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Environment and Investment Agreements: Together, apart?

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The global investment regime stands at a crossroads. From the late 1980s onwards, its predominant, if not exclusive focus on economic growth has been increasingly shifting towards sustainable development. The delicate balance between these considerations is reflected in bilateral or multilateral negotiations , national legislation, and decisions by domestic courts or investment tribunals. One does not work without the other.
To contribute to this discussion, this policy brief summarizes existing environmental provisions in investment treaties and and free trade agreements to outline their potential role as part of the 2030 Agenda for Sustainable Development. In so doing, it summarizes the positions of the relevant multilateral institutions and *fora*, namely the UN Conference on Trade and Development, the OECD, or the United Nations Commission on International Trade Law. The general assumption is clear: While investment protection in general and investor-state-dispute settlement is under enormous pressure due to accusations of ignoring societal values such as environmental concerns, calls for disbanding it are premature. Foreign direct investment can and should play More, not less, foreign direct investment is needed to protect the environment.

1. Introduction

Rules on the protection of foreign direct investments (FDI) have never been an end in itself. At their very core stands 'the need for international cooperation for economic development, and the role of private international investment therein', as the preamble to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) put it.[1] Some twenty years later, the famous Brundtland report further emphasized that 'poverty, environmental degradation, and population growth are inextricably related and that none of these fundamental problems can be successfully addressed in isolation'.[2]

This also has implications for investment law and the balance between the protection of investments and states' 'right to regulate'. While private investors investors are worried of expropriations, arbitrary or unfair treatment, drastic legislative changes, and physical harm, states might seek or even be obliged to, e.g., protect endangered animals, manage waste disposal, decrease emissions of carbon dioxide or stop the pollution of rivers, lakes, and seas. Investors, in turn, might consider measures adopted for these purposes as violations of their interests – sometimes rightfully, sometimes not. Decisions by arbitral tribunals have gone in both directions without a clear trend or preference. All depends on the circumstances of each case.

In recent years, in particular following the adoption of the Paris Agreement on Climate Change, more and more states have adopted explicit references to environmental protection in trade or investment agreements. The present policy brief tries to outline this development, along with the potential role of FDI in the

[1] Available at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

[2] Available at https://en.wikisource.org/wiki/Brundtland_Report/Chapter_2._Towards_Sustainable_Development.

fight against climate change and for sustainable development.

The first part will introduce the basics of investment and environmental law, followed by a discussion of existing environmental provisions in investment agreements and related treaties. On this basis, a few words about environment-related case law by investment tribunals and the possible impact of climate change litigation in domestic and human rights courts or bodies on investment law are due.

The second part, then, focuses on the future of investment law in general and investment treaties in particular and how they could enhance (more) sustainable FDI. As will be shown below, the proper approach is not less investment, but the right type of investment.

2. Investment Law and Sustainable Development

Investment law developed in the late 1950s[3] and early 1960s with the purported aim of increasing FDI in poorer countries by granting protection to foreign investors and their investments. Its most common source are Bilateral Investment Treaties (BITs),[4] i.e. agreements between two states which guarantee the respective foreign investors certain rights such as fair and equitable treatment (FET), protection against discrimination of unjustified expropriation as well as access to arbitration tribunals to resolve disputes between investors and the host state. Investors thus have a special protection regime outside of a state's traditional judicial system (Investor-State-Dispute-Settlement, hereinafter ISDS). In addition, investment-related provisions can also be found in other treaties, [5] among them Free Trade Agreements (FTAs) or the World Trade Organization's (WTO) Agreement on Trade-Related Investment Measures (TRIMs).

Environmental law is an even younger field of international law. While its origins can be traced back to the late 19th century, its actual emergence began during the 1970s. Today, it is a clearly established set of rules covering a wide range of topics, from climate change all the way to the protection of endangered species. At the same time, many of its obligations are comparatively weak and depend on the political will of states.

Nevertheless, environmental law has an impact on other fields, including investment law. While the latter gives investors only rights without imposing (environmental, or other) obligations, states are expected to cut carbon emissions, protect endangered species, restrict waste dumping, and the like. Here, rich states might worry of losing out in an environmental race to the bottom. Poorer countries, in turn, often end up torn between, on the one hand, the need to attract foreign investments and, on the other, adopt measures to protect the environment.

