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I. Introduction

International investment law and the current investor-state dispute settlement system are going through a legitimacy crisis.[1] With parallels to the intense criticism faced by the international trade framework more than twenty years ago,[2] a wide range of critiques,[3] both at the substantial and procedural levels, have been formulated towards both the international investment legal framework and the investor-state dispute settlement (ISDS) mechanism. Scholars have opposed the asymmetry[4] of International Investment Agreements (IIAs),[5] which allegedly jeopardizes states' exercise of national sovereignty and limits their right to regulate.[6] The substantive protection granted by states to foreign investors under international investment law has been criticized as being broad, vague,[7] and a source of uncertainty.[8] ISDS itself has been denounced as "tainted by incoherencies and imbalances."[9] Deficiencies in the procedural mechanisms established by the Convention on the Settlement of Investment Disputes between States

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1. Frank Garcia et al, *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. OF INT'L ECON. L. 861, 862 (2015).

2. *Id.* at 863.

3. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 63 (Kluwer Law International ed. 2009).

4. Andra K. Biorklund, *The Necessity of Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT, 373-74 (Marie-Claire Cordonier Segger et al. ed., 2011).

5. The term "International Investment Agreements" (IIAs) is substituted to the term "Bilateral Investment Treaties" (BITs) whenever applicable, to include investment chapters contained in Free Trade Agreements (FTAs).

6. Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest*, 23 AM. REV. OF INT'L ARB. 245, 249 (2012).

7. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbirtation: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1589 (2005).

8. *Id.* at 1583.

9. Bijlmakers, *supra* note 6, at 245.

and Nationals of Other States (the ICSID Convention), which established in 1965 the International Centre for Settlement of Investment Disputes (ICSID), have also been pointed out.[10]

Many actors have pointed to the procedural deficiencies of the current ISDS system. Engaged at the frontline, several states have dissociated themselves from a framework they contributed to shaping their dual role as negotiators of and parties to IIAs as well as defendants in ISDS proceedings. A few developing countries, Bolivia,[11] Ecuador,[12] and Venezuela,[13] denounced the ICSID Convention. Such defiance towards the current system is not fortuitous. Developing countries have been victims of "asymmetries of power. . . [and] of information in dealing with developed countries and foreign investors,[14] which have led to the implementation of a system tailored to benefit multinational enterprises (MNEs) of developed, capital exporting countries. While I do not intend in this article to undertake a thorough assessment of these critiques, a preliminary conclusion can already be drawn: international investment law has failed to project itself as a "comprehensive governance system meant to ensure justice and the rule of law in one aspect of international economic relations, the allocation of investment capital."[15]

The field of environmental protection has particularly crystallized the existing tensions within the international investment legal framework between foreign investor's rights and states' right to regulate.[16] It is first necessary to recall that the primary purpose of the international investment legal framework is the promotion and protection of foreign direct investments (FDI), as a means to achieve economic growth. IIAs are not construed as corrective tools to compensate for the absence of a binding conventional framework regulating cross-border activities by MNEs and

10. *See, e.g.*, Dobyun Kim, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: the Need to Move Away From an Annulment Based System*, 86 N.Y.U. L. REV. 242, 249 (2011) (arguing that annulment committees have been unable to bring more coherence to the ICSID arbitration system).

11. Press Release, Int'l Ctr. for Inv. of Disputes, Bolivia submits a notice under Article 71 of the ICSID Convention (May 15, 2007), http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/Announcement3.html.

12. Press Release, Int'l Ctr. for Trade and Sustainable Dev., Ecuador finiquita convenio con el CIADI (July 14, 2009), http://www.ictsd.org/bridges-news/puentes/news/ecuador-finiquita-convenio-con-el-ciadi.

13. Press Release, Int'l Ctr. for Trade and Sustainable Dev., Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/.

14. Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 479 (2008); *see* Frank Garcia et al., *Reforming the International Investment Regime: Lessons From International Trade Law*, 18 J. OF INT'L ECON. L. 861, 862 (2015).

15. Garcia et al., *supra* note 14, at 874.

16. For a more detailed analysis of the right to regulate in international investment law, *see generally* AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (Marc Bungenberg et al ed., 1st ed. 2016).

their impact on the environment. More generally, IIAs are not by themselves legal instruments promoting environmental concerns.[17] Nonetheless, the social aspects of international investment law ought to be addressed. As stated by Federico Ortino, "[e]conomic growth and prosperity engenders higher societal expectation for higher quality jobs, employment protection, workers' participation in business management, corporate social responsibility, health standards and protection, etc. Even more crucially, economic growth and prosperity makes available the resources necessary to meet such expectations."[18] Yet, an overview of the current framework reveals that international investment law has not developed in a way that fosters the mutual benefits of host states and foreign investors. Indeed, the current ISDS system, as developed by the arbitral practice, is asymmetric, fully oriented towards the protection of investors' rights.

While international investment law has developed on the premise that FDI is inherently good—and therefore, that sustainable development would necessarily follow, the reality is quite different. IIAs do play a role in reducing political and regulatory risk, from a foreign investor's perspective,[19] but they have also been used by international investors as a basis to challenge environmental regulations when they were conflicting with their economic interests.[20] Such antagonism between the public interest (including environmental concerns), the protection of property, and commercial interests of foreign investors has logically crystallized around investment arbitration and the ISDS mechanism.

From the investor's perspective, regulations can create additional barriers and lead to potential losses.[21] In contrast, several factors such as new scientific developments, shifts in public opinion, improved understanding of environmental impacts and how to prevent them, or changes in modes of production or consumption frequently require states to adapt their environmental regulatory framework.[22] States may also undertake new commitments pursuant to the adoption of international environmental agreements. The resulting conflict between a host country's environmental policies whether or not they arise from binding legal instruments and its international obligations under an applicable IIA can eventually act as a deterrent. Under the threat of damages claims brought before arbitral tribunals by foreign investors impacted by a new regulatory measure, a host

17. *See* Rosalien Diepeveen et al., *Bridging the gap between international investment law and the environment*, 30 UTRECHT JOURNAL OF INT'L & EUR. L. 145, 151 (2014).

18. Federico Ortino, *The social dimension of international investment agreements: Drafting a new BIT/MIT model?* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, (Mar. 27-28, 2008), https://www.oecd.org/investment/globalforum/40311350.pdf.

19. Wolfgang Alschner & Elizabeth Tuerk, *Fostering Sustainable Development*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 217, 221 (Freya Baetens ed., 2013).

20. Bijlmakers, *supra* note 6.

21. SAVERIO DI BENEDETTO, INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT 13 (Andrea K. Bjorklund & August Reinisch eds., 1st ed. 2013).

22. *Id.* at 39.

country might be prevented from implementing legitimate regulatory measures, such as the enforcement of new standards in energy production, resource management or regarding the conservation of natural resources and ecosystems,[23] in prospect of long and costly arbitral proceedings.[24]

At the same time, investors may also be discouraged from undertaking long-term investments abroad, which require a stable and predictable regulatory framework.[25] These concerns are heightened by the uncertainty surrounding the scope of states' obligations[26] resulting to some extent from the varying interpretations of IIA standards by arbitral tribunals and more generally, from the absence of a multilateral instrument containing a set of common standards harmonizing the treatment of foreign investors by host states around the world.

The notion of sustainable development, which has been employed as an attempt to reconcile environmental protection with economic development,[27] could be a solution to better articulate the interplay of international investment law with other areas of public policy. The increasing popularity of the notion of sustainable development and its appropriation in the field of international investment law have arguably produced a concrete shift in investment policies.[28] This phenomenon is important given the dual potential of FDI to foster sustainable development[29] as well as negatively impact the environment or human rights.[30] Nevertheless, in practice, IIAs have not yet engaged successfully with the social dimension of the international investment regime,[31] including the protection of the environment, at least not in a systemic fashion. An OECD Survey, published in 2011, reveals that about ninety-two percent of

23. *See* Åsa Romson, *International Law and the Environment, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 373-74 (Marie-Claire Cordonier Segger et al ed., 2011).

24. The recent *Vattenfall* and *Philipp Morris* cases illustrate the potential deterrent effect of such lawsuits, not only on the respondent regarding future policies, but also on other countries which would have been incline to implement similar measures. *See* Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011) (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany); Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. 2012-12 (Dec. 17, 2015); Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).

25. Romson, *supra* note 23, at 39.

26. DI BENEDETTO, *supra* note 21, at 14.

27. JORGE E. VIÑUALES, FOREIGN INVESTMENT AND ENVIRONMENT IN INTERNATIONAL LAW 11 (Cambridge University Press ed. 1st ed. 2012).

28. *See* U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, 13-24, UNCTAD/DIAE/PCB/2015/5 (2015).

29. Alschner & Tuerk, *supra* note 19, at 245.

30. Bijlmakers, *supra* note 6, at 245.

31. *Id.* at 244-47.

IIAs do not contain any reference to the environment.[32] This high percentage could be explained by the fact that states did not anticipate that the standards of protection negotiated in IIAs would be invoked by foreign investors to challenge their environmental policies. According to this view, environmental provisions were simply deemed unnecessary by contracting states in light of the original purpose of IIAs.

The results found by the OECD survey, however, do not mean that investment arbitration tribunals have systematically disregarded the impact of investment activities on the environment or disqualified states' environmental regulations when they conflicted with a foreign investor's right under an IIA. In fact, while some scholars have pointed to the "need for reform,"[33] others stress that many arbitral tribunals have followed a "balanced approach when applying and interpreting protection standards, . . . weighing investment protection against the inherent right of the sovereign State to regulate."[34] This conclusion tends to mitigate the apparent imbalances of the investment framework. Yet, incoherencies in the application of the substantive protection granted to foreign investors in IIAs have fueled a growing concern regarding states' ability to implement regulatory change in a context of a multiplication of arbitral claims challenging adverse environmental measures. As a consequence, states have introduced in IIAs new types of provisions that seek to safeguard certain levels of policy space.[35]

The purpose of the present paper is to ascertain the dichotomy that exists today. On the one hand, a majority amongst states, scholars, practitioners, and the civil society have acknowledged the need to rebalance international investment law to better include public interest concerns. Accordingly, states have negotiated treaty provisions seeking to tackle these imbalances. On the other hand, arbitral tribunals have responded to this alleged lacunae with mechanisms which reinserted the public interest into the equation, with various degrees of success. Recent awards show that the arbitral practice has reached a certain maturity, even if each proceeding follows a strictly construed mandate based on the provisions of a specific IIA. Bringing these two considerations together, this article seeks to determine whether the new trends in investment treaty drafting are capable of solving the inherent imbalances of the current framework.

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32. Kathryn Gordon & Joachim Pohl, 2011/1 OECD Working Papers on International Investment, Environmental Concerns in International Investment Agreements: A Survey 5 (June 1, 2011), http://www.oecd.org/daf/inv/ investment-policy/WP-2011_1.pdf.

33. Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L. J. 343, 355 (2009); *see* Frank Garcia et al., *Reforming the International Investment Regime: Lessons From International Trade Law*, 18 J. OF INT'L ECON. L. 861, 862 (2015).

34. Bijlmakers, *supra* note 6, at 254.

35. For a typology of these measures, *see* Gordon & Pohl, *supra* note 32 (Part B of this article seeks to provide an assessment of the most significant provisions.).

In the first part, this article will assess, based on relevant investment arbitration awards, how tribunals have interpreted IIAs' provisions to solve the issues arising when investors' rights and states' ability to regulate on environmental matters were in conflict. It will demonstrate that tribunals' interpretations of investors' rights have diverged in the search of the right balance between investors' protection and public interest concerns of the host state. While these diverging interpretations illustrate the need to develop new approaches, arbitral practice has progressively implemented a framework that does take into account states' right to regulate.

In the second part, this article will provide a more detailed analysis of the provisions in the field of environmental protection that states have incorporated in newly drafted IIAs in order to preserve a threshold level of policy space. It will assess whether these provisions are "arbitration-proof," putting them in perspective with the arbitral practice, and demonstrate that while these clauses may not be directly enforceable by states as a defense in arbitral proceedings, they share common features with the solutions already developed by arbitral tribunals and will shape the interpretation of IIAs' substantive provisions in future claims. These clauses will provide more coherency and legitimacy to international investment law as a whole by correcting the asymmetric structure of IIAs and incorporating public concerns directly into the text of the agreements.

II. Balancing Investors' Rights with Environmental Protection In International Investment Arbitration

IIAs typically grant foreign investors three main standards of protection: most-favored nation (MFN) and national treatment, fair and equitable treatment (FET), and protection against expropriations. The case law interpreting these three types of provisions and how they relate to environmental protection will successively be assessed.

A. Standards of Protection by Reference

The first category of cases concern the interface between environmental concerns and the "like-circumstance" test of IIAs' non-discrimination rules. The two standards of protection by reference, MFN and national treatment, seek to protect foreign investors by granting them a treatment no less favorable than the treatment offered to third parties in comparable situations, either domestic or other foreign investors. In interpreting these two principles, arbitral tribunals have successfully apprehended environmental concerns as a criterion to assess whether like-circumstances existed and whether, as a consequence, the investor's right to a treatment no less favorable was violated.

The first case discussed, *Parkerings*,[36] illustrates the influence of environmental factors in determining whether two situation are similar under the "like-circumstances" test. The dispute arose from construction of a parking lot in Vilnius, the capital of Lithuania, which would have affected an UNESCO protected site in the city's Old Town.[37] The claimant introduced, *inter alia*, a claim for discrimination under the Lithuania-Norway BIT's MFN clause, alleging that that the municipality had authorized a parking project in favor of another foreign investor.[38] The tribunal first recalled with a reference to *Pope & Talbot*[39] that the "essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation."[40] The tribunal, using a three-tiered test,[41] eventually rejected the claim on the ground that the situations of the two investors did not meet the "like-circumstances" test.[42] The environmental impact of the investment was crucial in the tribunal's conclusion that discrimination had not occurred: "The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project."[43]

In the UNCITRAL case, *S.D. Myers*,[44] the tribunal used a similar rationale to resolve a claim under article 1102 of the North American Free Trade Agreement (NAFTA).[45] In this case, the export ban of a chemical substance by the Canadian government, allegedly undertaken to minimize risk to human health and the environment, affected the U.S. investor's waste treatment activities.[46] The tribunal held that "the interpretation of the phrase 'like circumstances' in article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions

36. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, para. 288 (Sept. 11, 2007).

37. *Id.* at ¶ 385.2.

38. *Id.* at ¶ 225.

39. Pope & Talbot Inc. v. The Government of Canada, Award on the Merits of Phase 2, UNCITRAL at ¶ 78 (Apr. 10, 2001).

40. *Parkerings-Compagniet*, *supra* note 36, at ¶ 369.

41. *Id.* at ¶ 371 ("In order to determine whether Parkerings was in *like circumstances* with Pinus Proprius, and thus whether the MFN standard has been violated, the Arbitral Tribunal considers that three conditions should be met: (i) Pinus Proprius must be a foreign investor; (ii) Pinus Proprius and Parkerings must be in the same economic or business sector; (iii) The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment.").

