PANEL 3

New Challenges to Investment Arbitration: Environmental Claims

READINGS:

1. **Gordon, K. and J. Pohl (2011), "Environmental Concerns in International Investment Agreements: A Survey", OECD Working Papers on International Investment, 2011/01, OECD Publishing.**
2. **Ted Gleason, Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspectives**
3. **Jason Fry QC and Louis-Alexis Bret ed., The Guide to Mining Arbitrations, Global Arbitration Review**

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Environmental Concerns in International Investment Agreements

A SURVEY

Kathryn Gordon, Joachim Pohl

JEL Classification: F02, F18, F21, F23, F42, F53, K32, K33, N40, N50, N70, Q56, Q58

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Abstract

ENVIRONMENTAL CONCERNS IN INTERNATIONAL INVESTMENT AGREEMENTS: A SURVEY

by

Kathryn Gordon and Joachim Pohl*

International investment agreements define commitments on investment protection, but also shed light on how these commitments are to be integrated with other public policy objectives. Investment protection in the context of environmental regulation has been a frequent source of controversy and investor-state disputes. In order to enhance the factual basis for debate in this policy area, the present survey establishes a statistical portrait of governments' investment treaty writing practices in relation to environmental concerns in a sample of 1,623 IIAs, roughly half of the global investment treaty population. The survey provides a statistical portrait of the extent, kind and frequency of treaty language referring to environmental concerns and the evolution of the use of such language over time. It shows that: i) over time, more treaties contain such language; ii) only about 8% of the sample treaties include references to environmental concerns; and iii) there are wide variations in the content of such language, both across countries and across time.

JEL classification: F02, F18, F21, F23, F42, F53, K32, K33, N40, N50, N70, Q56, Q58
Keywords: foreign investment; international investment; international investment law; international environmental law; international investment agreements; bilateral investment treaties; environmental protection; international arbitration; regulation.

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Further information on investment-related work at the OECD may be found at www.oecd.org/daf/investment.

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Executive Summary

This study surveys the use of references to environmental concerns in a sample of 1,623 international investment agreements (IIAs) that the 49 countries that are invited to the "Freedom of Investment" process have concluded with any other country.[1] The survey assesses the extent, kind and frequency of such language in IIAs as well as the evolution of its use over time. In addition to analysing 1,593 BITs and 30 other bilateral agreements with investment chapters – mainly free trade agreements – the survey also reviews several model BITs and selected multilateral agreements with investment provisions.

The study updates and expands an earlier survey of environmental content in international investment agreements that the OECD Investment Committee discussed and adopted in 2007.[2] The key findings of the present study include the following:

- *Language referring to environmental concerns is rare in BITs but common in non-BIT IIAs*. In the treaty sample, 133, or 8.2%, of the IIAs contain a reference to environmental concerns. All 30 non-BIT IIAs contain such references, but only 6.5% of BITs do.
- *Country practices regarding environmental language in treaties vary*. Nineteen of the 49 countries covered in the study never use such language in their treaties. In contrast, a few countries systematically began including environmental language in treaties and such language appears in all of their treaties after a given date (Canada, Mexico and the United States since the early 1990s, and Belgium/Luxembourg more recently). Several countries appear to have no autonomous policy of including such language, but tolerate its inclusion in treaties signed with countries that have a preference for such language.
- *Inclusion of environmental language is becoming more common*. The first occurrence of such language in the IIA sample is in the 1985 China-Singapore BIT. A decade passed before environmental concerns were included in a sizeable number of BITs, and only another ten years later, in 2005, the proportion of newly concluded treaties with environmental concerns passed the threshold of 50% of new treaties concluded in a given year.
- *Much idiosyncratic variation, limited number of policy themes addressed, but major strategic differences among countries in terms of their positioning with respect to these themes*. Although significant variance can be observed in the details of the provisions and identical language across treaties is rare, almost all these provisions are variations on a limited number of themes addressing distinct policy purposes. Nevertheless, treaties show significant variation with respect to their treatment of these themes – some include only preamble language while others feature extensive language on more specific issues such as performance requirements and indirect expropriation.
- *Environmental language addresses seven distinct policy purposes.* These include:
  - *General language in preambles* that establishes protection of the environment as a concern of the parties to the treaty; 66 treaties (4.1%) contain such language.

[1] Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

[2] "*International Investment Agreements: A survey of Environmental, Labour and anti-corruption issues*", DAF/INV/WP/WD(2007)2/REV1 and DAF/INV/WP/WD(2007)2/REV1/ANN1.

- *Reserving policy space for environmental regulation* for the entire treaty; this is the most common category of language – it appears in 82 treaties (5.2%).
- *Reserving policy space for environmental regulation for specific subject matters* (e.g. performance requirements and national treatment); this language appears in 20 treaties (1.3%), of which 16 are FTAs and only 4 BITs.
- *Indirect expropriation*: Twelve of the treaties (0.75%) contain provisions that preclude non-discriminatory environmental regulation as a basis for claims of "indirect expropriation".
- *Not lowering environmental standards to attract investment*: Forty-nine treaties (3.1%) contain provisions that discourage the loosening of environmental regulation for the purpose of attracting investment.
- *Environmental matters and investor-state dispute settlement.* Sixteen treaties (1%) contain provisions related to the recourse to environmental experts by arbitration tribunals. One treaty excludes the environmental provisions as a basis for investor-state claims.
- *General promotion of progress in environmental protection and cooperation*. Twenty treaties (1.3%) contain provisions that encourage strengthening of environmental regulation and cooperation.