Such measures may obviously effect investors. Investment law-related case law provides many examples of disputes concerning the difficult balancing act between the protection of the environment and of investments. Investors might use their economic power to prevent governments from taking certain actions. In other cases, states might abuse or mishandle noble intentions (and obligations) by, e.g., discriminating arbitrarily between foreign and domestic investors or treating them unfairly.

As a way out of this dilemma (and recognizing the importance of environmental concerns), some suggest that investors should also be directly bound by, inter alia, environmental standards. The OECD Guidelines for Multinational Enterprises make clear that '[e]nterprises can be involved in a range of adverse environmental impacts' and should thus, e.g.,

> [e]stablish and maintain a system of environmental management appropriate to the enterprise associated with the operations, products and services of the enterprise over their full life cycle, including by carrying out risk-based due diligence… for adverse environmental impacts.[6]

Furthermore, the OECD Guidelines also expect investors to engage with communities and institutions negatively affected by the environmental impact of their activities, refrain from relying on a lack of perfect proof of evidence of harm, plan for the prevention, mitigation, and control of damage caused by their activities, improve their 'environmental performance' and educate and train their workers in environmental matters.

In its most expansive form, the notion of Corporate Social Responsibility (CSR) would also entail the possibility of (counter)claims by host states against investors operating within their jurisdiction or causing (environmental) harm to them. As Jarrett, Puig and Ratner put it, the old 'understanding of international investment law – investor rights and host state duties – is now a relic of the past. Yet because of their current asymmetrical nature, ISDS and IIL [international investment law] do not effectively regulate investors' conduct'.[7] To level the playing field, it is not enough to include obligations for investors in investment treaties, for example in connection with environmental impact

[3] The first modern BIT is from 1959 (between the Federal Republic of Germany and Pakistan).

[4] There are currently (April 2024) 2222 BITS in force, see https://investmentpolicy.unctad.org/international-investment-agreements.

[5] There are currently 386 treaties with investment provisions in force, see ibid.

[6] *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD 2023, available at https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1704459987&id=id&accname=guest&checksum=6916034C71FFD438F377E8B16677DADA, 33f.

[7] Martin Jarrett/Sergio Puig/Steven R. Ratner, 'New Options for Investor Accountability in ISDS', *EJIL:Talk!*, 22.12.2021.

assessments, management and improvement.[8] What really matters is their actual enforcement: One solution is to make access to ISDS conditional on a certain behavior by investors or reducing damages if they themselves violated domestic law in the host country. Another is allowing states or even individuals to sue private investors, possibly even at a 'Multilateral Investmnt Court' as envisaged by the European Commission since 2015.[9] At the time of writing, however, such proposals are far from being implemented. As will be shown in the next section, current and recent developments rather aim at expanding states's wiggle room for environmental protection instead of holding investors directly responsible.

3. The status quo: Environmental Clauses in IIAs and FTAs

The vast majority of international investment agreements (IIAs) are devoid of references to or specific provisions on environmental concerns.

Yet, there has been a noticeable trend to take such and other concerns into account from the end of the Cold War onwards,[10] further accelerated after the UN General Assembly's 2015 Sustainable Development Goals (SDGs) resolution (more than 60 IIAs – and counting – adopted since then refer to the SDGs).[11]

Most of these treaties, almost all of them BITs, however, simply (albeit explicitly) affirm the host states' right to regulate as extending to environmental policies and thus do not create anything new.[12] Less often are references to the environment in the preamble, which, although not binding by itself, is relevant when interpreting operative provisions. The rarest references are those to the requirement to preserve the (environmental) status quo in order to avoid the promise of lowering standards as a selling point for investors.[13] A few notable examples of FTAs and BITs with environmental provisions are described in the next subchapters.

3.1. Model Investment Agreements

Numerous countries publish written and unilateral proposals on what they intend their future BITs to look like: so-called model investment agreements. A few of them explicitly refer to sustainability and the environment. An often-discussed and leading example is the 2019 Netherlands model Investment Agreement,[14] which has been praised for possibly setting 'the scene for a new generation of investment treaties, paving the way with progressive rules on sustainable development …'.[15] It includes nine references to the environment: in addition to the well-established right to regulate (in the preamble and Article 2), its novelty are the specific articles (6 and 7) on sustainable development including paragraphs (4 and 6) that consider it 'inappropriate to lower' existing environmental standards while reaffirming obligations under environmental law, on CSR and one (paragraph 3) that highlights 'the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment'. Last but not least, one provision clarifies that measures to protect the environment do not, in general, constitute expropriation (Article 12 Paragraph 8). Other, less far reaching but still noteworthy examples of Model BITs containing environmental provisions are those of Austria (from 2008),[16] the US (2012),[17] Brazil (2015),[18] India (2015),[19] Russia (2016),[20] and, most recently, Canada (2021)[21] and Italy (2022).[22] The Model BITs of G-20 members like France (2006),[23] Germany,[24] Mexico

[8] International Institute for Sustainable Development, *A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda*, available at https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-3-investor-and-home-state-obligations/5-3-1-investor-obligations/.

