-state communications from the very beginning, when any licenses or concessions are granted or modified, when regulatory changes are contemplated or made, and to provide support when a state faces an investor claim.

2. Counterclaims

Through a counterclaim, a defendant in the proceedings can aim to counteract and undermine the plaintiff's claim or to reduce or eliminate any obligations to pay compensation.[120] While this is a procedural tool, the right to counterclaim depends on the investor's substantive obligations. A state can counterclaim and argue that an investor violated an obligation only if such an obligation existed in the first place.[121] Investor obligations may come from the text of the BIT – as evidenced in the

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117 *Ibid.*, p. 295.

118 See e.g., Emmert and Esenkulova, p. 16.

119 *Ibid*.

120 Marisi, *Environmental Interests in Investment Arbitration,* Kluwer Law International 2020, pp. 237 – 254, 237; Hoffmann, *Counterclaims in Investment Arbitration*, ICSID Review - Foreign Investment Law Journal 2020, Vol. 28, No. 2, pp. 438 - 453.

121 Marisi, p. 248.

recent texts of BITs incorporating provisions on investor obligations. Other sources may include general principles of law, domestic law, or contracts with the host state.[122]

In the context of ISDS procedural reforms, a state's right to make counterclaims gained increased attention.[123] While *Urbaser* was the first case where a state filed a counterclaim, notable recent examples include *Perenco v. Ecuador* and *Burlington v. Ecuador* where the tribunal granted the counterclaim.[124] Two oil companies – Perenco, a French-based company, and Burlington, a US-based company – formed a consortium for oil exploitation of blocks 7 and 21 in the Ecuadorian Amazon Forest, which they operated. The dispute in Perenco v Ecuador and Burlington v Ecuador stems from the Production Sharing Contracts (PSCs) that set out the details of their operations. After the increase in international oil prices, Ecuador attempted to renegotiate the PCSs but was unsuccessful. It then imposed a windfall tax of 99% on oil revenues. When the companies refused to comply with it, Ecuador sued in the national courts. Subsequently, the companies stopped their operations, and Ecuador eventually terminated the PCSs.

In *Burlington Resources Inc. v. Ecuador*, Ecuador counterclaimed against Perenco's partner.[125] Specifically, Ecuador alleged breaches of Ecuadorian environmental law and contractual obligations. It sought compensation of approximately $2.8 billion. The tribunal engaged in extensive analysis to define the meaning of environmental harm, and it further conducted a thorough review of the investor's oil fields and ruled on any contamination at each site. Ultimately, the tribunal ruled in Ecuador's favour on the counterclaim, awarding the state USD 41.7 million in damages.[126] In *Perenco v. Ecuador*, Ecuador counterclaimed against the investor that it had caused an "environ-

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122 Marisi, p. 248.

123 As of 2020, there are 11 cases where states filed a counterclaim*: Perenco v. Ecuador, Burlington v. Ecuador, Urbaser v. Argentina, Oxus v. Uzbekistan, Hesham v. Indonesia, Metal-Tech v. Uzbekistan, Goetz v. Burundi, Spyridon Roussalis v. Romania, Saluka v. Czech Republic, Amco Asia v. Indonesia, and Klöckner v. Cameroon.* See further Crina Baltag & Ylli Dautaj, *Regime Interaction in Investment Arbitration: Counterclaims*, Kluwer Arbitration Blog, 11 January 2022, available at http://arbitrationblog.kluwer-arbitration.com/2022/01/11/regime-interaction-in-investment-arbitration-counterclaims/. See also, Ishikawa*, Counterclaims and the Rule of Law in Investment Arbitration*, AJIL Unbound 2019, p. 113; and Gleason, *Examining Host State Counterclaims for Environmental Damage in Investor State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives*, Int'l Environmental Agreements: Politics, Law and Economics 2021, Vol. 21, No. 3, pp. 427–444.

124 In terms of earlier cases, a notable example is *Goetz v. Burundi* from 1999 (Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/95/3 – Settlement Award, https://www.italaw.com/cases/508). The tribunal concluded that the state did not meet its burden of proof that its damages stem from the investor's conduct.

Among the more recent cases, an interesting example is *Hesham T.M. Al Warraq v. Republic of Indonesia*, where the tribunal concluded that the state has a right to damages but failed to meet its burden to prove the legal basis to recover the incurred losses, see https://www.italaw.com/cases/1527.