- *The frequency of the use of environmental language in IIAs has generally increased over time, but this increase is not monotonic*. Over the long term, the proportion of IIAs that contain references to environmental concerns has increased. However, during the early 1990s and the early 2000s, the frequency of some approaches to include references to environmental concerns suffered a relative decline year-on-year. Recently, the use of clauses that reserve policy space for environmental regulation and references in treaty preambles has stagnated.
- *The set of environmental concerns that receive an explicit mentioning in IIAs is limited and has hardly evolved over time.* The language that characterises environmental concerns is either generic, or, where individual aspects are mentioned, dates back to the text of the 1948 General Agreement on Tariffs and Trade. More recent concerns, such as climate change and biodiversity, have not penetrated this closed set of issues, although such more recent concerns feature in the Energy Charter treaty, a multilateral agreement. This finding suggests a limited exchange between the investment and environmental policy communities.

This survey portrays statistically the characteristics of environmental language in a sample of investment treaties; it does not seek to explain the statistical findings nor does it assign legal significance to differences in state practice with regard to this language. There may be merit in further reflection on these two aspects, however, to understand better the objectives and effect of different approaches in treaty negotiation. This could inform treaty negotiators and treaty users – investors, host governments, and arbitral tribunals – to enhance predictability and legitimacy of decisions in relation to investment treaties.

With respect to the statistical findings and the legal significance of the different approaches to treaty writing, further analysis could notably address the questions:

- Why are references to environmental concerns common in FTAs with investment chapters while they are rare in BITs?
- What factors drive or limit change in relation to States' treaty writing practice?
- Does the inclusion of references to environmental concerns in IIAs bring benefits for reconciling openness to foreign investment and protection of environmental concerns?
- Which approach provides treaty partners the most controlled, versatile and dynamic expression of their views on the relationship between environmental and investment norms?

I. Introduction

International investment agreements define how the treaty partners balance investor protection with other public policy objectives. As environmental concerns have moved up societies' priority lists, environmental protection has also left its mark as a concern during treaty negotiations. Investment arbitration provides preliminary considerations on how environmental regulation interacts with investment treaty concepts such as national treatment, indirect expropriation and fair and equitable treatment.

The investment policy community at the OECD has repeatedly considered State practice in balancing openness to foreign investment with other public policy objectives.[3] In 2007, the OECD investment policy community has discussed a survey of environmental, labour and anti-corruption issues in international investment agreements.[4] The present document updates and enhances this earlier survey and focuses solely on governments' approaches to reflecting environmental concerns in their investment treaties.

The present survey establishes a statistical portrait of governments' investment treaty writing practice in relation to environmental concerns in a sample of 1,623 IIAs, thus covering roughly half of the global investment treaty population.[5] The sample includes all IIAs that participants in OECD-hosted investment dialogue – that is, 49 countries[6] plus the European Commission – have concluded with any other country, provided that the full text of the treaty was available on the Internet in July 2010.[7]

The survey restricts itself to a statistical characterisation of the extent, kind and frequency of language referring to environmental concerns and the evolution of the use of such language over time; it does not analyse the legal significance of this content, although it does provide a starting point for such analysis.

Broadly described, state practice can be characterised as follows:

- A large, but declining, proportion of BITs remain silent on environmental matters; in contrast, all FTAs in the sample refer to environmental concerns in an investment context.
- Most references to environmental concerns seek to define aspects of the environment/investment relationship that fall into seven categories: contextual language in preambles; not lowering environmental standards in order to attract investment; general right-to-regulate language or reserving environmental policy space; right to regulate in relation to specific treaty provisions (e.g. indirect expropriation); recourse to experts in dispute resolution; and intergovernmental consultation on environmental matters.
- Although environmental issues covered in investment treaties address a limited number of concerns, the treaties in the sample and the countries that are party to them vary in their approach to these issues. Some treaties feature only short references in their preamble, while others dedicate longer sections to environmental concerns.

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3 Several studies were dedicated to approaches to balance openness to foreign investment with national security. For the complete work accomplished in this area, visit www.oecd.org/daf/investment/foi.

4 Kathryn Gordon and Monica Bose. "International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues", DAF/INV/WP/WD(2007)2/REV1 and DAF/INV/WP/WD(2007)2/REV1/ANN1.

5 According to UNCTAD data, there were, at the end of 2009, 2750 BITs and 295 other IIAs, including several dozen free trade agreements that include provisions on investment promotion or protection. World Investment Report 2010, Chapter III.B, page 81.

6 Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

7 A description of the methodology, the sources used, and the treaties included in the sample of the study is available in Annex 1.