[9] Jarrett/ Puig/ Ratner.

[10] In early 2023, Shu and Shen have found 147 investment agreements (out of 2584) with preamble references to the environment and 323 additional environment-related clauses, see Kezhen Su/Wei Shen, 'Environmental Protection Provisions in International Investment Agreements: Global Trends and Chinese Practices', Sustainability 2023, 15, 8525, 4.

[11] See Klentiana Mahmutaj, 'Will the Morocco-Nigeria Bilateral Investment Treaty Transform Sustainable Development into Hard Law?', *EJIL:Talk!*, 27.01.2022.

[12] Shu/Shen, 5.

[13] Ibid.

[14] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download. For an elaborate discussion of its content see Eric De Brabandere, 'The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform' (2021) 36/2 *ICSID Review* 319.

[15] See Kabir A.N. Duggal/Laurens H. van de Ven, 'With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 2019 Netherlands Model BIT', *Kluwer Arbitration Blog*, 15.6.2019.

[16] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4770/download.

[17] Available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[18] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

[19] See https://edit.wti.org/document/show/d0eac9a8-2de6-44a8-9e9f-2986b8817aa9; for a discussion of its content see Prabhash Ranjan/Harsha Vardhana Singh/Kevin James/Ramandeep Singh, 'India's Model Bilateral Investment Treaty. Is India too Risk Averse?, *Brookings India*, August 2018.

[20] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6009/download.

[21] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download.

[22] See Maria Chiara Malaguti, 'The New Italian Model Bit Between Current and Future Trends' (2021) *The Italian Review of International and Comparative Law* 113. The Model BIT is available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6438/download.

[23] Available at https://edit.wti.org/document/show/4dd30824-38f3-4e5e-9d05-79a9d1bfb422.

[24] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

(2008),[25] or the United Kingdom (2008),[26] meanwhile, are silent on this subject-matter.[27]

3.2. BITs

When looking beyond model investment agreements, the BIT between Morocco and Nigeria from 2016 stands out:[28] its preamble mentions sustainable development and the 'fulfillment of the economic, social and environmental pillars that are embedded within the concept', followed by specific articles on Investment and Environment (Article 13), the obligation of investors to undertake environmental impact assessments (Article 14) and to 'maintain an environmental management system' and a prohibition to refrain from managing or operating 'the investments in a manner that circumvents international environmental … obligations which the host state and/or home state are parties' (Article 18). Until now, however, it has not been ratified by Nigeria (due to itscontinued and even increasing reliance on oil exports.[29]).

In contrast, a number of more recent (*i.e.* from 2018-2020) BITs including (at least some) similar provisions on the need to respect obligations under environmental law have indeed entered into force.[30] The latest examples stem from 2022 (at the time of writing, none have entered into force afterwards), namely the BITs between Japan and the Kingdom of Bahrain,[31] which emphasizes that its goals 'can be achieved without relaxing … environmental measures of general application' and includes a corresponding Article (24) that obliges both parties to 'refrain from encouraging investment by investors … by relaxing … environmental measures' and the one between Oman and Hungary, which includes similar provisions and a reference to the right to regulate (Article 3) and a clarification that non-discriminatory measures to protect the environment are not to be considered as indirect protection (Article 6).

3.3. NAFTA/USMCA

The foremost example of an investment-related treaty containing references to environmental concerns is Article 104 of the North American Free Trade Area (NAFTA, now the United States-Mexico-Canada-Agreement (USMCA)) established in 1992 and entered into force in 1994. As the first of its kind, it paved the way for environmental concerns in investment chapters in subsequent FTAs as it explicitly gives precedence to a number of environmental law treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. As will be shown below, NAFTA-related jurisprudence has clarified the relationship between environment and investment protection.[32]

3.4. CETA

The experiences with NAFTA were fundamental during the preparations for and negotiations on the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union (EU).[33] Being more than 20 years younger, CETA goes further in numerous ways: First of all, its investment chapter makes it clear that states may restrict market access

> to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban.