125 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), https://www.italaw.com/cases/181.

126 ¶1075

mental catastrophe" with the way it operated oil blocks in the Amazon rainforest.[127] The tribunal found the investor's conduct troubling and one that did not "paint a picture of a responsible environmental. [this quote is incomplete and needs a footnote/source]

While a right to a counterclaim is subject to several requirements, it has the potential to play a crucial role in investment arbitration, and especially in investment arbitrations with non-economic interests at stake. The advantages of counterclaims include increased efficiency and integrity of the system as they allow equality of arms between parties, avoid diverging decision and parallel proceedings, deter polluting behaviour on the side of investors, and incentivize more robust compliance with environmental laws of the host state.[128]

Moreover, counterclaims are especially important as they not only highlight non-economic issues, such as environmental or human rights issues, but compel the tribunal to analyze these issues where it might have otherwise disregarded or downplayed them.[129] While most arbitral rules allow for counterclaims, due to diverging approaches in practice, states have an option to either include broad jurisdiction provisions or include specific provisions on the right to counterclaim in the BITs and IIAs.[130] Concerning the latter, an example is the Morocco Model BIT which includes a state's right to counterclaim.

3. Multilateral Investment Court (MIC)

The Multilateral Investment Court (MIC) proposal has been attracting a rich academic and practical debate, especially within the ongoing work of the UNCITRAL Working Group III. The idea of a MIC has its origins primarily in the European Union's global diplomacy in negotiating TTIP, with strong public and political pressure as the underpinning factors driving the design and the advocacy for a MIC.[131]

Although TTIP negotiations ultimately failed during Mr Trump's presidency, the design and the proposal for a MIC found their way into the EU's bilateral trade and investment agreements with Canada, Singapore, Viet Nam, and Mexico. The dispute resolution system encompasses a two-tier system, with a first instance tribunal and an appellate mechanism. Each party appoints an equal number of members, while non-nationals will serve as chairs of the tribunals. The tribunal members

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127 *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, https://www.italaw.com/cases/819.

128 Marisi, pp. 252-253.

129 Choudhury, p. 56.

130 *Id.*, p. 58.

131 From the rich literature on this matter, see e.g., Lee, *ISDS Reform: Analysis on Establishing a Multilateral Investment Court System,* Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 2021, Vol. 87, No. 4, pp. 484 – 506; Bjorklund, *Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court*, Arbitration International 2021, Vol. 37, No. 2, pp. 433 – 447; Brown, *The EU's Approach to Multilateral Reform of Investment Dispute Settlement*, in Stanič and Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*, Kluwer Law International 2020, pp. 219 – 236.

will be subject to ethics rules, especially those preventing or forbidding "double hatting" scenarios. The driving force behind such a system is the expectation of consistency and predictability of the decisions, while appellate mechanisms would ensure the correctness and consistency of the awards.

In 2017, the EU decided to shift their focus to an international level within the UNCITRAL Working Group III. Within the scope of WG III's mandate, one can differentiate between low-impact procedural reforms that focus on improving the ISDS system as it currently stands, and systemic procedural reforms. The former includes reforms of the code of conduct of arbitrators and third-party funding. The latter primarily provides for the creation of the MIC.

Arguments in favour of a MIC include predictability and consistency, similar to those under EU bilateral agreements with Canada, Singapore, Viet Nam, and Mexico.[132] Those with a cautionary outlook discuss the lack of party autonomy in the arbitrators' selection process, the possibility of bias towards host states, expanded grounds for review of the awards, including the merits, and concerns of enforceability.[133]

Such procedural concerns affect the possible impact these dispute resolution system designs will have on climate change-related investment cases.[134] On one side, the concerns over pro-state bias might include tribunals considering a systemic interpretation of States' obligations under the new BITs and other environmental, social, human rights, and climate change-related obligations. However, the risk of inconsistent awards or awards which do not fully account for or consider adverse negative externalities of the trade, as they will apply the same substantive law as the ad hoc tribunals [this is unclear]. A viable way to overcome or influence the decisions includes binding joint interpretative statements focused on safeguarding states' right to regulate as a treaty obligation. The second might entail an easier process of non-disputing parties as amicus curiae.