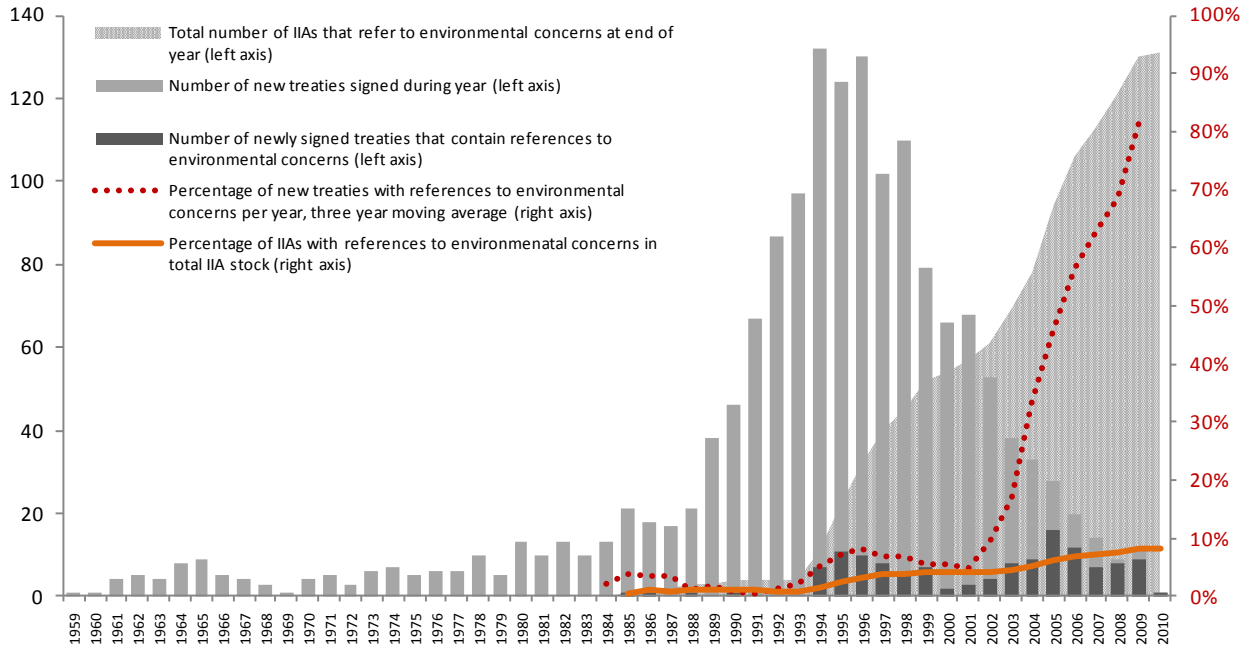
- IIAs also show "idiosyncratic variation" in the language they use to describe environmental concerns. Thus, while the broad policy purpose of language is limited to the policy themes or concerns just described, even the descriptions of these themes is subject to small differences in formulations for a given category of language.

II. Patterns and trends in the use of references to environmental concerns in IIAs

The prevalence of environmental language in the treaty sample is low, but growing. The survey shows that 133 IIAs, or 8.2% of the sample, contain environmental language of one kind or another. Figure 1 depicts the prevalence of such language in treaties signed between 1959 and 2010 insofar as they are included in the sample. Following the first occurrence of environmental language in the 1985 China-Singapore BIT, the use of such language continued to be very rare until about the mid-1990s. Then, the proportion of newly concluded IIAs that contain environmental language began to increase moderately, and, from about 2002 onwards, steeply (dotted line, right scale), reaching a peak in 2008, when 89% of newly concluded treaties contain references to environmental concerns. This high percentage partly reflects the larger proportion of FTAs with investment chapters signed in 2008. It should also be noted, however, that the treaty sample in recent years is not complete because of lags in including treaties in online databases. The finding that recent treaties are much more likely to include such language may not prove to be robust once additional treaties are added to the sample.

Despite the observed increase, the stock of BITs that contain environmental language remains relatively small (solid grey area, left scale).

Figure 1. Prevalence of environmental language in IIAs



Countries show marked differences in their propensity to include environmental language in their investment treaties. Overall, 30 of the 49 countries covered by the survey have included environmental language in at least one of their IIAs; thus, slightly less than half of the countries covered never include such language in their IIAs (Table 1). Some countries only very occasionally include such language. For

example, Egypt, the United Kingdom and Germany have just one treaty with environmental language out of 73, 98 and 122 treaties in the sample, respectively. Countries with relatively high propensities to include such language include: Canada (83% of its sample treaties), New Zealand (3 out of its 4 treaties in the sample), Japan (61% of its treaties), the United States (34%), and Finland (26%).