In addition, Article 8.9 reaffirms the right to regulate 'to achieve legitimate policy objectives, such as the protection of … the environment.' Lastly, Annex 8-A on expropriations states that proportionate and

> non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

Despite the successful conclusion of negotiations on 30 October 2016, these provisions are, as the investment chapter in general, exempted from the (provisional)application of CETA. What remains are the chapters on 'trade and sustainable development' (Chapter 22) and on 'trade and environment' (Chapter 24). The former aims to 'ensure economic growth supports [both parties'] social and environmental goals' and the latter 'commits the EU and Canada to putting into practice international environmental agreements' by protecting the 'right to regulate environmental matters' and the enforcement

[25] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2860/download.

[26] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download.

[27] Oddly enough, the latest Chinese Model BIT (the one from 1997) is not available on UNCTAD or other reliable investment-law related websites. But see Wei Shen, 'Evolution of Nondiscriminatory Standards in China's BITs in the Context of EU-China BIT Negotiations' (2018) 17 *Chinese Journal of International Law* 799.

[28] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

[29] Camillus Eboh, 'Nigeria aims to raise oil, condensates output to 2.6 mln bpd by 2026', *Reuters*, 1.1.2024.

[30] Turkey-Zambia, UAE-Zimbabwe, Belarus-India, Armenia-Korea, Japan-Jordan, Cabo-Verde-Hungary, Australia-Hungary, Korea-Uzbekistan, Japan-Morocco, Ivory Coast-Japan, Hungary-Kyrgyzstan, Israel-UAE, Hungary-UAE, Indonesia-UAE, Myanmar-Singapore.

[31] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

[32] See Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012), 232 *et seq*.

[33] See the materials for the December 2015 European Parliament Workshop on CETA.

of environmental laws. While CETA is predominantly a free trade agreement, its investment law provisions, once (if ever) in force, may and should, if necessary, be interpreted in light of these chapters. Investment is, and has never been, an end in itself.

3.5. Other FTAs

Among other FTAs that entered into force during the last years,[34] the recent initiatives of the United Kingdom stand out. After all, BREXIT put enormous pressure on British negotiators to replace the FTAs of the EU – to which it was obviously no longer a member – with its own as quickly as possible, resulting in the adoption of (at the time of writing) 38 FTAs since then,[35] spanning from the one with the EU all the way to those with Israel, Palestine (!), Türkiyeand Ukraine.

Most importantly, the preamble and Part Two Title II of the EU-UK Trade and Cooperation Agreement[36] on Services and Investment reaffirms 'the right to regulate within their territories to achieve legitimate policy objectives, such as … the environment, including climate change', as a precondition for authorizations.[37]

Other treaties also include references to the right to regulate environmental matters in the introductory article and/or specific articles on Investment and the Environment (most importantly in the EU-UK Trade and Cooperation Agreement) or on Investment and Sustainable Development.[38] At the same time, some UK FTAs do not have any, or at least no substantial, references to or provisions on the environment.[39]

3.6. The Energy Charter Treaty

The final example to be mentioned here is the Energy Charter Treaty (ECT) from 1991. It is noteworthy for the general requirement 'that all member states act to minimise the harmful environmental impact of energy-related activities'[40] and has a Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).[41] The ECT falls in none of the categories mentioned here since it neither constitutes a trade nor as an investment treaty (at least not in the genuine sense). Instead of dealing with these fields in general, it is, as the name already indicates, 'designed to cover the cooperation of European States with Russia and the new States in Eastern Europe and Central Asia in the energy sector'.[42] To achieve this goal, it possesses its own institutional structure, *i.e.* an organization and a secretariat, and several dispute settlement mechanisms, chief among them arbitration (both for inter-state complaints and complaints by foreign investors).[43] At this point, it also needs to be briefly mentioned that the ECT is generally considered as being outdated.[44] Yet, the reform process, initiated in November 2017, ultimately failed, mostly due to the resistance of Germany. The 'modernised' treaty would have included detailed and up to date rules on the protection of the environment.[45] Its future development remains uncertain: While the EU decided to pull ouf of the ECT on 30 May 2024, individual member states may decide for themselves whether they want to leave or whether they want to adopt a modernized agreement.[46]