42. *Id.* at ¶ 375.

43. *Id.* at ¶ 392.

44. S. D. Myers Inc. v. Canada, Partial Award, UNCITRAL, at ¶ 252 (Nov. 13, 2000).

45. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, art. 1102.

46. *S. D. Myers*, *supra* note 44, at ¶¶ 161-195.

that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."[47] The tribunal eventually ruled in favor of the U.S. investor, which, in a similar position to its Canadian counterpart, had received a less favorable treatment not justified by the specific circumstances of the case.[48] In doing so, the tribunal solely assessed the like-circumstances "from the business perspective,"[49] without consideration to the actual environmental situation of the different actors, in sharp contrast with the tribunal's above-mentioned statement stressing the need to take into consideration environmental concerns in assessing the like-circumstance test.

The tribunal in *Methanex* embraced an even narrower approach, yet eventually rejecting the claim based on a violation of article 1102 of NAFTA.[50] In this case, a Canadian methanol producer, Methanex, challenged a Californian measure banning MTBE, a molecule created from Methanol, arguing that the measure discriminated against foreign methanol producers in favor of domestic ethanol producers.[51] The tribunal concluded that domestic U.S. producers of ethanol were equally affected by the ban at issue in Methanex, which prohibited the commercialization of a substance deemed toxic, thereby concluding that no discrimination occurred without further consideration to the state's argument on the toxicity of the substance.[52]

The *Unglaube* tribunal also dealt with the articulation between the non-discrimination principle and environmental concerns,[53] although in an "uncommon form."[54] The claimant did not directly invoke MNF or national treatment clauses but rather alleged a violation of article 2.3 of the Germany-Costa Rica BIT which prohibited the "impairment of the use or benefits of foreign investments by arbitrary or discriminatory measures."[55] In assessing whether a violation of the treaty provision took place, the

47. *Id.* at ¶ 250.

48. *Id.* at ¶ 251.

49. *Id.* ("From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.").

50. Methanex Corp. v. United States of America, UNCITRAL, at ¶¶ 16-19 (Aug. 3, 2005) (Award), http://www.naftaclaims.com/disputes/usa/Methanex/Methanex_Final_Award.pdf.

51. *Id.* at pt. 1, 1.

52. *Id.* at pt. 4, 9.

53. Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1 and ARB/09/20, Award, at ¶¶ 224-30 (May 16, 2012).

54. DI BENEDETTO, *supra* note 21, at 95.

55. *Unglaube*, *supra* note 53, at ¶ 261.

tribunal held that the circumstances between the investors were not similar given the "environmental aim" of the national owner's activity, an environmental NGO,[56] which was "decisive to the tribunal's refusal to consider the two contiguous properties to be under comparable circumstances."[57] As a result, the tribunal found that no discrimination occurred, thereby rejecting a violation of the treaty provision.[58]

Finally, in a recent and controversial case, *Bilcon*,[59] the tribunal initially embraced the view of the tribunal in *Pope & Talbot*, according to which a state could justify an otherwise differential and adverse treatment, even in the absence of an equivalent of Article XX of the GATT, "to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises."[60] But after the investor established a prima facie case of discrimination,[61] it failed to justify its behavior by establishing a connection with an existing "rational government policy."[62] As a consequence, the majority of the tribunal in the *Bilcon* case found that Canada breached its obligations under NAFTA article 1102.[63]

Past arbitral cases show mixed results in the consideration of environmental concerns by arbitral tribunals in assessing the "like-circumstances" test under the MFN or national treatment clauses. As a consequence, standards of protection by reference will require further attention in the future. Key environmental concerns, such as the promotion of renewable energy, biosafety, the regulation of genetically modified organisms (GMOs), and sustainable water management[64] could become the center of gravity of tomorrow's investment protection. As a consequence, challenges by foreign investors from more traditional sectors seeking the same levels of protection could multiply. Environmental concerns, when relevant, must be at the heart of the like-circumstances test in order to ensure that regulations promoting greener activities are not used as a basis to

56. *Id.* at ¶ 264.

57. DI BENEDETTO, *supra* note 21, at 96.

58. *Id.*

59. William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, Award on Jurisdiction and Liability, UNCITRAL, PCA Case No. 2009-04 (Mar. 17, 2015).

60. *Id.* at ¶ 723.

61. *Id.* at ¶¶ 685, 695, 724 (The investor argued that its application was evaluated less favorably, both regarding the mode of review and the evaluative standard, than a number of Canadian investors in like-circumstances, in relation with other projects involving quarries and marine terminals in ecologically sensitive zones. Pursuant to local legislation, a Joint Review Panel had been formed for the ecological assessment of the project; a treatment deemed "differential and adverse" by the tribunal, which also found that the claimant was in like-circumstances with other domestic investors.).

62. *Id.* at ¶ 724.

63. *Id.* at ¶ 731.

64. Kate Miles, *Sustainable Development, National Treatment and Like Circumstances*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 278-292 (Marie-Claire Cordonier Segger et al ed., 2011).

challenge environmental regulations in the future. Other issues will need to be clarified, especially the determination of who bears the burden of establishing that a potentially disparate treatment is nonetheless justified based on unlike circumstances, as well as the threshold required to make such a demonstration. The analysis of the tribunal in *Bilcon* tends to show that tribunals show little deference to host states' determination that different products or methods of production are or are not in like-circumstances when applying standards of treatment by reference.[65] This broad discretion left to tribunals in determining whether circumstances are "like" or not may be problematic in light of the new challenges to environmental policies that could arise in the future.

B. Fair and Equitable Treatment

This article now turns to the articulation between environmental concerns and substantive protection granted to foreign investors in IIAs. Foreign investors can use a broad variety of theories to challenge adverse changes in environmental regulations.[66] While an important part of these claims were undertaken on the basis of clauses on the protection against expropriation, the FET standard has also been invoked to obtain compensation for damages arising from the implementation of an environmental regulation. This article will not undertake here a review of the notion of FET in international investment law[67] nor cover the situations where stabilization agreements have been used to improve the predictability of a given investor-State relationship.[68] The following developments instead focus on the notion of legitimate expectations amongst the several components of the FET, in light of its frequent use to challenge adverse changes in environmental legislation.

Advances in technology and scientific knowledge require a constant adaptation of a country's environmental laws, which makes the interpretation of the FET standard even more critical. A central question addressed by the tribunals is the determination of the extent to which an investor's legitimate expectations can be frustrated by the adoption of new environmental norms.[69] If a tribunal decides that legitimate expectations are protected under the FET standard, a second issue arises: whether the investor is entitled to challenge the adoption of the environmental regulation adverse to the investor's expectations. Typical cases may involve the withdrawal of permits by an administrative authority motivated by

65. Bilcon of Delaware Inc. v. Government of Canada, Award on Jurisdiction and Liability, UNCITRAL, PCA Case No. 2009-04 (Mar. 17, 2015).

66. Viñuales, *supra* note 27, at 337.

67. Newcombe & Paradell, *supra* note 3, at 255-97.

68. Viñuales, *supra* note 27, at 339-349. Audley Sheppard & Antony Crockett, *Are Stabilization Clauses a Threat to Sustainable Development?*, *in* Sustainable Development in World Investment Law 3393-3513 (Marie-Claire Cordonier Segger et al ed., 2011).

69. Viñuales, *supra* note 27, at 350.

concerns over pollution. The *Tecmed* case, as discussed below, relates to the non-renewal of a waste landfill permit.[70]

1. *The Scope of the FET Standard as a Preliminary Question*

a. Within NAFTA

The first NAFTA awards diverged in their interpretation of article 1105(1) of the NAFTA agreement.[71] In *S.D. Myers*, the tribunal concluded that FET had to be construed as the minimum standard of treatment,[72] limiting substantially the scope of the standard compared to the broader interpretation made by other tribunals in a non-NAFTA context.[73] Taking a different position, the tribunal in *Pope & Talbot* found that article 1105(1) of NAFTA rather provided a higher standard than customary international law.[74] In reaction to *Pope & Talbot*, the Free Trade Commission, representing NAFTA member states, issued a *Note for interpretation* which stressed that the FET standard had to be understood in the NAFTA context as being equivalent to the minimum standard of treatment of international customary law.[75] Following this interpretative note, the *Waste Management* tribunal seemed to embrace that view, yet without explicitly referring to customary international law:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF*, and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceeding of a complete lack of transparency and candour in an administrative process.[76]

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70. Técnicas Medioambientales Tecmed SA v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 41 (May 29, 2003).

71. NEWCOMBE & PARADELL, *supra* note 3, at 272.

72. *S. D. Myers*, *supra* note 44, at ¶ 252.

73. *See, e.g.*, *Tecmed*, *supra* note 70, at ¶ 154.

74. *Pope & Talbot*, *supra* note 39, at ¶ 118.

75. *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTACLAIMS.COM (July 31, 2001), http://www.naftalaw.org/commissionfiles/NAFTA_Comm_1105_Transparency.pdf.

76. Waste Management Inc. v United Mexican States, ICSID Case No. ARB (AF)/00/3, Award, at ¶ 98 (Apr. 30, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf.

Subsequent tribunals notably held that while the applicable minimum standard of treatment could evolve,[77] the FET standard as stipulated in NAFTA article 1105 was identical to that minimum international standard.[78]

As a consequence, it seems unlikely that the FET standard could be used in the context of the NAFTA agreement to challenge an environmental regulation on the sole basis that the change in regulation violated the investor's legitimate expectations. Under the minimum standard of treatment of customary international law, only a denial of justice, a lack of due process, a lack of due diligence, and instances of arbitrariness or discrimination would represent a violation of the minimum standard of treatment.[79] In other words, the sole implementation of the environmental measure itself would not constitute a basis to engage the international responsibility of the state under NAFTA, except in the case of otherwise

77. *See, e.g.*, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 438 (Mar. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf ("At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment."); International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, ¶ 194 (Jan. 26, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf ("The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."); ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, ¶ 22 (Jan. 9, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf. *Contra* Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, ¶ 22 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf ("Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).").

78. *See, e.g.*, *Bilcon*, *supra* note 65, at Award on Jurisdiction and Liability ¶¶ 432-33 ("The Tribunal agrees with Canada on this point. In light of the FTC Notes and in the specific context of NAFTA Chapter Eleven in which this Tribunal operates, 'fair and equitable treatment' and 'full protection and security' cannot be regarded as 'autonomous' treaty norms that impose additional requirements above and beyond what the minimum standard requires. NAFTA Article 1105 is, then, identical to the minimum international standard.").

79. NEWCOMBE & PARADELL, *supra* note 3, at 238.

arbitrary or discriminatory conduct.[80] A similar conclusion can be made for recent IIAs which have construed narrowly the scope of the FET standard. For this reason, this paper will focus on the FET standard as understood in a broader sense by arbitral tribunals and will focus on cases where such implementation would constitute by itself a violation by the state of protection standards.

b. Outside NAFTA

In a non-NAFTA context, tribunals have generally interpreted FET as encompassing a wide range of procedural and substantial rights, beyond the minimum standard of international law in customary international law.[81] The elements commonly associated with the FET standard are, in addition to those included in the minimum standard of treatment: the protection of legitimate expectations, non-discrimination, transparency and protections against bad faith, coercion, threats, and harassment.[82] The protection of legitimate expectations has frequently been invoked to challenge regulatory changes if the intended measures are inconsistent with the state's past conduct or engagements to the investor. For this reason, determining

80. In its dissenting opinion in the *Bilcon* case, the arbitrator Donald McRae pointed to the "remarkable step backward in environmental protection" of the majority's decision. *See* William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada., PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 51 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf. The tribunal applied the *Waste Management* standard in interpreting NAFTA article 1105. *Bilcon*, Award on Jurisdiction and Liability ¶¶ 443-44. The majority eventually decided that the actions of the panel were arbitrary in that they "'effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment' rather than fully carrying out the mandate defined by the applicable law." *Id.* ¶ 491. This alleged violation of Canadian domestic law, according to Pr. McRae, should not have amounted to an arbitrary behavior sufficient to meet the high threshold of *Waste Management*. *See Bilcon*, Dissenting Opinion of Professor Donald McRae ¶¶ 35-36. Such reasoning substantially lowers the threshold required to establish an arbitrary behavior under NAFTA article 1105. In the words of Pr. McRae, "What the majority has done is add a further control over environmental review panels. Failure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law. This is a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels." *Id.* at ¶ 48.

81. NEWCOMBE & PARADELL, *supra* note 3, at 238. *See, e.g.*, Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.4.7 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf ("The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment."); Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 Award, ¶ 258 (May 22, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf ("It might well be that in some circumstances where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other more vague circumstances, the fair and equitable standard may be more precise than its customary international law forefathers.").

82. NEWCOMBE & PARADELL, *supra* note 3, at 279.

whether an environmental measure violated an acquired right of the investor, assuming the doctrine of legitimate expectations is not construed by the arbitral tribunal as extending beyond acquired rights, is of particular relevancy.

2. *The Protection of Legitimate Expectations*

The scope of the protection of legitimate expectations includes fairness and due process in decision making as well as "expectations with respect to the use and benefit of economic rights and interests forming part of the investment."[83] Some tribunals have also included the stability of the legal and business framework of the host state.[84] Legitimate expectations require a specific, targeted, and unambiguous conduct by the state,[85] and the investor's reliance must be objectively justifiable and reasonable.[86] *Tecmed*, a landmark case in the application of this standard, builds on two precedent awards, *Saluka* and *Spyridon*, which adopted a rather permissive position[87] regarding the implementation of environmental regulations.[88] The case concerned the denial by the Mexican government to renew the authorization to operate a waste landfill. The Tribunal found that Mexico violated its obligation by refusing to renew such permit before the relocation of the landfill, despite a previous engagement that the relocation would occur only after the new site was made available. The tribunal embraced a quite restrictive approach regarding the policy space available to the host state:

> [Fair and equitable treatment requires] treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may

83. *Id.* at 280.

84. *Unglaube*, *supra* note 53, at ¶ 248.

85. NEWCOMBE & PARADELL, *supra* note 3, at 281 (citing Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 148 (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf).

86. *Id.* at 282.

87. DI BENEDETTO, *supra* note 21, at 106-07.

88. Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶¶ 304-05 (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 317 (Dec. 7, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf ("In order to determine whether frustration of the foreign investor' expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must enter into consideration as well."); *Id.* at ¶ 691 ("The tax regulations which led to the incriminated decisions were taken by [the Romanian competent authority] in the course of exercising its obligations to implement the food and safety regulations. Such regulations by a state reflect a clear and legitimate public purpose. In the Tribunal's view, Claimant may not have expected that the State would refrain from adopting regulations in the public interest, nor may Claimant have expected that the Romanian authorities would refrain from implementing those regulations.").