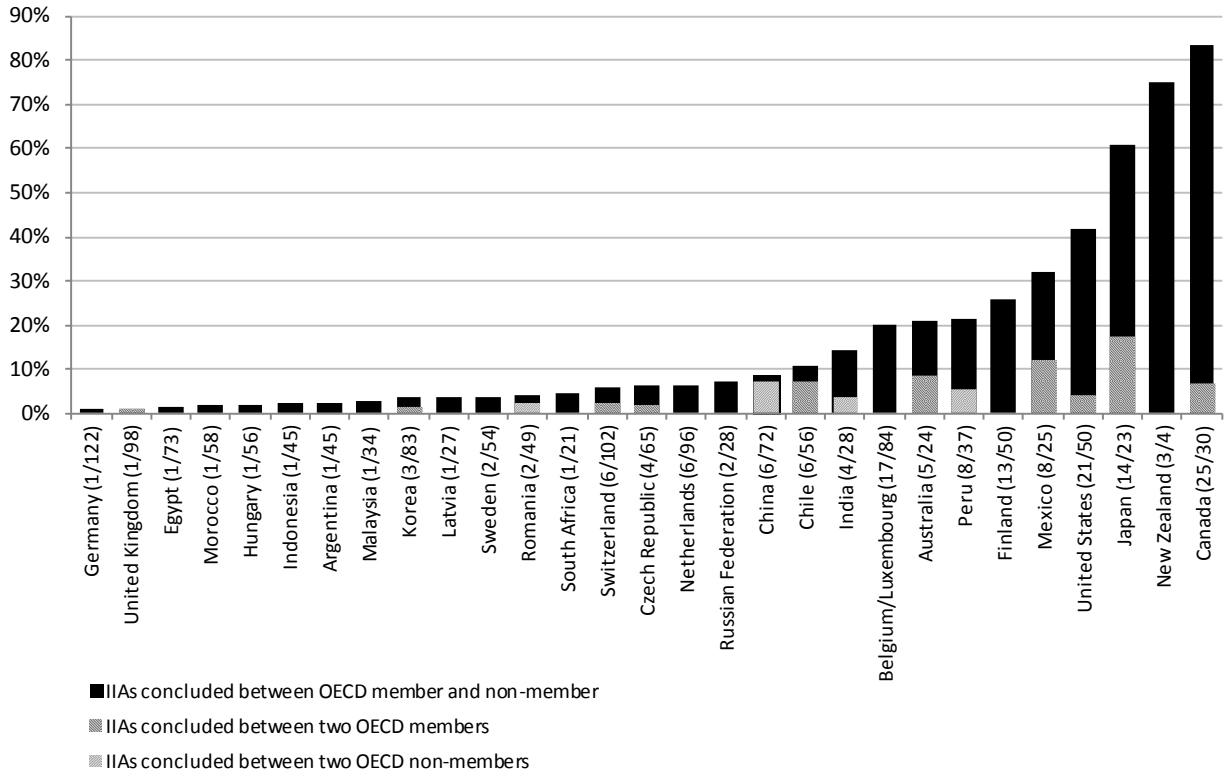
Table 1: IIA references to environmental concerns: Country summary

Country	Number of treaties included in the sample	Number of treaties that refer to environmental concerns	Percentage of treaties that refer to environmental concerns	First occurrence in a BIT in the sample
Austria	47	0	0%	—
Argentina	45	1	2%	1999
Australia	24	5	21%	1999
Belgium/Luxembourg	84	17	20%	2004
Brazil	8	0	0%	—
Canada	30	25	83%	1990
Chile	56	6	11%	1996
China	72	6	8%	1985
Czech Republic	65	4	6%	1990
Denmark	39	0	0%	—
Egypt	73	1	1%	1996
Estonia	15	0	0%	—
Finland	50	13	26%	2000
France	92	0	0%	—
Germany	122	1	1%	2006
Greece	38	0	0%	—
Hungary	56	1	2%	1995
Iceland	3	0	0%	—
India	28	4	14%	1996
Indonesia	45	1	2%	2007
Ireland	1	0	0%	—
Israel	12	0	0%	—
Italy	46	0	0%	—
Japan	23	14	61%	2002
Korea	83	3	5%	1996
Latvia	27	1	4%	2009
Lithuania	29	0	0%	—
Malaysia	34	1	3%	2005
Mexico	25	8	32%	1995
Morocco	58	1	2%	2004
Netherlands	96	6	6%	1999
New Zealand	4	3	75%	1988
Norway	15	0	0%	—
Peru	37	8	22%	2005
Poland	33	0	0%	—
Portugal	44	0	0%	—
Romania	49	2	4%	1996
Russian Federation	28	2	7%	1995
Saudi Arabia	8	0	0%	—
Slovakia	25	0	0%	—
Slovenia	18	0	0%	—
South Africa	21	1	5%	1995

Country	Number of treaties included in the sample	Number of treaties that refer to environmental concerns	Percentage of treaties that refer to environmental concerns	First occurrence in a BIT in the sample
Spain	59	0	0%	—
Sweden	54	2	4%	1995
Switzerland	101	5	5%	1994
Turkey	62	0	0%	—
United Kingdom	98	1	1%	2006
United States	44	15	34%	1994

Inclusion of environmental language in investment treaties is not a practice limited to OECD member countries. Figure 2 shows the percentage of a given country's IIAs that contain language referring to environmental issues.[8] Figure 2 also indicates the share of IIAs with environmental language that OECD Members have concluded with another OECD Member, with non-members as well as the share of IIAs that non-Members have concluded with other non-Members. Overall, 6% of the OECD-OECD IIAs contain environmental language, 3.4% of the IIAs signed between non-Members, and 9.5% of the OECD-non-OECD IIAs.

Figure 2. Proportion of IIAs with environmental language in a given country's IIA population



[8] Only countries that have at least one IIA with language referring to environmental concerns are listed.

III. The policy purpose of references to environmental concerns in IIAs

An examination of the content of environmental language in investment treaties sheds light on the policy purpose it is designed to serve. These purposes can be arranged in the following 7-part typology:[9]

- *General language in preambles* that mentions environmental concerns and establishes protection of the environment as a concern of the parties to the treaty; 66 of the treaties contain this language.
- *Reserving policy space for environmental regulation* for the entire treaty; this is the most common category of language – it appears in 82 of the treaties.
- *Reserving policy space for environmental regulation for more specific, limited subject matters* (performance requirements and national treatment); 20 treaties in the sample, predominantly FTAs, contain such language.
- *Indirect expropriation*: 12 of the treaties contain provisions that clarify the understanding of the parties that non-discriminatory environmental regulation does not constitute "indirect expropriation";
- *Not lowering environmental standards*: 49 of the treaties contain provisions that discourage the loosening of environmental regulation for the purpose of attracting investment;
- *Environmental matters and investor-state dispute settlement*: 16 treaties contain provisions related to the recourse to environmental experts by arbitration tribunals. One treaty excludes investor-state claims based on obligations undertaken in the treaty's environmental provisions.
- *General promotion of progress in environmental protection and cooperation*: 20 treaties contain provisions that encourage strengthening of environmental regulation and cooperation.