3.7. The EU and Sustainable FDI

Last but not least, special consideration needs to be given EU practice concerning IIAs. Its 2011 FTA with South Korea was the first of its kind to include a specific chapter on sustainability. Since then, the EU has used its exclusive competence – adopted in the Lisbon treaty – in FDI matters and the conclusion of IIAs to live up to its long-standing and overarching aim of protecting the environment by including specific chapters on this subject-matter. In 2015, the European Commission thus emphasized its goal to 'promote an ambitious and innovative sustainable development chapter in all trade and investment agreements'[47] as part of its then-adopted 'Trade for all'-policy. In its evaluation report some two years later, it again emphasized that 'no trade agreement will lead to lower levels of … environmental … protection than offered in the EU today' and lauded CETA as the prime

[34] An earlier example is Article 10.12 of the 2004 US-Chile Free Trade Agreement.

[35] See the WTO Regional Trade Agreements Database.

[36] Title II, Chapter 1. See also Article 14.18 in the Brith trade agreement with New Zealand, Article 13.18 in the one with Australia, and the Joint Interpretative Instrument on the Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada.

[37] Ibid., Article SERVIN 5.10.

[38] Article 3.11 of the 2021 Iceland - Liechtenstein - Norway - United Kingdom FTA, , Article 60 of the 2021 Cameroon - United Kingdom Economic Partnership Agreement (2021) or Article 334 of the Strategic Partnership, Trade and Cooperation Agreement between the UK and the Republic of Moldova.

[39] The one with Türkiye only refers to 'the importance of sustainable development, including urgent action to protect the environment and combat climate change and its impacts, and the role of trade in pursuing these objectives' in the preamble, while those with Viet Nam (both from 2020), available at or Singapore do not include any references to the environment at all.

[40] Article 19 of the Energy Charter Treaty reads as follows:

> In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade.

[41] Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).

[42] Christoph Schreuer, 'Investments, International Protection', para 13.

[43] See See https://www.energycharter.org/process/frequently-asked-questions/.

[44] See Alex Wilson/European Parliamentary Research Service, Modernisation of the Energy Charter Treaty.

[45] See https://www.energychartertreaty.org/modernisation-of-the-treaty/.

[46] See https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/.

[47] European Commission, Directorate-General for Trade, *Trade for all – Towards a more responsible trade and investment policy*, Publications Office, 2014, https://data.europa.eu/doi/10.2781/1753, 24.

example of the way forward.[48] For the time being, however, no similarly far-reaching treaties have been concluded while CETA's investment chapter remains inoperative (since CETA has not yet been ratified by all EU members, only the other parts are applied provisionally). On a unilateral level, however, it has adopted measures like the Carbon Border Adjustment Mechanism to ensure that climate-friendly producers in the EU will not be disadvantaged in comparison to imports from third countries (with lower environmental standards), which is now in its traditional phase, or the Regulation on Deforestation-free poducts. Their conformity with WTO law remains unclear and ultimately depends on the readiness of WTO panels and other (potentially relevant courts) to allow reliance on environment-related exceptions in treaties like the GATT.[49]

At the same time, this lack of progress concerning IIAs and FTAs is a global trend. As this chapter has shown, there are only limited and often isolated examples. Despite setbacks, the EU thus has become somewhat of a 'role model' to prove the compatibility of FDI with sustainable development.[50]

4. Environmental Aspects in Investor-State-Disputes

Even though most IIAs, in particular older ones, do not contain provisions on sustainable development, environmental concerns have been relevant in countless actual and potential investment cases, many of them part of what can be considered as the canon of ISDS.[51]

While it is not necessary to reinvent the academic wheel by summarizing these well-known disputes here, a few observations on key developments are warranted:[52]

First, the often-debated (and difficult to prove) 'chilling effect' – inaction by states owed to fear of being sued by investors – obviously also relates to environmental protection.[53] Most importantly, as the examples of *Ethyl v. Canada* and the *Vattenfall* saga in Germany have shown, it might prevent both poorer and richer countries from implementing environmental measures: the former involved the – ultimately thwarted – ban of a gasoline additive, the latter – ultimately loosened – restrictions on the operation of a coal-fired power plant.[54]

Second, when a case does arise, the problem of a lack of consistency in ISDS jurisprudence also applies to environmental protection. Some arbitrators might be more state- and/or environment-friendly, others act in the interest of investors. Since there is no such thing as a global investment (supreme) court, it has always been difficult to discern actual trends.