A second option or an interim solution emerged within the UNCITRAL Working Group III and may well be a more acceptable one. In the first instance, we would keep ad hoc tribunals or the ISDS system as it currently stands, but newly introduce review on the appellate level. Every state would be able to elect if they would like to join the system and with respect to which BITs. The appellate

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132 See e.g., Thanvi, *The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues*, Indian Journal of Arbitration Law 2019, VIII(2), pp. 97-117.

133 On enforceability, see e.g. Potesta*, Investment Arbitration, Challenges and Prospects for the Establishment of a Multilateral Investment Court: Quo Vadis Enforcement?,* Austrian Yearbook on International Arbitration 2018, pp. 157 – 178.

134 Other concerns are financial in nature, in particular the question of who will finance the MIC. Moreover, if the members of the tribunals are publicly elected, this might lead to politicization of the process, impacting their neutrality and independence. The idea of publicly elected members having more consideration of public law elements results in a pro-state bias. Thus, while the promise is for a cheaper, less time-consuming, independent body, in reality, it may be expensive to finance, with pro-state bias elements, leading to few cases it will ultimately decide on.

body would only deal with review issues. The solution might be more accessible, quicker, and less expensive to implement.

E. CONCLUSIONS

Apart from the modernization and reform processes, states, academics, and other stakeholders have considered other possibilities in search of balance between sustainable development and investment law. This section provides a summary of noteworthy initiatives.

The Stockholm Chamber of Commerce launched an international competition – Stockholm Treaty Lab – for drafting a multilateral investment treaty focused on ISDS and climate change. The competition gathered interdisciplinary teams who proposed diverse ways in reconciling investment protection and climate change goals. More specifically, the general focus was on providing a framework for a bilateral or multilateral instrument that would incentivize and protect green investments, while simultaneously phasing out fossil fuel-based projects and investments. A winning proposal – the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation – received extensive attention, with publications in academic journals and presentations at conferences, and the UNCITRAL Working Group III. The relevance of the proposed treaty is that it aims to align investment in green energy to Paris Agreement and Sustainable Development Goals through an international framework of cooperation and facilitation. The proposed treaty may serve as a model treaty, especially considering the emergence of global debates in that vein.

As the delegates continue their work in the UNCITRAL Working Group III, non-governmental organizations and think-tanks continue to express diverging views on the appropriate mechanisms in relation to sustainable development and ISDS. While the influence of these positions remains to be seen in the context of WG III, there have been examples of reform processes elsewhere. ICSID began revision of its rules for the fourth time in 2016, resulting in the text of proposed rules in January 2022. ICSID Member States approved the amended rules on 21 March 2022, and the updated rules went into effect on 1 July 2022. These amendments are the most extensive to date, drawing from the experience with hundreds of ICSID cases to achieve the overall goal "to modernize, simplify, and streamline the rules, while also leveraging information technology to reduce the environmental footprint of ICSID proceedings."[135] Among the new procedural elements, two are relevant for the present chapter: expanded transparency provisions to publish awards, and a revision of the opportunity for non-disputing parties to file submissions (*amicus curiae* briefs). In this way, ICSID is responding to growing calls for increased transparency of the proceedings, as well as easing the access of non-disputing parties to ongoing proceedings.

Lastly, the most notable changes come in form of ongoing discussions as to the purpose of FDI procedural and substantive protections. Many academics emphasize that the international framework should no longer primarily favor foreign investors as the goal has to be to incentivize foreign investments conducive to the overall economic development of the host state. Consequently, the host state's right to regulate in the public interest and the right to file counterclaim is vital in ensuring

[135] Further information on the reform process is available at https://icsid.worldbank.org/resources/rules-amendments.

balance between protecting foreign investors and securing the host state's right and ability to comply with its duties and obligations under other international law instruments. As evidenced in the analysis of the ISDS and ECT cases, there is a problematic lack of consistency in the tribunal decision-making processes. While a possible path forward could include revision of the BITs to include provisions reflecting these concerns, that is still not a guarantee of a balanced outcome. The decision in *Eco Oro* is a prime example of that. Such decisions can have devastating consequences, primarily leading to regulatory chill. Moreover, they can lead to host states withdrawing from multilateral treaties. An example of this occurring in practice is Italy's withdrawal from ECT in 2016, with countries such as Russia and Australia taking a similar approach. Italy faced a wave of "regulatory cases" from investors in relation to its legislation on phasing out fossil fuels. Interestingly, Spain, which faced around 40 cases regarding its photovoltaic incentives, has not (yet?) announced an intention to withdraw from the treaty. The ECT's modernization process will likely conclude in June 2022, with some raising concerns that if the final outcome is not satisfactory, withdrawal from the treaty is a feasible option.