Annex 2 shows which treaties in the sample contain references that fall in these categories of policy purpose; only treaties that contain environmental language are listed in the table. Annex 2 shows that, while the number of environmental policy concerns addressed in the treaty sample is limited, the approaches of both individual treaties and countries to this matter varies widely. Some treaties contain only preamble language (36 of the treaties shown in Annex 2 contain only general environmental language in the preamble). Others contain only one mention of other issues (36 treaties mention only preserving policy space for environmental regulation). Still others treaties contain extensive language covering many of these policy purposes – for example, 5 of the treaties shown in Annex 2 cover 5 or more of the policy purposes (two with Canada as a signatory, one with Chile and two with the United States).

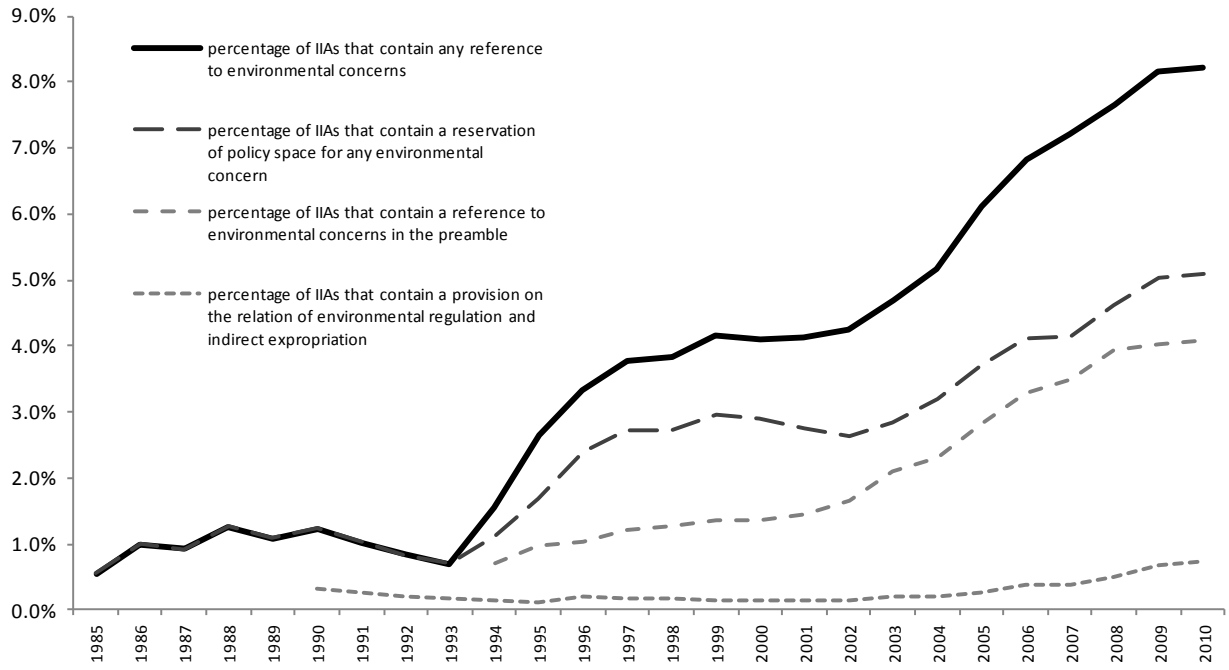
It is worth noting at the outset that the seven categories are not equally represented in the sample, nor is their evolution over time homogenous. Figure 3 shows the evolution of the percentage of treaties that contain references to three of the 7 categories of policy purpose in the stock of treaties in the respective years, as well as the evolution of the frequency of all forms of language combined. The most common category in the sample – with 82 treaties mentioning it – is "reserving environmental policy space". Use of this category of language began in 1985, and is therefore among the oldest categories of language. The second most common category of environmental language – with 66 treaties – is preamble language, which first appears in 1994 BITs and FTAs.[10] Use of language in the preamble has grown since and remains among the most frequently observed categories of references to environmental concerns in IIAs.

[9] This categorisation necessarily implies some degree of interpretation of the clauses. This interpretation is made only to reduce the complexity of the subject matter for the purpose of this study. As the following detailed presentation shows, the lines between these categories are sometimes uncertain.

[10] Mexico-Bolivia FTA (1994), Mexico-Costa Rica FTA (1994), United States-Georgia BIT (1994), United States-Trinidad and Tobago BIT (1994), United States-Uzbekistan BIT (1994).

Provisions clarifying to what extent environmental regulation constitutes "indirect expropriation" emerged as early as 1990,[11] but were hardly ever used until 2004, when they became slightly more frequent.[12] This kind of clause remains rare. These policy purposes and the language used to introduce them in the treaties are discussed in more detail in subsequent sub-sections.