> know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[89]

A tribunal in *Unglaube*, a more recent case,[90] adopted a better approach to balance an investor's right under the FET clause and implementation of environmental regulations.[91] In this case, the claimant alleged a breach of legitimate expectations, transparency, and due process duties.[92] The tribunal especially held that a considerable measure of deference to state acts should be accorded when "a valid public policy *does* exist, and especially where the action or decision taken relates to the State's responsibility for the protection of public health, safety, morals, or welfare."[93] As noted "[t]his deference. . . is not without limits."[94] According to the tribunal, "[e]ven if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory.[95] The tribunal eventually rejected the claim because a valid public policy justified such deference, in the absence of any arbitrary or discriminatory conduct by the state.[96] An appropriate reasoning should, therefore, seek to assess the reasonableness of the investor's reliance in light of an existing public purpose.[97] But absent a discriminatory or arbitrary conduct by the host state, an environmental measure is not likely to constitute a breach of the standard of legitimate expectations—with the caveat that the standard applied to determine whether the state's conduct was discriminatory or arbitrary is left to the arbitral tribunal and should not be characterized too easily.

3. *Stability and Predictability of the Host Country's Legal Framework*

Several tribunals have inferred from the FET clause a duty of states to insure the stability and predictability of the host country's legal framework.[98]

89. *Tecmed*, *supra* note 70, at ¶ 154.
90. *See*, *supra* note 53, at ¶ 286.
91. DI BENEDETTO, *supra* note 21, at 114.
92. *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, *supra* note 53, at ¶ 235.
93. *Id.* at ¶ 246-47.
94. *Id.* at ¶ 117.
95. *Id.*
96. *Id.*
97. *See* NEWCOMBE & PARADELL *supra* note 3, at 286.
98. *Id.*; *see, e.g.*, CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 276 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf ("In addition to the specific terms of the Treaty, the significant number

General legislative acts can constitute a violation of the fair and equitable treatment if they critically alter the regulatory environment in which the investment is taking place.[99] Where found applicable, the stability and predictability requirement is not absolute; as stated by the tribunal in *Parkerings*, "an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."[100] Regarding general changes in the regulatory framework, only an act taken "unfairly, unreasonably or inequitably in the exercise of its legislative power" will constitute a violation of the FET.[101] Here again, a relatively high threshold was implemented by the tribunal to balance the public interest and the investor's protection under the FET clause, although a significant level of discretion is vested in the arbitral tribunal in the determination if what is a fair, reasonable, and equitable exercise of the legislative power of the host state. In addition, a test's result can be more problematic regarding the adoption and enforcement by the executive branch of regulations in the field of environmental protection, as well as decisions of the judicial power, which not only give rise to a greater number of cases but can often be, because of their own nature, more specific and targeted than legislative measures.

C. THE STANDARD OF PROTECTION AGAINST EXPROPRIATION

The implementation by a host country of environmental regulations, either of a general character such as bans on certain types of products or targeted bans such as the withdrawal of a license for environmental concerns, may significantly affect foreign investors' property rights. Arbitral tribunals have encountered remarkable difficulties in establishing a clear criteria to draw a distinction between non-compensable regulatory measures and indirect expropriations. The uncertainty that has resulted, both for investors and for states, may have explained the recent developments in treaty practice and the inclusion of more detailed clauses in IIAs specifying the scope of indirect expropriation under the treaty (*see infra* at 2.4). The purpose of the current section is to provide an analysis of the arbitral practice on expropriation cases dealing with environmental concerns. The

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of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability.").

99. Roland Kläger, *'Fair and Equitable Treatment' and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 237, 248 (Marie-Claire Cordonier Segger eds., Kluwer Law International 2011). *See, e.g.*, LG&E, LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 133 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.248. *See, e.g.*, in the context of the Argentine crisis, LG&E, LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic (Decision on Liability, 3 Oct. 2006) ICSID Case No. ARB/02/1 [133] (LG&E).

100. *Parkerings-Compagniet*, *supra* note 36, at ¶ 371.

101. *Id.* at ¶ 332.

two different types of expropriations, direct and indirect, must be distinguished.

1. *The Environmental Purpose of the Measure is Irrelevant in the Qualification of Direct Expropriation*

The *Santa Elena* case, one of the first investment cases with an environmental component, falls into the first category.[102] Answering a claim for the direct expropriation of a land to create a wildlife park, the tribunal stated that "the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference."[103] The tribunal did not challenge the fact that the expropriation was made for public purposes (and acknowledged this fact as a condition for a lawful expropriation)[104] and was, therefore, "legitimate;"[105] however, it did not excuse the state from its obligation of compensation. The tribunal concluded: "expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies."[106]

The *Santa Elena* award has been pointed as conservative[107] for the apparent lack of consideration by the tribunal of the environmental motive of the expropriation. However, the environmental purpose of the measure still plays a role in direct expropriation cases to decide lawfulness of the expropriation, but not at the level of the determination of the expropriation itself. The impact of the case should not be overestimated as it concerned a direct expropriation, a situation that is not brought frequently before investment tribunals.[108]

2. *Protecting the Environment as a Public Purpose: an Uncertain Application in Indirect Expropriation Cases*

Concerns about host states' ability to regulate on environmental matters have crystallized in indirect expropriation cases. Such cases may be divided

102. Compañía del Desarollo de Santa Elena SA v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf.

103. *Id.* at ¶ 71.

104. The criteria of a lawful expropriation, often listed in IIAs, require it to be for a public purpose, made in accordance with due process of law, in a non-discriminatory manner and accompanied with prompt, adequate, and effective compensation. NEWCOMBE & PARADELL, *supra* note 3, at 369.

105. *Santa Elena*, *supra* note 102, at ¶ 71.

106. *Id.* at ¶ 72.

107. ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 236 (Cambridge University Press 2012).

108. NEWCOMBE & PARADELL, *supra* note 3, at 341.

into two sub-categories: "regulatory" expropriations, understood as "substantial deprivation of the value of property resulting from the adoption of a measure of general application but without formal transfer of title," and "targeted" expropriations, where the taking result from an "individual and specific" measure, involving a higher risk of discrimination.[109] This distinction is important to determine the potential deterrent effect of the protection against expropriation on states intending to implement general environmental regulations.

a. The Threshold Requirement of a Substantial Deprivation

Key principles can be drawn from the arbitral practice to determine whether an indirect expropriation took place.[110] Andrew Newcombe and Lluís Paradell have summarized them as follow:

> First, the form of the measure is not determinative nor is the intent of the state. Second, the claimant must establish that the measure in question results in a substantial deprivation. Third, the character of the government measures in question must be taken into account in determining whether a police powers exception applies. Fourth, the investment-backed legitimate expectations of the investors are relevant in assessing whether there has been an indirect expropriation. Finally, the indirect expropriation analysis is context and fact specific.[111]

The two authors note that in the majority of cases, the deprivation[112] is not substantial enough to be characterized as expropriatory.[113] For instance, in *Chemtura*, the tribunal rejected the claim that the suspension of the claimant's authorization to produce and commercialize certain lindane-based pesticides amounted to an expropriation under NAFTA article 1110, because the measure "did not amount to a substantial deprivation of the Claimant's

109. VIÑUALES, *supra* note 27, at 295.

110. NEWCOMBE & PARADELL, *supra* note 3, at 341.

111. *Id.*

112. An arbitral tribunal needs first to answer the question of whether the deprivation of a discrete right is sufficient to qualify as an expropriation or whether a deprivation of the investment as a whole is required. *See, e.g.*, Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0531.pdf (recounting an instance in which the tribunal considered several claims separately, notably for the deprivation of a license and a ship, to determine whether an expropriation had occurred with respect of each right); *see also* Venezuela Holdings, B.V., et al v The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, ¶ 286 (Oct. 9, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4011.pdf ("The Tribunal considers that, under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature.").

113. NEWCOMBE & PARADELL, *supra* note 3, at 357; *see id.* at 344-45 (providing a list of criteria established by courts on the requirements for a substantial depravation).

investment."[114] If this factual requirement is met, however, and the claimant succeed in proving the substantial deprivation and the causality, the burden shifts to the state to invoke the police powers doctrine, by making "a *prima facie* case to justify the regulatory measure as a non-compensatory measure."[115] States may invoke environmental concerns as a justification under the police powers exception. But, as demonstrated below, this doctrine is not applied uniformly by tribunals and tends to be replaced by a more literal interpretation of the treaty provisions, which limit the role of the public interest as a condition of the lawfulness of the measure rather than an exception to the qualification of expropriation. The analysis begins with a description of several arbitral cases, each embracing a different reasoning to determine whether a targeted measure constituted an expropriation. A further analysis of these different approaches will then be undertaken to provide an analytical framework to assess recent trends in treaty drafting.

b. Application of the 'Sole Effect' Doctrine: Cases where the Environmental Purpose of the Measure had Little Consequences for the Qualification of Indirect Expropriation

Several arbitral tribunals concluded that the state's targeted environmental regulation qualified as an indirect expropriation. Given that no compensation had been paid by the state, the measure constituted a violation of the treaty's clause warranting protection against expropriation. In *Metalclad*, where the dispute had arisen from the refusal of a permit to build a waste landfill and the subsequent reclassification of the land as an ecological preserve by Mexico, the tribunal found that the government's conduct constituted a violation of the expropriation standard contained in article 1110 of the NAFTA.[116] It interpreted the provision broadly holding that under the agreement, indirect expropriation included "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[117] The environmental dimension of the case had little impact on the outcome.[118] The tribunal did not give much weight to the environmental concerns upon which the Mexican government allegedly based its measure, rather focusing on the sole effect of the measure on the investment, at the exclusion of any other parameter.[119] But, the

114. Chemtura Corporation v. Government of Canada, UNCITRAL, Award, ¶ 265 (Aug. 2, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.

115. NEWCOMBE & PARADELL, *supra* note 3, at 366.

116. *See*, *Metalclad*, *supra* note 85.

117. *Id.* at ¶ 103.

118. VIÑUALES, *supra* note 27, at 295.

119. *Metalclad*, *supra* note 85 (The *Metalclad* tribunal emphasized that it "need[ed] not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a

tribunal subsequently noted that the municipality had no basis to allege that the hazardous waste landfill had adverse environmental effects,[120] which may indicate that even if the public policy objective of the measure had been taken into account, the tribunal would most likely have found no violation given that the alleged environmental regulation lacked a basis in fact.[121]

c. Application of a Proportionality Test: Balancing the Environmental Purpose of the Measure With the Degree of the Measure's Interference With The Investor's Right of Use or Ownership

Facing an analogous scenario, the *Tecmed* tribunal[122] also decided that the non-renewal of a waste landfill amounted to an indirect expropriation. But, in so doing, the tribunal did not only take into account the measure's impact on the investment, but also weighed the legitimate goals pursued by Mexico in determining whether the measure amounted to an expropriation.[123] The tribunal first underlined that "regulatory actions and measures will not be excluded from the definition of expropriatory acts."[124] It then applied a proportionality test following an interpretative method drawn from the European Court of Human Rights' case law.[125] Noting that "the economic and commercial operations in the [l]andfill after such denial [had] been fully

violation of NAFTA article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.").

120. *Id.* at ¶ 106.

121. Another series of cases which do not incorporate the public purpose of the measure in the reasoning of the tribunal must be distinguished: those where the tribunal does not reach the threshold requirement of substantial deprivation and consequently excludes the qualification of expropriation without considering the public purpose of the measure. *See infra* pt. I § A ¶ 3. In such cases, this apparent lack of regard is due to the fact that the economic impact of the measure is not grave enough to qualify as an expropriation in the first place. The NAFTA tribunal in *Glamis Gold* found, for instance, that the "severity of the economic impact and the duration of that impact" did not amount to a regulatory taking because the interference with the property right was not important enough—without referring to the public purpose of the measure in its award. Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, ¶¶ 356-66 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

122. *Tecmed*, *supra* note 66.

123. *Id.* at ¶ 122 "Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."

124. *Id.*

125. *See id.* (citing James and Others v. United Kingdom, App. No. 8793/79, Eur. Ct. H.R. 1, 19-20 (1986), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.).

and irrevocably destroyed"[126] as a result of the non-renewal of the permit, the tribunal eventually qualified the measure as expropriatory.[127]

d. Application of the Police Powers Doctrine: Deference to the Environment Purpose of the Measure

Following a different approach, the tribunal in *Methanex* rejected the expropriation claim based on the police powers doctrine.[128] The claimant argued that the adoption of the ban by the state of California indirectly prohibited the investor's product and was tantamount to an expropriation under article 1110 NAFTA.[129] Basing its argument on *Metalclad*, in which the tribunal had only considered the economic impact of the measure, the claimant argued that the regulation was an incidental interference with the use of property, which had "the effect of depriving [the investor], in whole, or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[130] The tribunal did not explicitly refer to the police powers in the award, but nonetheless decided that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[131] The tribunal concluded that "[the]

126. *Id.* at ¶ 117. *See also* LG&E, LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 190 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf ("In evaluating the degree of the measure's interference with the investor's right of ownership, one must analyze the measure's economic impact—its interference with the investor's reasonable expectations—and the measure's duration.").

127. *See also* AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/italaw6304.pdf (relating to, and to be red in the context of a concession contract for water distribution and waste water treatment services.); *Id.* at ¶ 140 ("In analyzing the measures taken by Argentina to cope with the crisis, the Tribunal finds that, given the nature of the severe crisis facing the country, those general measures were within the general police powers of the Argentine State, and they did not constitute a permanent and substantial deprivation of the Claimants' investments."). The *AWG Group* tribunal weighted both the general public powers of the Argentine state and the impact of the measure on the investment.

128. *Methanex*, *supra* note 50.

129. *Id.* at pt. IV ch. D ¶ 6. The state of California passed an executive order banning the use or sale of MTBE, a gasoline additive. Methanex, a Canadian corporation producing and distributing methanol, an ingredient used in the production of MTBE, argued before the tribunal that the Californian ban amounted to an expropriation in violation of article 1110 of NAFTA (as well as a violation of FET in violation of article 1105 of NAFTA and a denial of national treatment in violation of article 1102 of NAFTA). *Id.* at pt. I ¶¶ 2, 4.

130. *Id.* at ¶ 4.

131. *Id.* at ¶ 7.

ban was a lawful regulation and not an expropriation."[132] The police power was applied as an exception to the general rule that a substantial deprivation of the investor's property qualifies as an expropriation.[133]

The *Methanex* tribunal was highly deferential to the host state's public interest. Its reasoning, in that regard, may be seen as unsatisfactory. First, unlike in *Tecmed*, the *Methanex* tribunal showed no consideration to the impact of the regulation on the investment, thereby turning the exception into a principle, in sharp contrast with a common view in investment law to assess the impact of the measure on investor's rights first.[134] In comparison, the *Saluka* tribunal which also embraced the police power doctrine, took a more balanced position.[135] After noting that the measure "had the effect of eviscerating [Saluka's] investment,"[136] the tribunal applied the police powers exceptions to "neutralize" the qualification of expropriation.[137]

Second, the *Methanex* award did not follow the elements of the definition of a lawful expropriation contained in article 1110 NAFTA.[138] Instead of acknowledging the lack of compensation, which should have characterized the expropriation as unlawful under article 1110, and then using the police powers doctrine to determine whether the expropriation could have been justified given its environmental purpose under a traditional application of the police powers, the tribunal disregarded the condition of adequate compensation. It concluded that because the three other conditions were fulfilled (public purpose, non-discrimination, and due process), no expropriation occurred in the first place.[139] The tribunal, by doing so, applied the conditions of a lawful expropriation to identify whether the expropriation could be justified after having been qualified as such.[140] The

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132. *Id.* at ¶ 15.