For one, the *Metalclad* and *Tecmed v. Mexico* decisions have shown that investment tribunals might look at cases from the investors' and a purely economic point of view, disregarding local, political, socio-economic and, most importantly for our purposes, environmental context of regulations.[55]

However, investment tribunals do not inevitably turn a blind eye to such arguments. In *S. D. Myers v. Canada*, the potential legitimacy of environmental reasons to justify a ban on the export of polychlorinated biphenyls, 'a group of man-made organic chemicals consisting of carbon, hydrogen and chlorine atoms' that 'have been demonstrated to cause a variety of adverse health effects'[56] was accepted. Although the tribunal rejected Canada's arguments and agreed with the investor's claim that it was ultimately rather driven by protectionist intentions, it nevertheless noted the legitimacy of a state's claim and indeed obligation to ensure the level of environmental protection it has chosen.[57] *Methanex Corp. v. United States of America*, then, marked the first time submissions by NGOs were accepted by an investment tribunal and the final decision was ultimately

> beneficial from the environmental and civil society perspectives; the substantial threat to national autonomy for bona fide regulation of business activities that many saw in early Chapter 11 [of NAFTA] awards appears to have receded, without depriving investors of the opportunity to challenge clearly discriminatory or abusive government behavior.[58]

In these cases,[59] investment tribunals took a more balanced view by not only focusing on the investor but

[48] European Commission, Directorate-General for Trade, Report on the implementation of the trade policy strategy Trade for All, Publications Office, 2017, https://data.europa.eu/doi/10.2781/148862, 8.

[49] See Ralph Janik, Aspekte der handelsrechtlichen Ausgestaltung des CO2-Grenzausgleichs in der EU, ECO Austria Kurz Analyse 20, available at https://ecoaustria.ac.at/wp-content/uploads/2022/09/300922-EcoAustria_Kurzanalyse_CBAM_WTO_final.pdf.

[50] See Stefanie Schacherer, Sustainable Development in EU Foreign Investment Law (Brill 2021).

[51] An UNCTAD IIA Issues Note from September 2022 speaks of 'at least 175 IIA-based ISDS cases in relation to measures taken for the protection for the protection of the environment'. Notable examples include *Santa Elena v. Costa Rica*, *Metalclad v. Mexico*, *S. D. Myers v. Canada*, *Tecmed v. Mexico*, *Waste Management v. Mexico*, *Methanex v. United States* or *Chemtura v. Canada*, see Kulick, Chapter 6.

[52] See Nicolás M. Perrone, *Investment Treaties & the Legal Imagination. How Foreign Investors Play by Their Own Rules* (Oxford University Press 2021), Chapter 5; Willcocks Andrew and Garin Respaut Magali, 'Environmental Issues in ISDS', *Jus Mundi*, 23.10.2023.

[53] Gus van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press 2020), 105 *et seq.*

[54] Ibid.

[55] Perrone, 129f.

[56] United States Environmental Protection Agency, 'Learn about Polychlorinated Biphenyls', https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls.

[57] See the discussion by Charles H. Brower II, 'S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc., [2004] F.C. 38' (2004) 98/2 *The American Journal of International Law* 339.

[58] Sanford E. Gaines, 'Methanex Corp. v. United States' (2006) 100/3 *The American Journal of International Law* 683, 689.

[59] See also the similar outcome in the *Glamis v. USA* and *Chemtura v. Canada* cases.

also the state's right to regulate, a shift away from the question whether they may do so to how they do it (i.e., whether it is discriminatory, arbitrary or otherwise unjustified).[60]

5. Climate Change Litigation and Investor-State-Dispute-Settlement

There is an additional reason why we may expect to see more environment-related ISDS cases: the increase of climate change litigation, usually via domestic and, if applicable, regional (human rights) courts. Legal actions by private initiatives with the goal of forcing states to comply with carbon emission obligations does not only relate to a state's 'own' companies but also to foreign investors on its soil.

In *Urgenda*, the very first successful climate change-related case, the Supreme Court of The Netherlands held that the right to life (Article 2 ECHR) and the right to private and family life (Article 8 ECHR) obliged the Dutch state 'to pursue a more ambitious reduction as of end-2020 [as originally envisaged], and that the State should reduce emissions by at least 25% by end-2020'.[61]

In so doing, the legal framework and the court's decision unsurprisingly do not differentiate whether emissions stem from domestic of foreign companies operating on a state's soil. All that matters is the overall reduction within its jurisdiction.