Figure 3. Percentage of IIAs that contain specific categories of language referring to environmental concerns



1. General references to environmental concerns in preambles

In the sample, 66 IIAs and 2 model BITs contain preamble clauses on environmental concerns. The first appearances in the sample of such preamble language is in three 1994 BITs signed by the United States. A number of other countries later included such language in their preambles, including China, Finland, Germany, Japan, Korea, the Netherlands, Sweden, Switzerland, and the US. Preambular references to the environment are among the most often found in the sample, and 16 of the 49 participants in the FOI Roundtable use such references in at least one of their treaties.

China, Finland, Japan, Korea, Netherlands, Sweden and the US use the following phrase in the preambles of some of their BITs:

> [Agreeing[13]/ Recognising[14]/Convinced[15]] that these objectives can be achieved without **relaxing**[16] [essential security interests[17]] health, safety and environmental [measures/norms[18]] of general application;

---

11 Canada-Czech Republic BIT (1990).

12 Australia-Chile FTA (2008), Belgium/Luxembourg-Colombia BIT (2009), Canada-Jordan BIT (2009), Canada-Latvia BIT (2009), Canada-Panama FTA (2010), Canada-Peru BIT (2006), Canada-Romania BIT (1996), Chile-United States FTA (2003), Peru-United States FTA (2006), United States-Rwanda BIT (2008), United States-Uruguay BIT (2005) and the Canada-Model BIT (2004).

13 China-Guyana BIT (2003); China-Trinidad and Tobago BIT; Finland-Algeria BIT (2005); Finland-Armenia BIT (2004); Finland-Belarus BIT (2006); Finland-Bosnia and Herzegovina BIT (2000); Finland-Ethiopia BIT (2006);

While some recent US BITs also contain this text, the United States Model BIT[19] contains a variation, which has so far been used twice in treaties.[20] The variation reads:

> **Desiring** to achieve these objectives in a manner **consistent** with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.

The Netherlands occasionally uses variations on the following language:

> **Considering** that these objectives can be achieved without [**compromising**[21]**/undermining**[22]] health, [safety[23]/social security[24]] and environmental measures of general application;[25]

Germany has once used a clause that differs from the frequently used model:

> Recognizing also the **increasing need** for measures to protect the environment[26]

The Preamble to the Australia-Chile FTA states the following:

> **Implement** this Agreement in a manner consistent with sustainable development and environmental protection and conservation;

The NAFTA preamble contains the following text:

> Undertake each of the preceding in a manner consistent with environmental protection and conservation; … strengthen the development and enforcement of environmental regulation.

The Energy Charter Treaty also refers to environmental concerns in its preamble, but uses more extensive language, which addresses more environmental concerns explicitly and which lists multilateral environmental agreements:

> Recognizing the necessity for the most **efficient exploration, production, conversion, storage, transport, distribution and use of energy**;
>
> 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

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Finland-Guatemala BIT (2005); Finland-Kyrgyzstan BIT (2003); Finland-Nicaragua BIT (2003); Finland-Nigeria BIT (2005); Finland-Serbia BIT (2005); Finland-Tanzania BIT (2001); Finland-Uruguay BIT (2005); Finland-Zambia BIT (2005); Netherlands-Burundi BIT (2007); Netherlands-Mozambique BIT (2001); Sweden-Mauritius BIT (2004); United States-Albania BIT (1995); United States-Azerbaijan BIT (1997); United States-Bahrain BIT (1999); United States-Bolivia BIT (1998); United States-Croatia BIT (1996); United States-El Salvador BIT (1999); United States-Georgia BIT (1994); United States-Honduras BIT (1995); United States-Jordan BIT (1997); United States-Mozambique BIT (1998); United States-Nicaragua BIT (1995); United States-Trinidad and Tobago BIT (1994); United States-Uzbekistan BIT (1994); Finland Model BIT (2004).

14 Japan-Korea BIT (2002); Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008); Japan-Vietnam BIT (2003).

15 Korea-Trinidad and Tobago BIT (2002); Switzerland-Mozambique BIT (2002); Switzerland-Syria BIT (2007).

16 Emphasis in this and subsequent extracts is by the authors to emphasise words relevant for the present analysis.

17 Only in Netherlands-Burundi BIT (2007) and Sweden-Mauritius BIT (2004).

18 Only in Switzerland-Syria BIT (2007).

19 US Model BIT 2004.

20 In United States-Uruguay BIT (2005) and US-Rwanda BIT (2008).

21 Netherlands-Namibia BIT (2002), Netherlands-Suriname BIT (2005).

22 Netherlands-Dominican Republic BIT (2006).

23 Netherlands-Namibia BIT (2002), Netherlands-Suriname BIT (2005).

24 Netherlands-Dominican Republic BIT (2006).

25 Netherlands Model BIT (2004).

26 Germany-Trinidad and Tobago BIT (2006). This provision resembles in part a preambular clause of ECT.

> Recognizing the increasingly urgent 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.

These clauses position environmental concerns in relation to the treaties' main purpose –investment protection. However, they stop short of defining a hierarchy between the objectives. Also, preambular texts do not establish rights and obligations between the parties but rather to provide guidance as to the "context" of the treaty for the purposes of interpretation.[27] As such, the role of environmental language in the preamble is different from the role of provisions in the body of the treaty.