133. Methanex Corporation v. United States of America., UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, pt. 4 ch. D (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf.

134. ARNAUD DE NANTEUIL, L'EXPROPRIATION INDIRECTE EN DROIT INTERNATIONAL DE L'INVESTISSEMENT 484-85 (Pedone 2014). *See also* NEWCOMBE & PARADELL, *supra* note 3, at 366.

135. *Saluka*, *supra* note 88, at ¶¶ 304-05.

136. *Id.* at ¶ 276.

137. DE NANTEUIL, *supra* note 134, at 489.

138. North America Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605, art. 1110 (1993) ("No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.").

139. DE NANTEUIL, *supra* note 134, at 489.

140. *Id.* at 490.

Saluka tribunal replaced thereafter the police powers doctrine in the role of an exception mechanism.[141]

Third, the *Methanex* tribunal, in concluding that the measure was a lawful regulation and not an expropriation, disregarded the fact that a regulation can be a lawful measure under the IIA and an indirect expropriation at the same time, or in other words, that a measure can (i) result in a substantial deprivation of the investment, giving rise to an indirect expropriation claim and (ii) be non-discriminatory, taken for a public purpose and with due process, thus, remaining lawful under the relevant treaty provision.[142] By creating this distinction, the tribunal overlooked the key issue at stake, which was the determination of a standard achieving an appropriate balance between both investors' rights and states' inherent power to regulate on environmental matters.

More recently, the *Chemtura* tribunal further elaborated on the police powers as an exception mechanism to the qualification of expropriation. The *Chemtura* tribunal found that the targeted measure did not amount to a substantial deprivation and denied the claim of indirect expropriation. Despite this initial finding, the tribunal subsequently turned to the state's police power defense argument, as if it was an additional principle that could exclude the qualification of an indirect expropriation in the first place.[143] In doing so, the tribunal in *Chemtura* embraced *Methanex's* inverted reasoning:

> Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the [governmental agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, *does not constitute an expropriation.*[144]

Applying the police powers after having established the existence of a substantial deprivation, as in *Chemtura*, or *ex ante* as a carve-out, without consideration to the impact of the measure on the investor's rights as in *Methanex* arguably does not change the outcome. The tribunal concluded, in both cases, that no expropriation had occurred. But, assessing the impact of the measure on the investment, before turning secondly to the police powers, is important as a matter of accuracy for legal reasoning. When a tribunal, as in *Methanex* and *Chemtura*, states that the measure is non-discriminatory, motivated by public policy and with due process, representing as a consequence a valid exercise of its police powers, it is in

141. *Id.*
142. *Id.* at 488.
143. *See* VIÑUALES, *supra* note 27, at 295.
144. *Chemtura*, *supra* note 114, at ¶ 266 (emphasis added).

reality providing the qualification of a lawful expropriation. Assessing these conditions as criteria for the absence of expropriation is not a correct application of the IIAs provisions. For these reasons, the application of the police powers in *Chemtura* is more balanced in the sense that it follows this two-step analysis; yet, it remains accurate in light of how IIAs formulate the three criteria of non-discrimination, public purpose, and due process as criteria of lawful expropriation and not as criteria to determine whether an expropriation even existed, as followed by the tribunal in *Chemtura*.

The reasoning consists in first assessing whether a substantial deprivation occurred and then deciding, if this is the case, whether the expropriation is lawful pursuant to the treaty provision, is arguably less favorable to host states, given that the police powers is not applied to exclude the qualification of an indirect expropriation in its entirety. For this reason, it may not be optimal from a public policy perspective, given that this approach would give rise to a duty to compensate in any situation where the environmental regulation amounted to a substantial deprivation of the investment. Policy concerns may, therefore, require tribunals to shift away from a black or white application of the police powers and embrace a proportionality test, consisting in taking into account, concomitantly, the level of impact on the investment, and the public purpose of the measure, at the same stage of the reasoning. Such approach may give rise to additional challenges, such as increasing the unpredictability of the tribunal's ultimate decision or vesting too much deference in the tribunal itself. These concerns are addressed in the following section.

3. *Towards a More Balanced Application of the Police Powers in Recent Indirect Expropriation Cases*

a. The Unsatisfactory Application of the Police Powers Doctrine to Exempt the Host State from any Duty of Compensation

Considered together, *Methanex* and *Chemtura* seem to imply a stronger deference by NAFTA investment tribunals to the state's regulatory powers in the context of indirect expropriations. But, the treaty's provisions on expropriation do not provide an express basis to use the police powers in order to exclude the qualification of expropriation *ex ante* (by opposition to justifying *ex post* the behavior of the state as a lawful expropriation still requiring the payment of compensation).

The recourse to the notion of police powers crystallizes the difficulties that face tribunals seeking to draw a line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation.[145] On the one hand, the tribunal's extensive application of the notion of police powers in *Methanex* could grant states too much leeway,

145. *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law: OECD Working Papers on International Investment 2004/04*, OECD (Sept. 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.

by enabling them to implement general measures which, despite substantially depriving the investor of its property rights, would not be expropriations under the IIA and therefore would not require compensation.

On the other hand, the application in indirect expropriation cases of the traditional test used for direct expropriations—(i) whether a substantial deprivation occurred and (ii) whether the measure was taken for a public purpose, in accordance with due process of law, in an non-discriminatory manner and with prompt, adequate and effective compensation (i.e. whether the expropriation was law under the IIA)—may prove unsatisfactory. If this test was applied as such by tribunals in indirect expropriation cases, a legitimate environmental measure substantially depriving the investor would automatically be qualified as unlawful, given that no compensation would have been paid by the state. The latter, by definition, would have challenged the qualification of expropriation at the first place and, therefore, the hypothesis of a pre-emptive payment seems highly unlikely.[146] Such approach would increase the cost of implementing environmental measures, if the qualification of expropriation is automatically found every time a substantial deprivation occurred. This theory has been referred to as the "sole effect" doctrine. Only the effect of the measure on the investment can be considered in order to determine whether compensation was due. The purpose of the regulation is only taken into account at the stage of the determination of the lawfulness of the expropriation, in answering the question of whether the expropriatory measure was taken for a "public purpose" or for the "public interest," amongst the other requirements provided by the treaty.

b. The Threshold Requirement of a Substantial Deprivation as a Safeguard to the Application of the Sole Effect Doctrine to Challenges Against General Regulatory Measures

The application of the "sole effect" doctrine to environmental measures seems inappropriate, given that it in fact requires the tribunals to make the determination that the measure is either a valid act or an unlawful expropriation, which could in turn increase the costs of environmental protection and act as a deterrent. But, the distinction between lawful regulatory measures and unlawful indirect expropriation cases is not as sharp at it appears. Past awards show that the requirement of substantial deprivation is a high standard to meet.[147] A mere decrease in value or profitability due to a state measure would not rise to the level of an

146. U.N. Conference on Trade and Development, *Exploration: UNCTAD Series on Issues in International Investment Agreements II*, U.N. Doc. UNCTAD/DIAE/IA/2011/7 (Sept. 2004), http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

147. *See, e.g.*, Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Interim Award, ¶ 96 (June 26, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf; CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶ 150 (Sept. 13, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

expropriation[148]—although other grounds, e.g., the FET standard, may be available. Therefore, in expropriation cases brought by investors to challenge general environmental regulations, the requirement of a substantial deprivation represents an important obstacle to the qualification of indirect expropriation. This threshold is an important safeguard to avoid excessive claims preventing states from implementing general regulatory measures.[149] In such cases, absent bad faith, discrimination, or a gross disproportion to the investor's right and expectations,[150] the general rule seems to be that the investor would not be founded in claiming compensation.

Changes in the environmental legal framework of a state are not exceptional,[151] even if no arbitration awards dealing with general regulatory changes and expropriation claims are available to provide guidance.[152] But this outcome is different when the investor has received specific assurances from the host country. Although the legitimate expectations were already studied as a component of the FET, they also play a role in assessing whether the government measure was expropriatory.[153] Although they cannot be a substitute for the lack of substantial deprivation, they may come into play after such a determination. In cases involving general regulatory

148. In *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, outside the context of NAFTA, the tribunal ruled that no substantial deprivation occurred—and that as a consequence, Argentina's conduct did not breach the expropriation clause of the BIT. Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 145 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf. As a consequence of such qualification, the tribunal did not need to answer Argentina's argument that the police powers exception applied to the case. However, the tribunal did answer Argentina's argument that the police power exception should also apply to full protection and security and FET violations and answered negatively to both, judging that "the application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment, . . . a tribunal must take account of a State's reasonable right to regulate. . . . Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. . . . In short, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate." *Id.* at ¶ 148. Regarding the expropriation claim, the tribunal decided that the targeted measure (the refusal of an Argentine province to revise water tariffs under a concession contract, which was eventually terminated unilaterally by the province due to allegedly high nitrate levels) did not cause a substantial deprivation. The tribunal's implicitly confirmed a conception of the police powers as an exception mechanism and not a principle applying without a first assessment of the impact of the measure on the investment to determine whether an expropriation occurred in the first place. *Id.*

149. *See* NEWCOMBE & PARADELL, *supra* note 3, at 357.

150. *Id.* at 366. *See also* VIÑUALES, *supra* note 27, at 305–15.

151. *See* VIÑUALES, *supra* note 27, at 307.

152. NEWCOMBE & PARADELL, *supra* note 3, at 361.

153. *Id.* at 350.

measures however, it is difficult to imagine a situation in which a host country would commit to the investor not to undertake non-discriminatory regulations.[154] In *MTD*,[155] the tribunal embraced a critical view, recalling that "BITs are not an insurance against business risk."[156] The claimant argued that it was indirectly expropriated and after receiving authorization from the state to conduct its investment, claimant was then denied a permit based on zoning requirements.[157] The tribunal stressed that granting the permit would have required Chile, the host state, to change its zoning laws, which was not a right available under the BIT.[158] It followed the view that investors are required to assess the regulatory environment of the country in which they invest and calculate the commercial right accordingly.[159] In *Methanex*, the tribunal also mentioned the respect of past specific commitments as a limitation to the police powers doctrine.

c. Reconciling the Arbitral Practice on Challenges Against Environmental Measures

The incoherence arising from the arbitral practice is problematic. If one considers that the *Methanex* award was based on a "misinterpretation" of NAFTA article 1110, the threat to environmental policy making posed by the *Metalclad* case[160] could surface again given the latitude afforded to each tribunal in interpreting the notion of expropriation. We touch here on the reasons why a more predictable framework would be helpful, not only within the NAFTA framework,[161] but in international investment law in general to provide the actors of international investment law with more coherence in the qualification of indirect expropriation. A balanced approach seems preferable to enable tribunals to weigh both interests at stake, i.e., the impact on investors' rights and the purpose of the measure. Within a proportionality analysis, the police power doctrine could be considered as a factor, rather than as a rigid exception mechanism.

Several trends can be identified from this overview of the arbitration practice concerning the three traditional standards granted in IIAs. First, it can be concluded that most tribunals took into account the environmental purpose of host state's measures in their interpretation of IIAs' provisions. Despite an apparent homogeneity, each case involves different claims and distinct sets of facts, which makes it difficult to draw conclusions for future environmental cases.

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154. *See* DE NANTEUIL, *supra* note 134, at 491.
155. MTD Equity Sdn Bhd and MTD Chile SA v. Rep. of Chile, Award (May 25, 2004), ICSID Case No. ARB/01/7.
156. *Id.* at ¶ 178.
157. *Id.* at ¶ 207.
158. *Id.* at ¶ 214.
159. VIÑUALES, *supra* note 27, at 302.
160. Joshua Elcombe, *Regulatory powers vs. investment protection under NAFTA's Chapter 1110: Metalclad, Methanex, and Glamis Gold*, 8 UNIV. OF TORONTO FAC. OF L. REV. 71 (2010).
161. *See id.* at 92-98.

Second, most of the rules of interpretation identified by the arbitral tribunals are internal, in the sense that they follow "the internal interpretative canons of [international investment law], that is, the canons which look at the ordinary meaning of applicable rules and—in the context of [international investment law]—do not in themselves involve taking into account values and interests other than property-related and commercial ones."[162] External legal elements, such as environmental obligations set out by other treaties,[163] have been largely ignored by the arbitration practice due to the limited mandate of arbitration tribunals,[164] despite the open door provided by Article 31.3(c) of the Vienna Convention, which provide that any relevant rules of international law applicable in the relations between the parties—here, to a given IIA—are part of the context of a given agreement and should therefore be recognized a role as interpretative tools of IIAs provisions.

Third, the several approaches followed by tribunals remain unsatisfactory. The analysis usually starts with an assessment of the impact of the measure on the investment, i.e., whether a substantial deprivation took place. The police powers exception, when applied, provides states with a powerful defense mechanism,[165] but its heterogeneous application by arbitral tribunals creates uncertainty. The application of the police powers exception is also problematic given that it largely overlooks the impact of the measure on the investor's rights. Substantial deprivations of the investor's rights provoked by environmental measures of the host state should not be assessed through a black or white prism—the same remark being also applicable to the analysis undertaken by the *Metalclad* tribunal which only considered the effect on the investor's property to assess the expropriatory nature of the measure. Potentially every regulatory measure is taken for a public purpose, so a mere statement that a measure promotes the public interest should automatically waive the state's obligation to compensate. The tribunal in *Vivendi* expressed this concern: "If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose."[166] The lawfulness of an expropriation must therefore be distinguished from the qualification of expropriation, which triggers a duty to compensate. Tribunals have, over the years, provided legal tools to assess whether an indirect expropriation occurred and whether compensation was due. Yet, solving the legitimacy crisis of international investment law requires all actors of economic

162. DI BENEDETTO, *supra* note 21, at 132.

163. *Id.* at 84.

164. *See Chemtura*, supra note 114, at ¶ 137 (The tribunal considered the international commitments of the state (its international obligations under the Aarhus Protocol to the Convention on Long-range Transboundary Air Pollution) in justifying the exercise of environmental regulatory powers, even if it conflicted with the FET obligations under NAFTA.). *See also* DI BENEDETTO, *supra* note 21, at 144 (Those international obligations were not used in the interpretation of the FET standard.).