This principal finding has later been echoed by the German Constitutional Court's (*Bundesverfassungsgericht*) 'Climate Decision' (*Klimabeschluss* or *Klimaschutz-Beschluss*). Similar to the Hooge Raad, it found that the (German) state was obliged to distribute the burdens of carbon emissions between present, younger, and future generations when ensuring climate neutrality. In other words: the German constitution and the requirement of intergenerational equity prohibits postponing measures at the expense of younger and unborn people.[62] As in the *Urgenda* decision, the Bundesverfassungsgericht unsurprisingly also did not differentiate between foreign and domestic carbon dioxide emitters but referred to the German energy, industrial, transport, buildings, and agriculture sector (the five largest) in their entirety.[63] The German government and legislature is bound to decrease Greenhouse gas emissions by all industrial actors, be they domestic or foreign. It remains to be seen whether they will go to court.

6. The Way forward: Sustainable FDI

As the discussion above has shown, there is still a long way to go. References to sustainable development in general and/or environmental protection in particular are rare (some of them can only found in Model BITs and not in actually binding treaties) and often weak. It remains to be seen whether and how investment tribunals will actually be ready to give governments leeway to protect the environment.

Thus, and more generally, there are two opposite scenarios concerning the role of investment law in achieving sustainable development and, as a substantial part of it, environmental protection. At the one extreme, we may wonder whether investment law per se is about to come to an end or at least play a much smaller role in the future.[64] Somewhat less drastic, but still along similar lines, are those who think that (only) ISDS is and will be affected by this trend. In other words: While existing IIAs will survive and more and more new ones will enter into force, less and less of them will include provisions granting investors a right to sue host states at arbitral tribunals. Rather, they will be bound to go to address potential violations of their rights in domestic courts (like everyone else).

At the other end of the spectrum stand those who firmly believe in the future of IIAs and ISDS while, often enough, rejecting the idea of giving too much weight to environmental considerations. They thus argue that investment disputes need to be decided on the basis of the content of the respective IIA alone.[65] As long as it does not explicitly refer to environmental protection or sustainable development, they remain irrelevant. Furthermore, if there is only a general reference in, say, the preamble (see the discussion above), they will still only play a small role when, for example, interpreting the FET standard. The protection of the investment against states and their 'unforeseeable' actions thus usually ranks higher and governments will only be able to successfully defend environmental regulations and corresponding infringements in very exceptional circumstances.

A middle path, then, argues that FDIs are crucial in achieving the SDGs. UNCTAD already – albeit briefly – noted increased awareness of states of

[60] Perrone, 137.

[61] *Hooge Raad* [Supreme Court of The Netherlands], ECLI:NL:HR:2019:2007 [*Urgenda*], 13.1.2020.

[62] Official Translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=46D57DB3A167B1343C1BE90F13079235.internet951.

[63] Ibid, para 5.

[64] For a discussion on the future of investment law see Steffen Hindelang/Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016).

[65] For a discussion on why arbitrators tend to perceive investment law as a somewhat isolated field and why it is not a 'self-contained regime' see Bruno Simma/Dirk Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law' in Marc Bungenberg/Jörn Griebel/Stephan Hobe/August Reinisch (eds), *International Investment Law* (Nomos/Hart Publishing 2015) 361.

environmental protection in connection with investments back in 1998 (!),[66] a recent study at the behest of the Human Rights Council notes that 'the current landscape indicates significant potential for further incorporation of sustainable development in IIAs'[67] and the OECD constantly emphasises that '[b]eyond the quantity of FDI, its quality also matters'.[68]

For this reason, the OECD has begun with its work programme on the Future of Investment Treaties in March 2021 to determine IIAs 'could help address these challenges and how to deal with existing agreements in a pragmatic way'.[69] Its work is subdivided into two tracks, (1) on climate change and which (climate friendly) investments deserve promotion and protection and (2) on the shift from old and often outdated treaty provisions in IIAs towards updated or entirely new treaties.

Particularly noteworthy in these regards is the OECD FDI Qualities Initiative which provides

> governments with the policies, data and expertise they need to encourage sustainable investment that is greener, promotes quality jobs & upskilling, improves gender equality, and contributes to a more productive and innovative economy.[70]

Among its main components are the FDI Qualities Indicators that 'provide governments with the data to measure FDI's sustainability impacts'[71] and, since June 2022, a 'Policy Toolkit … designed to help governments identify priorities for reforms to attract and retain sustainable investment'[72] and the Recommendation on FDI Qualities, the first agreement on FDI as a tool to achieve the SDGs.