Apart from these topics, which occupy a significant part of the academic, policy, and practitioners' debates, other workable solutions include state-to-state dispute settlement processes in case of alleged BIT violations.[136] More broadly, the emerging discussions revolve around the notion of investment governance, not purely investment protection. These ideas reflect concerns that the proposed reforms in the UNCITRAL Working Group III and ECT will not adequately and sufficiently quickly respond to sustainable development efforts, and especially efforts in combating climate change.

ANNEX

Table 1: Overview of International Environment Treaties

Year	Convention	Brief Summary
1972	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention) 89 Parties	The objective of the London Convention and Protocol is to promote the effective control of all sources of marine pollution. Contracting Parties shall take effective measures to prevent pollution of the marine environment caused by dumping at sea (see articles I and II of the Convention and article 2 of the Protocol).
1972	Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) 194 Parties	The Convention sets out the duties of States Parties in identifying potential sites and their role in protecting and preserving them. By signing the Convention, each country pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage.

[136] For more on this, see Chapter 5.2.

1973	Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) 183 Parties	An international treaty to prevent species from becoming endangered or extinct because of international trade. Under this treaty, countries work together to regulate the international trade of animal and plant species and ensure that this trade is not detrimental to the survival of wild populations. Any trade in protected plant and animal species should be sustainable, based on sound biological understanding and principles.
1973	International Convention for the Prevention of Pollution from Ships *modified by the Protocol of 1978 (MARPOL 73/78) 156 Parties	The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes.
1974	Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) 172 Parties	The Convention provides the only international mechanism for protecting sites of global importance and is thus of key conservation significance. It covers all aspects of wetland conservation and ‘wise use'. It has three main ‘pillars' of activity: the designation of wetlands of international importance as Ramsar sites; the promotion of the wise use of all wetlands in the territory of each country; and international cooperation with other countries to further the wise use of wetlands and their resources.
1979	Geneva Convention on Long-Range Trans-Boundary Air Pollution 51 Parties	Eight protocols identify specific measures to be taken by Parties to cut their emissions. The Convention provides access to emission, measurement and modelling data and information on the effects of air pollution on ecosystems, health, crops and materials.
1982	UN Convention on the Law of the Sea (UNCLOS III) 167 Parties & the European Union	The Convention lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It embodies in one instrument traditional rules for the uses of the oceans and at the same time introduces new legal concepts and regimes and addresses new concerns. The Convention also provides the framework for further development of specific areas of the law of the sea.
1982	Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) 188 Parties	The overarching objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as “hazardous wastes” based on their origin and/or composition and their characteristics, as well as two types of wastes defined as “other wastes” – household waste and incinerator ash.

1992	Convention on Biological Diversity 150 Parties	The Convention on Biological Diversity is dedicated to promoting sustainable development. Conceived as a practical tool for translating the principles of Agenda 21 into reality, the Convention recognizes that biological diversity is about more than plants, animals and microorganisms and their ecosystems – it is about people and our need for food security, medicines, fresh air and water, shelter, and a clean and healthy environment in which to live.
1992	United Nation Framework Convention on Climate Change (UNFCCC) 197 Parties	The United Nations Framework Convention on Climate Change (UNFCCC) has been the principal forum for cooperation among nations on greenhouse gas (GHG)-induced climate change since its adoption in 1992. Its objective is "to stabilize greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system, in a time frame which allows ecosystems to adapt naturally and enables sustainable development."
1997	Kyoto Protocol (KP)	The first subsidiary agreement to the UNFCCC.
2015	Paris Agreement (PA)	The PA is the second major subsidiary agreement under the UNFCCC. The PA is to eventually replace the KP as the primary subsidiary vehicle for process and actions under the UNFCCC.