165. DE NANTEUIL, *supra* note 134, at 490.

166. VIVENDI, *supra* note 81, § 7.5.21. *See also* DE NANTEUIL *supra* note 134, at 496.

development to be provided with a coherent, balanced, and sustainable framework. States should be able to implement legitimate non-discriminatory environmental measures without the threat of having their regulations challenged every time they impact the economic interests of foreign investors. For these reasons, states have increasingly inserted in IIAs provisions which seek to preserve policy space, especially in the field of environmental protection. They include preambular language to provide guidance to tribunals when interpreting treaty provisions, general exception clauses, and language clarifications excluding *ex ante* certain measures from the scope of a given provision or the treaty as a whole. It is to these provisions that this paper now turns.

III. An Assessment of New Trends in Treaty Drafting: Towards a Balanced Approach Between Investors' Rights and Host States' Ability to Regulate?

The protection of the environment has served as a training ground for innovative treaty drafting in the field of international investment law. New types of provisions are introduced in IIAs with the intent to balance host states' public interest with traditional investors' rights. Several authors have provided an analysis of this recent trend,[167] but an assessment of the potential implications of these environmental provisions on treaty arbitration remains to be undertaken, building on the arbitral practice. What methods and theories have arbitral tribunals used to protect legitimate environmental concerns applying IIAs that did not contain these new provisions? What lessons can be drawn from these cases? At the same time, investment arbitration should not be the sole focus. It is also necessary to assess, from a broader perspective, whether these new trends could help solve the current legitimacy crisis which faces international investment law today. In the first part, we discussed how tribunals interpreted the substantive protection granted in IIAs to foreign investors and investments in a way that preserved a certain level of host states' policy space, yet concomitantly failing to provide both host states and foreign investors with coherence in treaty interpretation. We now turn to the assessment of the latest trends in treaty drafting with a specific focus on environmental concerns.

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167. *See, e.g.*, Christina L. Beharry & Melinda E. Kuritzky, *Going green: Managing the environment through international investment arbitration*, 30 AM. U. INT'L L. REV. 383 (2015); DI BENEDETTO, *supra* note 21; KULICK, *supra* note 107; Markus W. Gehring & Avidan Kent, *Sustainable development and IIAs, from Objective to Practice*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 284 (Armand de Mestral & Céline Lévesque eds. 2013); NEWCOMBE & PARADELL, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351-70 (Marie-Claire Cordonier Segger, Markus W Gehring, & Andrew Newcombe & Paradell eds. 2011); Suzanne A. Spears, *Making way for the public interest in international investment agreements*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 275-94 (Chester Brown & Kate Miles eds. 2011); VIÑUALES, *supra* note 27.

The OECD, in its survey of environmental provisions in IIAs (2012), noted that only eight percent of IIAs contained a reference to the environment.[168] This phenomenon can be explained by the historical purpose of investment agreements, the protection of investors from capital exporting countries when investing in the developing world, but also by a certain disinterest of the international development community toward environmental concerns.[169] The OECD survey shows that the overall number of IIAs which contain environmental language is now expanding. While such language was infrequent until the mid-1990s,[170] the proportion of newly concluded IIAs with a reference to environmental matters increased significantly, with a peak of eighty-nine percent in 2008.[171] The authors of the survey also note that such an occurrence is more frequent in investment chapters contained in free trade agreements (FTAs).[172] More recently, the database on IIA provisions published by the United Nations Conference on Trade and Development (UNCTAD) confirms the growing share of recently negotiated IIAs which includes a reference to environmental concerns or the state parties' right to regulate.[173] Yet, only a minority of IIAs, even amongst those signed in 2015 and 2016, contain a reference to environmental concerns.

The concern to preserve sufficient policy space in FTAs can be explained by their coverage of a broader set of issues and by the increasing focus placed by the international trade framework on the environment, which has become

168. Gordon & Pohl, *supra* note 32, at 5.
169. Diepeveen, et al., *supra* note 17, at 148.
170. Gordon & Pohl, *supra* note 32, at 8.
171. *Id.*
172. *Id.* at 7.
173. UNCTAD's "IIA Mapping Project" sets out to create a comprehensive database of International Investment Agreements (IIA). As part of the Project, students from more than twenty universities have participated in a mapping exercise to list more than 150 variations of IIA provisions and incorporate them into an "International Investment Agreements Navigator." As of November 22nd, 2016, the provisions of 1949 BITs and investment chapters of FTAs had been referenced. Amongst the treaties already mapped, twenty-six (including seven FTAs) contained a preambular reference to the state's right to regulate; fifty-four contained a preambular reference to sustainable development (including ten FTAs), with a share largely growing in the past six years, with forty-four references in IIAs signed after 2010, compared to ten before 2010; 114 contained a preambular reference to environmental aspects more generally (including sixteen FTAs), with forty-six references in IIAs signed since 2010; 108 IIAs contained a clause mentioning the state's right to regulate in the text of the treaty (including eighteen FTAs), twenty-nine IIAs contained a reference to corporate social responsibility (including ten FTAs), with twenty-six occurrences in treaties signed after 2010, compared to only three before 2010; 238 IIAs contained a clause mentioning health and environment concerns in the text of the treaty except the preamble (including thirty-two investment chapters of FTAs); 108 contained a clause mentioning the state's right to regulate in text treaty (including eighteen investment chapters of FTAs); ninety-six IIAs contained a "not lowering standards" type of provision (including twenty-two investment chapters of FTAs); 180 IIAs contained a general public policy exception clause including health and environmental concerns, (including twenty-eight investment chapters of FTAs). More details available online at <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>.

a "mainstream trade issue."[174] Future developments in IIA drafting will reveal if the gap between FTAs and BITs drafting tends to narrow. It would indicate that the increasing occurrence of environmental provisions in IIAs can be explained by the shift of international investment law towards a more balanced approach between investors' rights and states' ability to regulate, rather than the mere consequential impact of the inclusion of investment chapters within FTAs which require reading an investment chapter in conjunction with other environmental references within a given FTA (such as preamble and general exceptions).

A. Preambular References

1. *Typology of Preambular References to the Environment*

Preambular language is one of the most frequently observed categories of environmental clauses identified by the OECD in its survey.[175] A broad range of concerns have been included in IIAs' preambles: references to the concept of sustainable development or to other international environmental agreements,[176] affirmations that the promotion of foreign investments should not be undertaken at the expense of the environment by lowering environmental standards, etc. Overall, the number of IIAs that contain preambular language on environmental matters remain limited.[177] But states increasingly include environmental concerns in their Model BIT's

174. Steve Charnovitz, *The WTO's Environmental Progress* 10 Journal of Int'l Econ. L. 685, 687 (2007) (Amongst the most significant landmarks of this "greening" of international trade law was the inclusion in the preamble of WTO agreement of the notion of sustainable development, which led the compliance panel in the US-Shrimp case to incorporate sustainable development as part of the objectives of the WTO agreement). *See* Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, § 5.54 WT/DS58/RW, (June 15, 2001).

175. Gordon & Pohl, *supra* note 32, at 11 (explaining that preambular language was the second most frequently observed type of provisions in their 2012 study, appearing in sixty-six IIAs and two model BITs within the sample).

176. Gordon & Pohl, *supra* note 32, at 13.

177. *Id.* at 11 (only sixty-six IIAs out of a sample of 1,623 IIAs contained preambular language on environmental concerns).

preambles,[178] an encouraging sign given the role of Model BITs as references in the negotiating process.[179]

a. Reconciling the Protection and Promotion of Foreign Investments with Environmental Protection and Conservation

An important share of environmental preambular references attempt to reconcile the stated objective of IIAs to promote and protect international investments with environmental protection and conservation.[180] The NAFTA preamble, for instance, contains the following sentence: "Undertake each of the preceding in a manner consistent with environmental protection and conservation; . . . strengthen the development and enforcement of environmental regulation."[181] The preamble of numerous IIAs, notably signed by China, Finland, Japan, Korea, the Netherlands, Sweden, and the United States, express similar concerns with some variations in the wording.[182]

b. Not Lowering Environmental Standards

Another sample of preambular references express a concern regarding the lowering of environmental standards to attract foreign investment. Finland, the Netherlands, and the United States included such provisions in their Model BITs. Finland's Model BIT reads as follows: "AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application . . . ."[183] The Netherland's 2004 Model BIT contains the following language: "Considering that these objectives can be achieved without compromising health, safety and environmental measures of general application."[184] These two draft provisions have been incorporated in subsequent IIAs.[185]

178. *Investment Policy Hub*, UNCTAD, http://investmentpolicyhub.unctad.org/ (last visited June 29, 2017). Amongst the Model BITs drafted in the 2000s available on UNCTAD's investment treaty database:

- Model BITs which do not contain a reference to the environment or sustainable development: Denmark (2000), Peru (2000), Greece (2001), Mauritius (2002), Uganda (2003), Kenya (2003), Guatemala (2003), Italy (2003), France (2006), Colombia (2011), Germany (2008), Ghana (2008), Mexico (2008), the United Kingdom (2008).
- Model BITs which do contain at least one reference to the protection of the environment or sustainable development: Finland (2001), the Netherlands (2004), Canada (2004), Turkey (2009), Guatemala (2010), Austria (2010), the United States (2012), the Southern African Development Community (2012), Norway (2015), India (2015), and Brazil (2015).

179. *See id.* (the similarities between Brazil's Model BIT and recently negotiated treaties such as the Brazil-Chile BIT (2015)).

180. Gordon & Pohl, *supra* note 32, at 13.

181. North American Free Trade Agreement, *supra* note 45, at pmbl.

182. *See* Gordon & Pohl, *supra* note 32, at 12, for a broader sample of preambular references.

183. Agreement Between the Government of the Republic of Finland and the Government of [Country] on the Promotion and Protection of Investments, 2001.

184. Agreement on Encouragement and Reciprocal Protection of Investments Between [Country] and the Kingdom of the Netherlands, Mar. 2004.

185. *See* Gordon & Pohl, *supra* note 32, at 27–32.

c. Climate Change

Newly signed FTAs containing an investment chapter often feature more precise preambular language than BITs, given the larger scope of these agreements. The FTA between Japan and Switzerland illustrates this point, with an unusual reference to climate change: "DETERMINED, in implementing this Agreement, to seek to preserve and protect the environment, to promote the optimal use of natural resources in accordance with the objective of sustainable development and to adequately address the challenges of climate change."[186]

d. Sustainable Development

Many IIAs provide in their preamble for a reference to the concept of sustainable development. The preamble of the NAFTA stipulates that Canada, Mexico, and the United States are resolved to "PROMOTE sustainable development."[187] The Australia-Chile FTA, which contains an investment chapter, stipulates in its preamble that the two countries are "resolved to . . . IMPLEMENT this Agreement in a manner consistent with sustainable development and environmental protection and conservation."[188] Norway's 2015 Model BIT[189] is investment-oriented, with a reference to the need for sustainable investments:

> Desiring to strengthen their economic and investment relations in accordance with the objective of sustainable development in its economic, social and environmental dimensions, and to promote investment in a manner aiming at high levels of environmental . . . protection in accordance with relevant internationally recognized standards and agreements in these fields to which they are parties. Desiring to contribute to a stable framework for investment in order to

186. Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation, Japan-Switz., Sept. 1, 2009.

187. North American Free Trade Agreement, *supra* note 45.

188. Australia-Chile Free Trade Agreement, Austl.-Chile, July 30, 2008.

189. Agreement Between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments, May 30, 2015 (The provisions of Norway's 2015 Model BIT have not been inserted in an actual BIT, yet Norway's most recent BIT was ratified in 1994. Amongst the fourteen BITs ratified by Norway still in force as listed on UNCTAD's website, none contained a reference to environment, not including other IIAs such as the European Charter and IIAs signed between the European Free Trade Association (EFTA) countries and third parties. The interruption in the ratification of BITs was allegedly due to "issues associated with the relationship between the Norwegian Constitution and the agreements' provisions concerning investor-state arbitration and compensation for expropriation." *Comments on the Model for Future Investment Agreements*, http://www.uio.no/studier/emner/jus/jus/JUR5850/tekster/norway_draft_model_bit_comments.pdf (last visited June 29, 2017). The Norway 2007 Model BIT nonetheless contained similar preambular language. It was withdrawn in 2009). *See* Damon Vis-Dunbar, *Norway shelves its draft model bilateral investment treaty*, (June 8, 2009), https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/.

> maximize effective and sustainable utilization of economic resources and improve living standards.[190]

Norway's Model BIT's preamble also contains a reference to corporate social responsibility.[191]

These references illustrate that the concept of sustainable development is increasingly penetrating the international investment legal framework.[192] The important number of contributions on the topic and the evolving definition of sustainable development make it difficult to determine the precise role played by the notion within the international investment law framework. The reference to sustainable development in preambles could provide arbitrators with useful guidance to balance investors' rights with public policy concerns. But sustainable development remains a malleable notion that can serve as an argument to defend environmental regulation as well as increasing FDI flows, especially when they concern sectors such as renewable energy, use and distribution of resources, etc. Sole references to sustainable development could, therefore, be used as arguments for pro-investor interpretations of the notion, read in conjunction with the object and purpose of IIAs to protect foreign investors and their investments.[193]

e. References to Other International Agreements

A few IIAs contain a reference to international environmental agreements in their preamble. These references must be distinguished from provisions in the actual text of the IIA. This second type of clause incorporates, by reference in the text of the agreement, obligations arising from other international agreements. These clauses tend to be more specific and obligation-driven, but they are also very uncommon.[194] Amongst preambular references, the preamble of the Energy Charter Treaty contains extensive environmental language, which can be explained by the nature and goals of the Energy Charter Treaty:

> Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and . . . recognizing the increasingly urgent

190. Agreement Between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments 1-2, May 30, 2015.

191. *Id.* at 2 (It reads as follows: *Emphasising* the importance of corporate social responsibility).

192. *See Investment Policy Framework for Sustainable Development*, UNCTAD (2015), http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf. *See generally* Cordonier et. al., *supra* note 4.

193. *See* NEWCOMBE & PARADELL, *supra* note 3, at 114.

194. *See, e.g.*, Agreement Between the Belgium-Luxembourg Economic Union, on the one hand, and the Republic of Tajikistan, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5.3, Belg.-Lux.-Taj., Feb. 12, 2009 ((signed in 2009 but not yet entered in force): "The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.").

> need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes.[195]

Norway's Model BIT also contains a reference to other international instruments: "Recognizing that the provisions of this agreement and provisions of international agreements relating to the environment shall be interpreted in a mutually supportive manner."[196]

Preambular references to international environmental agreements, however, could be useful to foster a harmonized reading of the different states' international obligations and promote more coherence within the different fields of international law. The tribunal's interpretation in *S.D. Myers* tends to support such a finding. The tribunal took into account Canada's obligations arising under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, to determine whether Canada's environmental measure pursued a legitimate goal consistent with the policy objectives of the Convention.[197] This decision arose in the specific context of NAFTA, which expressly recognizes the primacy of the Basel Convention in its article 104 "Relation to Environmental and Conservation Agreements," upon ratification by all NAFTA parties.[198] The tribunal, after stressing that Canada but not the United States ratified the Convention,[199] acknowledged that its provisions could not prevail over the NAFTA.[200] Nonetheless, the tribunal gave weight to the Convention in assessing whether Canada violated its obligations under the NAFTA. Such position is consistent with NAFTA's preamble, which states that the parties seek, *inter alia*, to "strengthen the development and enforcement of environmental laws and regulations," even if the tribunal did not explicitly refer to it when discussing the NAFTA preamble.[201]

2. *The Limited Role of Preambles in the Interpretation of IIAs' Substantial Standards*

Preambular language traditionally plays an important role in treaty interpretation[202] as part of the context of a given provision.[203] Preambles do

195. Energy Charter Treaty pmbl., Dec. 17, 1994, 2080 UNTS 95.

196. Agreement Between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments, *supra* note 190, at 2.

197. *S.D. Myers*, *supra*, note 44, at ¶ 255.