2. Right to regulate – reserving policy space for environmental regulation

A growing number of IIAs include clauses in the body of the treaty that seek to reserve policy space to regulate environmental matters. In fact, this type of reference to environmental concerns is the oldest form observed in the IIA sample; its first occurrence dates to 1985 (in the China-Singapore BIT). Clauses that reserve policy space are still the most frequent form of environmental texts, with 82 occurrences in the sample. Twenty-five of the 49 countries covered use policy space clauses in at least one of their IIAs and at least two (Canada and the United States) have included them in their model BITs.

The scope of the environmental concern that the clauses describe varies. Many refer to "environmental concerns" in general, while some mention specific concerns such as "sanitary and phyto-sanitary" issues; "exhaustible natural resources"; or refer to an even more detailed set of issues.

Variations of clauses have been observed that make reference to "environmental concerns" or "regulations on environment" without specifying the scope and contents of these concepts. Canada uses in 21 of its treaties a clause on the regulation with respect to environmental matters, and the US Model BIT 2004 as well as NAFTA contain such a clause:

> Nothing in this [Agreement[28]/Treaty[29]/Chapter[30]] shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is **undertaken in a manner sensitive to environmental concerns**.

Some other clauses that contain general reservations of policy space have been observed, including the following:

> This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, **protection of the environment**, morality and public health.[31]

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27 Article 31 alinea 1 and 2 of the Vienna Convention on the Law of Treaties provide as general rule of interpretation that:
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: […].

28 Canada-Armenia BIT (1997); Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Latvia BIT (2009); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-Romania BIT (1996); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995); Canada-Ukraine BIT (1994); Canada-Venezuela BIT (1996).

29 United States-Rwanda BIT (2008), United States-Uruguay BIT (2005), US Model BIT 2004, Article 12 II.

30 NAFTA Article 1114(1).

31 Hungary-Russian Federation BIT (1995).

> The provisions of this Agreement shall, from the date of entry into force thereof, apply to all investments made, whether before or after its entry into force, by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, **including its laws and regulations on labour and environment**.[32]

Many treaties that reserve environmental policy space elaborate on the scope that the reservation of policy space covers. A variety of definitions can be found, often mentioning the "beneficiaries" of protective norms such as human, animal and plant life or health,[33] or the protection of natural resources. Other treaties define the scope of reserved policy space with reference to the area of regulation, and mention elements such as prevention or control of the release or emission of pollutants or environmental contaminants, the control of hazardous or toxic chemicals and wastes and the protection or conservation of wild flora or fauna, and specially protected natural areas in the party's territory.

Language found in BITs includes the following descriptions of the scope:

> 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.[34]
>
> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action directed to the protection of its essential security interests, or to the **protection of public health or the prevention of disease and pests in animals or plants**.[35]
>
> Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the **prevention of diseases or pests**.[36]
>
> Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting measures to maintain public order, or to protect public health and safety, **including environmental measures necessary to protect human, animal or plant life**.[37]
>
> [Subject to the requirement[38]/Provided[39]] 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 Contracting Party from adopting or enforcing measures necessary: (a)[40] […]; (b) **to protect human, animal or plant life or health; [or]** (c) **[relating**

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32 Netherlands-Costa Rica BIT (1999).

33 This language resembles that found in Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT), which came into force in January 1948.

34 Argentina-New Zealand BIT (1999).

35 China-New Zealand BIT (1988); China-Singapore BIT (1985); China-Sri Lanka BIT (1986).

36 Australia-India BIT (1999).

37 Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995).

38 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); Canada-Ukraine BIT (1994); Canada-Venezuela BIT (1996); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

39 Canada-Armenia BIT (1997); Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995); Finland-Zambia BIT (2005).

40 The order in which the items are listed varies among treaties.

to[41]/for[42]] the conservation of living or non-living exhaustible natural resources[43] [**if such measures are made effective in conjunction with restrictions on domestic production or consumption[44]**]; [(d) imposed for the protection of national treasures of artistic, historic or archaeological value;[45]].

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action in accordance with its laws applied in good faith on a non-discriminatory basis and only to the extent and duration necessary for the protection of its essential security interests, or to the protection of **public health or the prevention of diseases and pests in animals and plants**.[46]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non-discriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or to the protection of **public health or the prevention of disease and pests in animals or plants**.[47]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply, in accordance with its laws, prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the **protection of public health or the prevention of diseases and pests in animals and plants**.[48]

Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the **prevention of diseases or pests**.[49]

Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may: […] (c) take any measure necessary to protect **human, animal or plant life or health**;[50]

Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting measures to maintain public order, or to protect public health and safety, including **environmental measures necessary to protect human, animal or plant life**.[51]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions or take action in accordance with its laws normally and reasonably applied in good faith, on a non-discriminatory basis and to the extent necessary, for the **prevention of the spread of diseases and pests in animals or plants**.[52]

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41 Canada-Armenia BIT (1997); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995).

42 Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996).

43 Canada-Ecuador BIT (1996), Canada-Egypt BIT (1996), Canada-El Salvador BIT (1999), Canada-Jordan BIT (2009), Canada-Latvia BIT (2009), Canada-Peru BIT (2009), Canada-Thailand BIT (1997), Canada-Ukraine BIT (1994), Canada-Venezuela BIT (1996). Canada-Armenia BIT (1997) and Canada Model BIT (2004). This language resembles GATS Article XIV and GATT Article XX, but also explicitly includes the specification "living and non-living" exhaustible natural resources.