Yet, these are not binding instruments that are tied to potential sanction mechanisms but rather soft power tools, i.e. ones that work with recommendations, consultation, and support. The underlying idea is that states can and should not be 'pressed' to take action but that they take action voluntarily. After all, the basic idea is simple: FDI, sustainable development and the fight against climate change go hand in hand. Even more, they are mutually dependent you can't have one without the other: FDI 'is an important source of finance to help meet these global commitments to sustainable development'.[73]

UNCTAD has both equally worked with non-binding instruments and assessed policy options for the 'right' facilitation of investments. Parts of these efforts include its 2015 Investment Policy Framework for Sustainable Development, a set of recommendations for policymakers on how to harmonize growth with sustainable development,[74] and the 2022 Core Investment Principle's 'overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development',[75] or its toolbox for promoting sustainable energy investment.[76]

The final organisation that deserves consideration here is the WTO. Although obviously a trade and not an investment organization, it, along with its members, is fully aware that both fields are inherently interrelated. This is particularly evident in the fact some 125 WTO members participating in the Joint Initiative on Investment Facilitation for Development (among them not only developing and least-developed countries but also the EU and its members, Australia, Japan, Switzerland, or the United Kingdom) finalized a plurilateral agreement 'to improve the investment and business climate and make it easier for investors in all sectors of the economy to invest, conduct their day-to-day business and expand their operations'[77] in November 2023. As a plurilateral agreement, not all WTO members are obliged to become parties (unlike most WTO agreements) but given the high number of states participating in the negotiations, one may hope that a majority (at least) will, sooner or later, join.

7. Conclusion

The basic content and structure of IIAs were originally shaped *in abstracto*, with theory and practice increasingly drifting apart over time. For some time now, they and the field of investment law is in flux. Even the basic premise of investment law – that it leads to more direct foreign investment, first and foremost in developing countries – has been contested until this very day.[78]

Sustainable development and, as a substantial part of it, the protection of the environment, is significant in shaping these debates. While it is too early to think of an 'environmentalization' of investment law, one can

[66] UNCTAD, *Foreign Direct Investment and Development* (IIA issues paper series, UNCTAD 1999), available at https://unctad.org/system/files/official-document/psiteiitd10v1.en.pdf, 46.

[67] *Right to development in international investment law*. Study by the Expert Mechanism on the Right to Development, 9.3.2023, UN Doc. A/HRC/EMRTD/7/CRP.2, para. 26.

[68] OECD, *FDI Qualities Guide for Development Co-operation*, https://doi.org/10.1787/25183702, 7.

[69] OECD, *The Future of Investment Treaties*, https://www.oecd.org/investment/investment-policy/investment-treaties.htm.

[70] OECD, *Sustainable development*, https://www.oecd.org/investment/sustainable-investment/

[71] Available at https://www.oecd.org/investment/FDI-Qualities-Indicators-Measuring-Sustainable-Development-Impacts.pdf.

[72] OECD, *FDI Qualities Guide*, 7.

[73] OECD, *Sustainable development*.

[74] UNCTAD, *Investment Policy Framework for Sustainable Development*, https://investmentpolicy.unctad.org/investment-policy-framework.

[75] UNCTAD, *Non-binding Guiding Principles for Investment Policies*, https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD-ISDB-guiding-principles-for-investment-policies.pdf, 4.

[76] UNCTAD, *Trends in the investment treaty regime and a reform toolbox for the energy transition*, IIA Issues Note No. 2, 2023, available at https://unctad.org/publication/trends-investment-treaty-regime-and-reform-toolbox-energy-transition.

[77] WTO, Investment facilitation for development, https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm.

[78] See, among countless others, Eric Neumayer and Laure Spess, 'Do bilateral investment treaties increase foreign direct investment to development countries?' (2005) 33 *World development* 1567.

no longer characterize it as a purportedly apolitical and purely economic field. To achieve this goal, many newly-adopted investment treaties and FTA chapters on investments include references to the need and the corresponding right to regulate for the purpose of environmental protection, against weakening pre-existing standards, or clarifications that measures in this regard to not, as a rule, constitute expropriation. If sufficiently robust, IIAs can and should mobilize, if not more direct foreign direct investment *per se*, at least those that are environmentally-friendly. Investors are not enemies but partners in, for example, global efforts against climate change. The answer is more and the right kind of FDI, not less.

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