198. North American Free Trade Agreement, *supra* note 45, at art. 104.

199. *See supra* note 190, at ¶ 210.

200. *Id.* at ¶¶ 214-5.

201. *Id.* at ¶ 196.

202. Ortino, *supra* note 18, at 246.

203. The Vienna Convention on the Law of Treaties (VCLT), signed May 23, 1969, 155 UNTS 331 art 31(1) & (2) (entered into force Jan. 27, 1980) (provides the following rule of interpretation:

not contain obligations for the parties,[204] which makes their inclusion relatively costless.[205] The interpretative role of IIAs' preambles, as any other international agreement in general, should not be minimized.[206] They should fulfill a major interpretative function in determining the legal significance of each IIAs' provision.[207] The interpretation of IIAs' broad, substantive standards has divided arbitral tribunals, as well as the articulation of these notions with public policy concerns. The Vienna Convention supports the interpretative role of treaty preambles, including IIAs. It is doubtful that IIAs' preambles play such a role in practice. Most tribunals have acknowledged the interpretative function of preambles,[208] but their impact has been limited due to tribunals' restrictive interpretation. Some tribunals even expressed caution against giving too much weight to preambular language.[209]

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. . . .").

204. *See, e.g.*, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Rep. of Pak., ICSID Case No. ARB/03/29, Award, ¶ 230, (Aug. 27, 2009) ("It is doubtful that in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT.").

205. *See* Gordon & Pohl, *supra* note 32, at 5 (Despite this apparent flexibility, only a minority of IIAs' preamble contain an explicit reference to environmental concerns.).

206. Alschner & Tuerk, *supra* note 19, at 202.

207. Beharry & Kuritzky, *supra* note 167, at 389.

208. *See, e.g.*, Siemens A.G. v. The Argentine Rep., ICSID Case No. ARB/02/8, Award, ¶ 290 (Aug. 27, 2009) (In a case non-related to the environment, with no environmental language in the BIT's preamble: "As expressed in the Treaty preamble, it is the intention of the State parties to intensify their economic cooperation, and their purpose to create favorable conditions for the investments of the nationals of a party in the territory of the other, while recognizing that the promotion and protection of such investments by means of a treaty may serve to stimulate private initiative and improve the well-being of both peoples. It follows from the ordinary meaning of 'fair' and 'equitable' and the purpose and object of the Treaty that these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative."). *See also* Azurix Corp. v. The Argentine Rep., ICSID Case No. ARB/01/12, Award, ¶ 307 (July 14, 2006) ("In the preamble of the BIT, the parties agreed that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.' Therefore, the BIT itself is a document that requires certain treatment of investment which the parties have considered necessary to "stimulate the flow of private capital.").

209. *See Plama Consortium Ltd. v. Republic of Bulgaria* Case No. ARB/03/24 ICSID, Decision on jur., § 193 (Feb. 8, 2005). *See also* NEWCOMBE & PARADELL, *supra* note 3, at 125; *Saluka*, *supra* note 73, § 300 ("The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so

In light of the above-mentioned trends in treaty interpretation, the role of environmental concerns inserted in recent IIAs' preambles are not clear. Given that tribunals must, unless provided otherwise, interpret the agreement in accordance with the principles set forth in the Vienna Convention, one may argue that the new drafting trends will push tribunals to increasingly engage with non-commercial concerns.[210] In practice, however, references to public interest in IIAs preambles are still unusual, and often, tribunals determine that the treaty provisions should be interpreted in favor of the protection of foreign investment.[211] A main challenge for environmental references inserted in preambles is to overcome the apparent obstacle of tribunals' common conception of the object and purpose of IIAs as being the promotion and protection of foreign investment. Admittedly, environmental preambular language is part of the "context" of a given provision contained in the same treaty, as stated in the Vienna Convention. Therefore, such language is available to and should be used by arbitral tribunals as a tool to interpret unclear provisions in a way that would ensure environmental concerns are considered in the tribunal's reasoning. Such findings have proven to be true in the WTO framework where preambular language has played an important interpretative role.[212]

The protection of the environment has not been considered by tribunals as an objective of IIAs *per se*, when such concerns are included in the treaty's preamble—not mentioning the cases where they are not. Environmental references only "position environmental concerns in relation to the treaties' main purpose—investment protection."[213] The *Metalclad* award illustrates these concerns, amongst the few cases with an environmental aspect taken in application of a IIA, which the preamble contains a reference to the

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undermine the overall aim of extending and intensifying the parties' mutual economic relations.").

210. *See* Spears, *supra* note 167, at 293.

211. *Id.* at 292 (citing MTD Equity Sdn Bhd and MTD Chile SA v. Rep. of Chile, ICSID Case No. ARB/01/7, Award, ¶ 104 (May 25, 2004) at, in which the tribunal interpreted the treaty provision "in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favourable to investments."). *See also* SGS Société générale de surveillance SA v. Rep. of the Phil., ICSID Case No. ARB/02/6, Decision on Jur., ¶ 116 (Jan. 29, 2004) (The tribunal held that the BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other. It is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments."). The author also points that in the context of the Argentine crisis cases, in which some Argentine BITs contained preambular language on non-economic policy objectives, such as the United States-Argentina BIT ("Recognizing that the development of economic and business ties can contribute to the well-being of workers in both parties and promote respect for internationally recognized worker rights"), the tribunals "assumed [this non-economic policy objective] to be a natural outcome of achieving the investment protection and promotion objectives of the treaty."). Spears, *supra* note 167, at 291.

212. Nathalie Bernasconi-Osterwalder & Lise Johnson, *Belgium's Model Bilateral Investment Treaty: A Review*, (Mar. 20, 2010), http://www.iisd.org/pdf/2011/belgiums_model_bit.pdf.

213. Gordon & Pohl, *supra* note 32, at 14.

environment. In application of NAFTA Chapter 11, the tribunal in *Metalclad* took a conservative posture, which did not take into account the environmental purpose of the measure in interpreting the notion of measure tantamount to an expropriation under article 1110.[214] Despite the references to the protection of the environment and sustainable development contained in NAFTA's preamble,[215] the tribunal focused solely on the clauses referring to the investors' protection, without mentioning the preamble's environmental provisions.[216] The tribunal's "pick and choose" approach is even more troubling because NAFTA's preambular environmental language is supported by the North American Agreement on Environmental Cooperation (NAAEC), an environmental side agreement to the NAFTA, and could also have been read in conjunction with the article 1114 of NAFTA's Chapter 11 itself, which states that "[n]othing in . . . Chapter [Eleven] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with [Chapter Eleven] that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[217] In the *S.D. Myers* case, the tribunal embraced a more inclusive interpretation of the NAFTA preamble, without impacting the interpretation of indirect expropriation.[218]

The analysis of the *Metalclad* tribunal cast doubts on the willingness of tribunals to give a meaningful role to environmental concerns expressed in future IIAs' preambles. Even if the insertion of environmental concerns in IIA preambles were to become systematic, their role as an interpretative tool would remain uncertain if the arbitral practice did not evolve. Interpreting IIAs' unclear provisions in a protective way for the investment, potentially at the expense of the state's regulatory power in the field of environment, does not seem consistent with the current evolution of international investment law treaty drafting. It is also noteworthy that the protection of environment, and the need to promote sustainable investments are usually not referred to as objectives or goals of the treaty. When included in preambles, such clauses rather express a concern that should inform the actual goal of the

214. *See Metalclad*, *supra* note 85.

215. North American Free Trade Agreement, *supra* note 45, at pmbl. (NAFTA's preamble states that the parties are resolved to "[e]nsure a predictable commercial framework for business planning and investment . . . in a manner consistent with environmental protection and conservation;" "[p]romote sustainable development. . . [and] [strengthen the development and enforcement of environmental laws and regulations.").

216. *See Metalclad*, *supra* note 71. ("The Parties to NAFTA specifically agreed to "ENSURE a predictable commercial framework for business planning and investment." NAFTA further requires that "[e]ach Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.").

217. North American Free Trade Agreement, *supra* note 45, at art. 1114.

218. *S.D. Myers*, *supra* note 44, at ¶ 196.

treaty: the protection and promotion of foreign investments.[219] This finding tends to limit the interpretative role of preambular environmental language, at least when they are not accompanied by substantive references in the core of the agreement, despite the fact that IIAs often state that the objective of the treaty is protection and promotion of investment in furtherance of the treaty parties' economic growth, prosperity, and/or development.

Preambles have a key a role in the determination the object and purpose of a treaty. In the context of IIAs, such object and purpose should not be immutable. Recent trends in international economic law have shown that the protection of foreign investors is shifting towards the promotion of foreign investments within a context of sustainable development. Such finding is reinforced by the growing inclusion of investment chapters in FTAs. Consequently, preambles should be used by tribunals to promote the objective of sustainable development and give rise to interpretations of substantive norms which give full attention to states' legitimate intent to protect the environment. Recent instruments like Norway's Model BIT or the Japan-Switzerland FTA contain detailed preambular language, a general exception clause, and a right to regulate clause,[220] which express a commitment to replace sustainable development at the core of international investment law. This use of environmental language in the preamble, supported by exceptions in the core of the IIA, could bring about a shift in arbitral tribunals' interpretation of substantive provisions. The simultaneous use of preambular language with substantive standards referring to the environment in the text of the treaty could lead to a mutually supportive interpretation of the terms of the treaty.

B. Clauses Reaffirming the Host State's Right to Regulate

1. *Between Political Statements and Pleonasms: The Limited Impact of "Right to Regulate" Provisions*

Turning now to IIAs' substantial provisions engaging with environment concerns, the first highlighted category of clauses is those which seek to reserve a certain level policy space for environmental regulation.[221] These

219. *See* Gordon & Pohl, *supra* note 32, at 14.

220. The Japan-Switzerland FTA (2009) contains extensive references to environmental concerns in its preamble, as well as a substantial clause on "Health, Safety and Environmental Measures" within the core of the agreement, which reads as follow:

"The Parties recognise that it is inappropriate to encourage investment activities by relaxing domestic health, safety or environmental measures or lowering labour standards. To this effect, each Party should not waive or otherwise derogate from such measures and standards as an encouragement for establishment, acquisition or expansion of investments in its Area."

221. *See* Gordon & Pohl, *supra* note 32, at 14. According to the authors, they are the oldest and most frequent type in OECD's sample.

clauses are frequent in BITs negotiated by Canada[222] and the United States,[223] which contain a reaffirmation of the state's right to regulate. The investment chapters of the NAFTA and the (Trans-Pacific Partnership) TPP also feature a similar provision. Article 9.16 of the TPP, modeled after NAFTA article 1114, reads as follow: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."[224]

These clauses do not provide arbitrators with any guidance on how to weigh public interest arguments against investors' rights.[225] IIAs provisions that affirm the state parties' right to regulate in environmental matters are broad political statements. They merely recognize that states are not prevented from adopting laws "otherwise consistent" with the treaty. First, their impact is limited because they formulate a right that is already granted to them and fail to provide for additional regulatory flexibility to implement environmental measures.[226] By definition, if a government enforces a regulation "consistent" with the substantive standards of the applicable treaty—i.e. not prohibited under the treaty itself—the state will not violate any of its obligations under that treaty. The clause is, therefore, a mere statement that the state can adopt domestically a behavior which is itself, *ceteris paribus*, not prohibited under international law. Accordingly, "right to regulate" provisions are void political statements or from a strictly legal point of view, a pleonasm.[227]

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222. *See, e.g.*, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, art. 17, Can.-Lat., May 5, 2009. *See also* Gordon & Pohl, *supra* note 32, at 14. This type of provisions has been replaced in Canada's BITs by more detailed general exception clauses.

223. *See, e.g.*, The two latest BITs signed by the United States: Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., Jan. 1, 2012 and Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., Nov. 1, 2006. *See also* Gordon & Pohl, *supra* note 32, at 14.

224. Trans Pacific Partnership Agreement, art. 9.16, Feb. 4, 2016.

225. *See* NEWCOMBE & PARADELL, *supra* note 3, at 507 ("at most [article 1114 NAFTA] might serve as an interpretive presumption that non-discriminatory environmental measures made in good faith do not contravene investment obligations." It is noteworthy that NAFTA tribunals, even in cases involving an assessment of the validity of an environmental measure, have largely ignored article 1114.).

226. *Id.* at 509.

227. This trend seems to be evolving. For example, the recent Argentina-Qatar BIT, signed on November 6, 2016, affirms the Member States' right to regulate to achieve "legitimate policy objectives," without requiring at the same time the measures to be otherwise consistent with the substantive provisions of the treaty. It reads as follows: "None of the provisions of this Agreement shall affect the inherent right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social and consumer

Second, they fail to address the relevant issue at stake, which is the tension faced by a government seeking to implement a general regulation or a targeted measure between the host country's domestic legal frameworks and its commitments under the applicable IIA. Such tension exists because domestic regulatory frameworks are, from the perspective of the tribunal, not the substantive law of the case but a fact that the tribunal takes into consideration to assess the lawfulness of the host country's measures under international law (including the treaty upon which the claim is based). Public policies implemented by states, such as environmental measures or health prevention, are implemented at the domestic level. To be effective, provisions seeking to safeguard policy space must elevate the right to regulate under international law, i.e. in the treaty itself, without subordinating it to the protections otherwise granted by the treaty—with a potential risk of undermining the effectiveness of the protection standards. For this reason, targeted exclusion mechanisms may be more appropriate.

2. *Variations of the 'Right to Regulate' Principle in IIAs*

Considering the limitations of first generation "right to regulate" clauses, several variations in the wording of these provisions have been observed. In particular, Colombia's Model BIT (2007) features a "right to regulate" clause, which substitutes a proportionality test to the traditional requirement that the measure must be consistent with the other provisions of the agreement.[228] This adjustment could have important consequences on the application by tribunals and could provide states with new defenses, especially if these clauses are combined with preambular language or general exceptions.[229] This provision has been incorporated in the Colombia-Turkey BIT;[230] and the Colombia-United Kingdom BIT also contains a similar proportionality test alongside a requirement that the measures be non-discriminatory.[231] The Colombia-France BIT combines the two

protection." The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, Arg.-Qatar, art. 10, Arg.-Qatar, Nov. 6, 2016.

228. Colombia Model BIT (2007), which reads as follows: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party, provided that such measures are proportional to the objectives sought." Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and [Country] Colombian Model August 2007, art. VIII, Aug. 2007.

229. *See, e.g.*, the Colombia-Turkey BIT (2014) which this clause as well as a general exception clause (art. 6) and preambular language expressing the parties' "conviction" that the objectives of the treaty "can be achieved without relaxing health, safety and environmental measures of general application." Agreement Between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, pmbl., Colom.-Turk., July 28, 2014.

230. *Id.* at art. 11.

231. Acuredo Entre El Gobierno de la Republica de Colombia y El Gobierno de la Republica Francesa Sobre El Fomento y Proteccion Reciprocos de Inversiones, Colom.-Fr., Oct. 7, 2014;

approaches, recognizing the right of a state party to implement non-discriminatory environmental measures, proportionate to the objective sought, as long as they are consistent with the provisions on expropriation contained in Article 6 of the BIT.[232] Amongst the BITs most recently signed by Colombia, the Colombia-Peru BIT, the Colombia-India BIT, and the Colombia-Israel FTA do not feature a "right to regulate" provision at all.[233]

Following a different approach, Belgium and Luxemburg linked the right to regulate to the right to modify or adopt environmental legislation,[234] using language frequently found in FTAs.[235] Such provisions seek to recognize the right for a party to determine which levels of regulations it finds adequate at the domestic level.[236] Article 5.2 of the Belgian Model BIT reads as follows:

> [R]ecognising the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental policies and priorities, and to adopt or modify accordingly its environmental legislation each Contracting Party shall strive to ensure that its legislation provides for internationally agreed levels of environmental protection and shall strive to continue to improve its legislation.[237]

The impact of these clauses in investment agreements is very limited, as they only contain "aspirational obligations."[238] In international trade law, similar environmental provisions are supported by a long-standing practice

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Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia , art. 8, U.K.-Colom., Oct. 10, 2014.

232. Acuredo Entre El Gobierno de la Republica de Colombia y El Gobierno de la Republica Francesa Sobre El Fomento y Proteccion Reciprocos de Inversiones, Colom.-Fr., Oct. 7, 2014.

233. Agreement Between the Government of the Republic of Colombia and the Government of the Republic of Peru on the Promotion and Reciprocal Protection of Investments, Colom.-Peru, Dec. 30, 2010; Agreement Between the Government of the Republic of Colombia and the Government of the State of Israel for the Promotion and Reciprocal Protection of Investments, Colom.-Isr., Sept. 30, 2013; and Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, Colom.-India, July 3, 2013.

234. Agreement Between the Belgium-Luxembourg Economic Union and Montenegro on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Montenegro, Feb. 16, 2010.

235. *Compare with* Trans Pacific Partnership Agreement, *supra* note 214, at art. 20.3(2) ("The Parties 'recognize the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.'").

236. A parallel can be drawn with the Agreement on the application of sanitary and phytosanitary measures (SPS) of the WTO, which established a right to each country to set their own standard, as long as they are applied only to the extent necessary to protect human, animal or plant life or health, based on scientific principles, not maintained without sufficient scientific evidence (art. 2.2 SPS) and "do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail." (art. 2.3 SPS). *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION (Jan. 1, 1995), https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

237. Belgium-Luxemburg, *supra* note 234, at art. 5.1.

238. *See* Bernasconi-Osterwalder, *supra* note 203, at 21-2.

of environmental exceptions within the WTO framework. Using similar provisions in IIAs certainly help contracting parties to make a statement on their concern to enact domestic regulations and manifest some states' willingness for a more balanced approach to investment protection. Yet, these provisions can hardly support a state defense before an arbitral tribunal that a violation of an investor's right should be excused or wiped out because of its right to regulate, or similarly, an alleged obligation to "strive to continue to improve its legislation;"[239] nor they seem capable to shape the application of the treaty's standards by arbitral tribunals, for instance, by reducing the scope of the array of situations potentially qualified as treaty violations. These provisions may even be explicitly excluded from the scope of the treaty's dispute settlement mechanism, as it is the case in the United States 2012 Model BIT,[240] illustrating that as innovative as they can be,[241] "right to regulate" clauses are not suited to mitigate imbalances within IIAs regarding the protection of host countries' public interest. If only protection standards are enforceable—by opposition to provisions seeking to safeguard states' policy space—the bias in favor of investors will remain despite a growing occurrence of environmental provisions in IIAs.

Articles reaffirming the host state's right to regulate are not, in their current form, phrased in a way that could be enforced by arbitral tribunals. They come short of elevating the nature or status of environmental regulations, which remain analyzed by tribunals through the prism of domestic law. Domestic law cannot supersede the standards of protection contained in IIAs. If a domestic regulation conflicts with a right granted to investors by an IIA or, to put in less controversial terms, to a standard of protection agreed upon by the state parties, the protection of investors will prevail. To bear any effects, the provisions granting policy space on one hand and investors' rights on the other have to be inserted in IIAs on an equal footing.

C. "Not Lowering Standards" Provisions

1. *A Type of Provision Explicitly or De Facto Excluded from the Scope of Dispute Settlement*

Borrowed from the international trade legal framework, clauses that discourage states to lower their environmental standards are sometimes found in IIAs,[242] with the aim to promote a continuous enhancement of the domestic environmental framework of the parties, or at least, to prevent a

239. Belgium-Luxemburg, *supra* note 234, at art. 5.2.

240. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 24.1, 2012.

241. *See* Gordon & Pohl, *supra* note 32, at 15.

242. *See, e.g.*, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 213, at art. 12

race to the bottom. If such provisions can be meaningful to orientate public policies and to avoid a race to the bottom, they do not directly seek to grant host states further policy space. Within the international trade framework, such provisions are used to limit the ability of contracting states to decrease their environmental standards to gain an economic advantage at the expense of its trading partners. But their use seems less meaningful in the context of IIAs given that their actual impact on locational determinants of MNEs is questionable. Some IIAs have linked "not lowering standard" clauses to consultation mechanisms, which illustrates the "soft" character of this type of provision.[243]

2. *Deference to the Host State's Engagements under Applicable International Environmental Agreements*

Some IIAs feature a "hierarchy of norms" approach to incorporate environmental concerns in order to provide guidance to arbitral tribunals in case of conflicts between a state's international obligation arising from international environment law.[244] The Comprehensive Economic and Trade

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"1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."

243. NEWCOMBE & PARADELL, *supra* note 3, at 509 (citing Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, art. 11, Can.-Peru, Nov. 14, 2006, which reads as follows: "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.").

244. *See, e.g.*, North American Free Trade Agreement, *supra* note 45, at art. 104.1, which provides that:

"1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,
b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,
c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
d) the agreements set out in Annex 104.1,

Agreement (CETA) also features a chapter on "Trade and Environment" with various references to multilateral environmental agreements to which the member states are parties[245] reaffirming the commitment of each party to "effectively implement in its law and practices, in its whole territory, the multilateral environmental agreements to which it is party."[246]

The recourse to a systemic approach is quite unusual in BITs and investment chapters of FTAs. Yet, such provisions could have a dual impact: allowing for values and norms "external to investment regimes"[247] to play a role in investment arbitration and replacing international investment law within a broader field of sustainable development, including not only economic goals but also environmental and human rights concerns. Such approach would force arbitral tribunals to integrate external values into their reasoning and possibly grant primacy to non-commercial provisions when they enter in conflict with standards of protection, which they have traditionally been reluctant to do.[248] But several factors mitigate this finding. First, provisions modeled on article 104 of NAFTA are rare, and even where included in an IIA forming a basis of a dispute, the arbitral tribunal is not likely to find a material inconsistency between the provisions of an international environmental agreements and the substantive standards granted by the IIA but will rather attempt to read them harmoniously.[249] Second, such provisions address only indirectly the lack of coherency in the interpretation of the substantive rights granted by IIAs. In other words, they

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such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement."

245. *See, e.g.*, Comprehensive Economic and Trade Agreement art. 23.4 -.5, E.U.-Can., Oct. 30, 2016. Article 24.3 'Right to regulate and levels of protection' reads as follows: "The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection."

246. *Id.* at art. 23.5(2).

247. DI BENEDETTO, *supra* note 21, at 134.

248. *Id.* at 137.

249. *See, e.g.*, S.D. Myers, Inc. v. Gov't of Can., UNCITRAL, Partial Award, ¶ 247 (Nov. 13, 2000) The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC, and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows:

- states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- states should avoid creating distortions to trade;
- environmental protection and economic development *can and should be mutually supportive.*" (emphasis added).

do not constitute provisions that could provide arbitral tribunals with leverage in assessing a state's behavior under a IIA when such behavior, undertaken for legitimate public interest concerns, would have otherwise resulted in a violation of the treaty.

D. General Exceptions, Exclusions, Language Clarification, and Interpretative Notes

We now turn to a major innovation in IIA drafting: the inclusion of provisions specifically aimed at reducing the scope of an IIA and articles subject to ISDS by excluding a subject matter—the protection of the environment, from the scope of a provision, or the entire treaty.

1. *Language Clarifications, Interpretative Footnotes, and Exclusions*

a. An Overview of the Existing Approaches

In reaction to concerns that non-discriminatory regulations could be challenged before tribunals based on the prohibition of indirect expropriation standards contained by most IIAs, several states have included language clarifications[250] to limit the extent of which regulatory measures could result in a violation of the standards of protection. These clarifications are usually contained in footnotes following the main text of the article covering expropriation or in an annex to the treaty. They explain the conditions under which environmental regulation can or cannot be considered indirect expropriation.[251] Although they only apply to indirect expropriation scenarios, the reasoning that must be undertaken by arbitrators is quite similar to that under general exceptions. If the state can establish the environmental purpose of the measure that allegedly led to a substantial deprivation of the investor's rights, the burden shifts to the investor who has to prove that the measure was arbitrary, discriminatory, or taken in bad faith (according to the conditions imposed by the provision) to bring back the measure into the scope of the article to obtain compensation.

250. Gehring & Kent, *supra* note 167, at 294.

251. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 230 (stating "Annex B Expropriation . . . (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." For an example of provision inserted in the article on expropriation, *see* Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, *supra* note 222, at art. 6.2(c) ("non-discriminatory measures that the Contracting Parties take for reasons of public purpose or social interest (which shall have a meaning compatible with that of 'public purpose') including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation."). *See also* Free Trade Agreement between the Gov't of New Zealand and the Government of the People's Republic of China, N.Z.-China, Apr. 7, 2008.

Otherwise, the measure is excluded from the scope of the clause limiting the ability of states to expropriate foreign investors without compensation. If that is the case, the traditional test to determine first is a substantial deprivation occurred, and second, if the criteria for an unlawful expropriation were met, the clause becomes superfluous.

b. Revisiting the Police Powers?

These provisions share similarities with the police powers doctrine,[252] especially with regards to the flexibility given to governments to implement public interest-related, non-discriminatory measures without the threat of compensation. The regulatory power of states is a legitimate and inherent prerogative; financial consequences on foreign-owned interests should, therefore, not be considered as expropriatory if the deprivation was caused in application of such powers.[253] But the application by investment arbitration tribunals of the police powers doctrine has created uncertainty on the criteria that should be weighted by states. Most arbitral awards were decided in application of traditional investment instruments, which only contained a prohibition of unlawful expropriations without limiting its scope of application. A case-by-case analysis was preferred to the establishment of clear criteria that would be applied to all investment cases.[254]

The recourse to "language clarification" provisions in IIAs certainly provide policymakers with more certainty. The question remains, however, whether exclusions mechanisms could prevent investors from bringing reasonable claims before investment tribunals by excluding their claims *ex ante* solely based on the environmental nature of the challenged regulation. "Clarification" clauses provide several safeguards, which seek to avoid such consequences. First, a regulatory measure, to be excluded from the scope of indirect expropriation, must usually be non-discriminatory and designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.[255] Second, some BITs go further; for instance, the Japan-Peru BIT features a very detailed clause that builds on the previous arbitral decisions in order to ensure that the tribunal will follow a balanced analysis taking into account all the interests at stake.[256] Third, arbitral tribunals retain a significant margin of appreciation to determine on a case-by-case basis whether a given clause is "non-discriminatory" and

252. *But see*, DE NANTEUIL, *supra* note 134, at 517, distinguishing the police powers as being an exception, while qualifying the clauses reserving policy space as an "exclusion" mechanism. The measure which constitutes an exclusion falls outside the scope of the provision (no compensation is due because the measure is not expropriatory), whereas a measure which is an exception is an expropriation, however, the duty to compensate is waived.

253. OECD, INT'L INVESTMENT LAW: A CHANGING LANDSCAPE 51 (2005).

254. *Id.* at 58.

255. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 230, at Annex B.

256. Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment Annex IV, Japan-Peru, Dec. 10, 2009

"designed and applied to protect legitimate public welfare objectives." Fourth, several treaties provide arbitrators with a loophole to decide that even if the above-mentioned test is met, the measure represents "rare circumstances" in which the measure still leads to the characterization of an indirect expropriation.[257] The tribunal itself is left with the determination of what "circumstances" would be sufficiently extreme to qualify an otherwise legitimate public interest measure as expropriatory.

2. *General Exception Clauses*

a. An Overview of the Existing Approaches

General exception clauses follow an inverted approach borrowed from international trade law.[258] Modeled on Article XX of the GATT,[259] these exceptions allow states to retain policy space in limited subject areas, provided that the measures are non-discriminatory and are not used as disguised restrictions on investment or trade.[260] In IIAs, they seek to exclude

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". . . (b) The determination of whether a measure or series of measures by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the measure or series of measures, although the fact that such measure or series of measures has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the measure or series of measures interferes with distinct, reasonable expectations arising out of investments; and

(iii) the characteristic of the measure or series of measures, including whether such measure or series of measures are non- discriminatory; and

(c) non-discriminatory measures that the Contracting Parties take for reasons of public purpose or social interest (which shall have a meaning compatible with that of "public purpose") including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation."

257. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 230, at Annex B.

258. Supnik, *supra* note 33, at 362.

259. Gen. Agreement on Tariffs and Trade art. 20, Oct. 30, 1947, 55 U.N.T.S. 194.

260. *See, e.g.*, Agreement between Canada and [Country] for the Promotion and Protection of Investments art. 10, 2004, which reads as follows:

"1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life or health;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources."

from the scope of the agreement measures relating to the protection of, *inter alia*, human, animal, or plant life, public health, or the conservation of exhaustible natural resources. States retain leeway in the implementation of general regulatory measures, including certain environmental regulations that would otherwise be impaired by the strict fulfillment of the treaty obligations.[261] Regarding the distribution of these provisions, FTAs are increasingly featuring general exception clauses in their investment chapters[262] while they remain rare in BITs, with Canada leading the way with numerous BITs containing an exception mechanism.[263] Colombia also drafted a general exception clause and inserted it in several of its negotiated BITs.[264] But general exception clauses in BITs are still uncommon.[265]

b. How Efficient are General Exceptions in an International Investment Law Context?

The efficiency of general exception clauses depends on the scope of the article itself. Some have pointed to the dangers of exceptions clauses drafted too inclusively, which bear a risk, assuming investors do take into account IIA provisions as a locational determinant, of frustrating "the objectives of fields such as climate change in which private investment is badly needed."[266] It is necessary to stress, however, that exception clauses using the same phrasing as Article XX of the GATT only apply to "non-discriminatory measures" which are not used as "disguised restriction on investment or

261. DI BENEDETTO, *supra* note 21, at 160.

262. *See, e.g.*, ASEAN Comprehensive Investment Agreement art. 17, Mar. 29, 2012, which was modeled on GATT art. XX, "chapeau" included; Investment Agreement for the COMESA Common Investment Area art. 22, May 23, 2007, also modeled from GATT art. XX which contains an exception for measures "designed and applied to protect the environment" (art 22.1(c)); Free Trade Agreement between Australia and Singapore, Austl.-Sing., Feb. 17, 2003; and Agreement on Investment and Trade in Services Between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua art. 8.02, Mar. 24, 2002, which incorporates GATS art. XIV.

263. *See, e.g.*, Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, June 5, 2009; Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Can.-Jordan, June 28, 2009; Agreement Between Canada and the State of Kuwait for the Promotion and Protection of Investments, Can.-Kuwait, Sept. 26, 2011; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, Jan. 10, 2014; Canada-Cote d'Ivoire Foreign Investment Promotion and Protection Agreement, Can.-Cote d'Ivoire, Nov. 30, 2014.

264. *See, e.g.*, Acuerdo Entre El Gobierno de La Republica de Singapur y El Gobierno de La Republica De Colombia Sobre Promocion Y Proteccion De Inversiones, Colom.-Sing., July 12, 2013; Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, Colom.-Japan, Sept. 12, 2011; and Agreement Between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, Colom.-Turk., July 28, 2014.

265. NEWCOMBE & PARADELL, *supra* note 3, at 501.

266. Gehring & Kent, *supra* note 167, at 293

trade"[267]—a sufficient safeguard not to require further amputation of the substantive scope of the exception. The trend in IIA drafting also shows that general exception clauses used in IIAs borrow the same closed list of exceptions than that of Article XX—measures that seek to protect human, animal, or plant life, and public health, to prevent disease and pests in animals or plants and/or to conserve exhaustible natural resources.[268] Further limitations of the scope of general exception clauses could in fact be counter-productive and narrow the regulatory flexibility of the state.[269] For instance, an exception limited to measures aiming at "the prevention of the spread of diseases and pests in animals or plants"[270] is relevant in the trade context to help governments implement measures to limit certain types of exports but would not be as relevant in the context of the movement of capital. They could even frustrate the reasoning developed by several arbitral tribunals, which approved measures aimed at the protection of public policy and rejected the investor claim based on the police powers of the state despite the absence of an exception provision in the treaty. Similarly, a clause covering "any measure necessary to protect human, animal, or plant life or health"[271] would only provide a weak defense in case of measures regulating sensitive sectors such as mining projects, amongst other situations where the host government could have an interest in

267. *See* Gordon and Pohl, *supra* note 32, at 15-6.

268. *See, e.g.*, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments art. 18, Can.-Serb., Sept. 1, 2014 (stating: "For the purpose of this Agreement:

(a) a Party may adopt or enforce a measure necessary:
(i) to protect human, animal or plant life or health,
(ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or
(iii) for the conservation of living or non-living exhaustible natural resources;
(b) provided that the measure referred to in subparagraph (a) is not:
(i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or
(ii) a disguised restriction on international trade or investment.").

269. NEWCOMBE & PARADELL, *supra* note 3, at 505.

270. This narrow type of provision can be found in treaties negotiated in the 1990s, *see e.g.*, Agreement Between the Government of the Republic of India and the Government of the Republic of Korea on the Promotion and Protection of Investments, India-Kor., Feb. 26, 2002; *see also* Agreement Between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments art. 5(3), Arg.-N.Z., Aug. 27, 1999 (reads as follow: "The provisions of this Agreement shall in no way limit the right of either Contracting Party to take any measures (including the destruction of plants and animals, confiscation of property or the imposition of restrictions on stock movement) necessary for the protection of natural and physical resources or human health, provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.").

271. *See, e.g.*, Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, Kor.-Japan, Mar. 22, 2002.

regulating pursuant to the principle of precaution. For this reason, while exception clauses can provide explicit guidance to achieve the adequate balance between investors' rights and states' right to regulate,[272] where applicable, their drafting should not be limited to a narrow list modeled on Article XX of the GATT, but rather seek to embrace the specificities of international investment law. In this regard, the exception clause of the China-Colombia BIT provides a very innovative drafting, which not only emancipates from the traditional list of Article XX and incorporates the needs of international investment law to balance investors' rights and states' ability to regulate but also provides arbitrators with a step-by-step analysis which arguably limits the uncertainty around general and targeted regulatory measures. It reads as follow:

> 1. Nothing contained in this Agreement shall be construed so as to prevent a Party from adopting or maintaining measures intended to preserve public order including measures to protect the essential security interests of the State, provided that such measures:
>
> a) are only applied where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
>
> b) are not applied in a manner constituting arbitrary discrimination;
>
> c) do not constitute a disguised restriction on investment;
>
> d) are proportional to the objective they seek to achieve;
>
> e) are necessary and are applied and maintained only while necessary; and
>
> f) are applied in a transparent manner and in accordance with the respective national legislation.
>
> For greater clarity, nothing under this paragraph shall be construed to limit the review by an arbitral tribunal of a matter when such exception is invoked.[273]

But one may nonetheless argue that the interpretation of such types of provision raises a new series of questions regarding the threshold required to qualify the state's behavior as constituting an "arbitrary discrimination" or a "disguised restriction on investment," and more generally what the general discretion vested in the arbitral tribunal in applying such standard.

c. Interpretative Issues Associated with General Exceptions

Detailed provisions such as Article 12 of the China-Colombia BIT's are rare. The growing recourse to general exceptions has raised numerous interpretative issues.[274] First, as Andrew Newcombe and Lluís Paradell pointed, if a regulatory measure meets the requirement of a general exception provision, it is very unlikely that it could ever be a violation of the

272. NEWCOMBE & PARADELL, *supra* note 3, at 503.

273. Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China art. 12, Colom.-China, Nov. 22, 2008.

274. NEWCOMBE & PARADELL, *supra* note 3, at 503.

minimum standard of treatment given the threshold the clause requires.[275] As a consequence, the tribunal would not need to apply the exception.[276] But this question would still be relevant if the FET provision is interpreted by the tribunal as imposing a higher threshold to the host state, especially regarding the protection of the legitimate expectations of the investor. Second, general exception clauses do not provide any guidance with respect to the protection against expropriatory measures.[277] Does the exception apply as a complete waiver of the obligation to pay compensation, thereby excluding the qualification of expropriation; or does it only render an otherwise unlawful expropriation lawful?[278] This question is left to the tribunal. Another critical issue concerns the articulation between general exception clauses and other provisions such as articles reaffirming the host state's right to regulate or environmental references in the agreement's preamble. It is doubtful that such references will have an impact in the interpretation by the tribunal of the general exception clause itself. A key challenge for future panels, in the context of a treaty containing an exception clause combined with preambular language, will be to reach a satisfactory outcome regarding both the protection of foreign investors and the promotion of states' policies fostering sustainable development.

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275. *Id.* at 505 (The authors stress that under the general exception, "the conduct in question would have to be (i) necessary to meet one of the three enumerated exception (*i.e.* that there was no other alternative that would reasonable (sic) meet the policy objective); (ii) not have been applied in a manner that would constitute arbitrary or unjustifiable discrimination; and (iii) not constitute a disguised restriction on international trade or investment.").

276. A similar conclusion can be made in cases of unlawful expropriation where the due process requirement is missing. *See, e.g.*, Copper Mesa Mining Corporation v. The Republic of Ecuador, PCA Case No. 2012-2, award (15 Mar. 2016), (¶ 6.66-67). The Tribunal, after characterizing the State's measures as "made in an arbitrary manner and without due process", the Tribunal went to conclude that the general exception clause of the applicable BIT could not apply "given its introductory proviso", which required a measure, in order to fall within the scope of the exception clause, not to be "applied in an arbitrary or unjustifiable manner" (Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed on 29 Apr. 1996, article XVII.3).

277. Nonetheless, *see* Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, *supra* note 273, on general exceptions, which stipulates that "For greater clarity, this Article shall not be construed as an exception to the obligations set out in Article 4 (Expropriation and Compensation) concerning compensation." *See also* Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, *supra* note 244, which expands the scope of the general exception clause, adding a note: "It is understood that paragraph 1 of Article 19 [the general exception clause] includes measures to protect the environment."

278. *See* NEWCOMBE & PARADELL, *supra* note 3, at 505-06. As stated by the two authors: "It would be surprising if, by effect of general exceptions, parties to IIAs intended to provide less protection to foreign investors that that accorded under customary international law; thus if the exception does not prevent a finding of expropriation (because the measure is a direct expropriation) presumably it cannot exclude payment for compensation."

d. An Approach Already Implemented by Arbitral Tribunals in the Interpretation of the Traditional Standards of Protection?

The use of international trade language in IIAs seems logical for various reasons.[279] Yet, the use of general exceptions containing the same language as Article XX of the GATT does not guarantee the desired outcome of an enhanced policy space to implement sound and non-discriminatory environmental regulations. The fact that limitations of several subject areas have proven effective in the context of trading in goods does not guarantee that such limitations will render the clause adequate in the international investment framework. The WTO Appellate Body developed a proven two-step analysis to determine the applicability of Article XX: the measure must fall within one of the enumerated exceptions (a)-(g) and satisfy the introductory section of Article XX (also referred to as the "chapeau").[280] Given the current fragmentation of international investment arbitration awards and given the fact that each claim arises under a different instrument and without the equivalent of the WTO appellate body to harmonize the interpretation of subsequent awards, it is doubtful that these provisions would be applied consistently and coherently by arbitral tribunals. The establishment of an appeal mechanism within the international investment law framework would be a first step towards establishing a more predictable framework to implement environmental regulations without excessive challenges by investors.

Nonetheless, several reasons tend to demonstrate that the investment arbitration practice would give full effect to general exceptions modeled on Article XX. In the recent *Unglaube* case,[281] the tribunal used the same steps than those required by Article XX in interpreting the FET standard.[282] The tribunal declared that:

> Where . . . a valid public policy does exist, and especially where the action or decision taken relates to the State's responsibility "for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states," such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders. . ..

This deference, however, is not without limits. Even if such measures are taken for an important public purpose, governments are required to use due

279. *See e.g.*, Supnik, *supra* note 33, at 365-66 (International investment law and international trade law both "involve international commerce"; they "share many of the same underlying values." "Establishing a practice that resembles GATT's Article XX General Exceptions would streamline future negotiations for a comprehensive, multilateral investment regime as part of the WTO.").

280. *See, e.g.*, Appellate Body Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

281. *Unglaube*, *supra* note 53.

282. DI BENEDETTO, *supra* note 21, at 207.

diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory.[283]

To interpret the FET standard, the tribunal first expressed deference to the public policies of the host state.[284] If a public policy exists and has been the objective of the state's measure, it justifies "deference to the state behavior, unless there was a proof of its arbitrariness or discriminatory character."[285] Such reasoning is like the approach tribunals would have to follow when applying an IIA containing a general exception clause. The consequence is a shift in the burden of proof when the investor claim arises from the implementation of a measure taken in consideration of a public policy. This solution is more satisfactory in the sense that it would mitigate the bias of the current framework in favor of foreign investors and balance the burden of proof, granting investors a possibility to prove that a measure was discriminatory or arbitrary. Yet, a risk remains; the risk considered as lawful would amount to a complete taking of the property—it is a risk which can be explained by the lack of concern by the general exclusion clauses for the impact of the measure on the investment, in a similar fashion, is a critique that had been made for the police powers.[286]

IV. Conclusion

Integrating the protection of the environment, a non-commercial objective, into IIAs has proven to be a challenge given the different stakeholders involved: the public interest on the one hand and foreign investors who oppose the particular interest at hand on the other.[287] Some authors have pointed out that strong environmental provisions can decrease the substantive protection granted by the treaty itself or more generally frustrate sustainable development objectives.[288] Yet, the existence of difficulties in conciliating competing interests does not mean that these difficulties should be avoided. Recent arbitration practices have shown the dangers of excluding the public interest from IIAs because IIAs play a crucial role in determining the tribunal's power. As imperfect as it may be, the inclusion of environmental language in IIAs, amongst other public interest concerns, is a prerequisite for the resolution of the legitimacy crisis of international investment law and the progression towards a more inclusive approach to economic development. In other words, economic activity and

283. *Unglaube*, *supra* note 53, at 246-7.

284. Di Benedetto, *supra* note 21, at 207

285. *Id.* at 115.

286. De Nanteuil, *supra* note 134, at 523-24. The author argues that when the economic value of the investor's property is fully destroyed, the foreign investor should not bear alone the burden of the expropriation, even if it was undertaken for legitimate reasons. The measure should amount to an expropriation for public purpose (*i.e.* lawful under the traditional criteria), but without waiving the obligation to compensate.

287. Although some "green investments" could at the same time promote economic development and sustainable use of natural resources (renewable energies, etc.).

288. Gehring & Kent, *supra* note 167, at 287; *see also* Diepeveen et al., *supra* note 17, at 147.

public interest concerns, including the protection of the environment and natural resources, cannot be treated separately. It does not mean that the objective and structure of IIAs must change; however, an inclusive approach seems preferable in order to better reflect "the social dimension of international investment,"[289] including the protection of the environment.

The coherency of the investment framework that has been developed over the years also needs to be considered when focusing on IIAs' environmental provisions.[290] The lack of coherence of investment arbitration should not be substituted by more incoherency within the international investment framework itself. Not only the multiplication of IIAs and their various provisions create complexity, but new changes in IIAs drafting could potentially have an impact on the protection ought to investors from other contracting parties, or inversely be mitigated through the recourse to the MFN clause.[291] The protection of investors' legitimate rights and the regulatory needs of the host country are primary objectives, but the coherency of the investment framework as a whole has to be kept in mind too, especially with the ongoing multiplication of investment chapters within regional FTAs which superimpose over states' traditional bilateral investment relations. It is perhaps the time to embrace again the idea of a multilateral investment agreement. The multiplication of investment chapters within broad regional trade agreements such as the CETA or the TPP lays the foundation of such process.

289. Ortino, *supra* note 18, at 245-6.

290. UNCTAD, *Définition de règles internationales en matière d'investissements: état des lieux, defis à relever et perspective*, 35 (2008), http://unctad.org/fr/Docs/iteiit20073_fr.pdf.

291. On the multilateralization of international investment law through the mechanism of the MFN treatment, *see generally* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INT'L INV. L. 180-96 (2009).