44 Canada-Armenia BIT (1997); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-Thailand BIT (1997).

45 Canada-Thailand BIT (1997).

46 Czech Republic-Mauritius BIT (1999).

47 Czech Republic-India BIT (1996).

48 Czech Republic-Singapore BIT (1995).

49 Australia-India BIT (1999).

50 Japan-Korea BIT (2002).

51 Finland-Zambia BIT (2005).

52 India-Korea BIT (1996).

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which s directed to the protection of its essential security interest, or to the **protection of public health or the prevention of diseases in pests or animals or plants**.[53]
>
> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the **protection of public health, or to the prevention of diseases and pests in animals and plants**, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.[54]
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of a Contracting Party, nothing in this Agreement other than Article 12 shall be construed to prevent a Contracting Party from adopting or enforcing measures: (a) necessary to **protect human, animal or plant life or health**; […][55]
>
> Notwithstanding any other provisions in this Agreement other than the provisions of Article 13, each Contracting Party may: […] (c) take any measure necessary to **protect human, animal or plant life or health**;[56]
>
> Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action necessary […] for reasons of public health or the **prevention of diseases in animals and plants**.[57]
>
> Each Contracting Party shall, in its State territory, promote as far as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its national laws and regulations. However, this Agreement shall not prevent a Contracting Party from applying restrictions of any kind or taking any other action to protect its essential security interests or public health or to **prevent diseases or pests in animals or plants**.[58]

Switzerland uses the annex of one of its treaties to reserve policy space for "sustainable development", the only occurrence of this concept in a definition of the scope of reserved of policy space in the sample:[59]

> It is understood that, in conformity with the principles set forth in these articles [on investment promotion, protection and non-discrimination], the concepts of **sustainable development** and **environmental protection** are applicable to all investments.[60]

Canada and Japan include in some of their treaties a reference to

> Notwithstanding any other provisions in this Agreement other than the provisions of Article 13, each Contracting Party may: […] take any measure imposed for the protection of national treasures of artistic, historic or archaeological value.[61]

Belgium/Luxembourg uses a different approach to delimit its reservation of policy space for the purpose of environmental regulation. These combine the reservation of policy space with a specific definition of environmental laws. The clause reserving policy space exists in various forms:

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53 India-Mauritius BIT (1998).

54 New Zealand-Hong Kong, China BIT (1995).

55 Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

56 Japan-Lao PDR BIT (2008); Japan-Vietnam BIT (2003).

57 Switzerland-Mauritius BIT (1998).

58 Romania-Mauritius BIT (2000).

59 A number of FTAs included in the sample refer to "sustainable development" in the preambles.

60 Switzerland-El Salvador BIT (1994), translation by the authors. The authentic text, in French language, reads "*Il est entendu qu'en conformité avec les principes énoncés dans ces articles, les concepts de développement durable et de protection de l'environnement sont applicables à tous les investissements.*"

61 Canada-Thailand BIT (1997); Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

> The Contracting Parties recognise the right of each one to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation. Each Contracting Party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation.[62]
>
> The Contracting Parties reaffirm their rights to establish levels of environmental protection and develop its own policies and priorities in this matter. It implies the right to adopt or modify accordingly its own environmental laws, in accordance with their respective domestic legislation.[63]
>
> Recognising the right of each Contracting Party to establish its own levels of [domestic/national[64]] environmental protection and environmental [(development)[65]/development] 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 this legislation.[66]

This clause is combined with a definition of the term "environmental legislation", of which several forms exist:

> [For the purpose of this Agreement:] "environmental legislation" means: any legislation of the Contracting Parties in force at the date of the signature of this Agreement or passed after the date thereof or provision of such legislation, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through: a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants; b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Contracting Party's territory.[67]
>
> The term "environmental legislation" shall mean any legislation of the Contracting Parties, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through: a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants; b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Contracting Party's territory.[68]
>
> The terms "environmental legislation" shall mean any legislation of the Contracting States, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health.[69]

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62 Belgium/Luxembourg-Guatemala BIT (2005).

63 Belgium/Luxembourg-Panama BIT (2009).

64 Only in Belgium/Luxembourg-Serbia BIT (2004).

65 Only in Belgium/Luxembourg-Barbados BIT (2009);

66 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

67 Belgium/Luxembourg-Barbados BIT (2009).

68 Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009).

69 Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Panama BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

3. Reserving policy space with respect to certain treaty provisions

A small set of treaties reserve policy space for specific, limited purposes, thus distinguishing this group from the comprehensive scope that the reservations described in the preceding subsection cover. Nineteen treaties fall in this category – 16 FTAs and only 4 BITs –, and 19 focus on performance requirements while one concerns exceptions to national treatment.

a. Performance requirements

Canada, Mexico and the United States occasionally include in their recent BITs language in the section on performance requirements that reserves policy space for this specific domain. Four occurrences of such clauses have been found in BITs, and 16 out of the 30 non-BIT IIAs contain such clauses. They first occur in 2001.

Canada's provision reads:

> A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 3 and 4 apply to the measure.[70]

The provisions in US BITs, which are similar to NAFTA Article 1106,[71] read:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) […]; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.[72]

b. National treatment exceptions

Sweden uses in one of its BITs a clause on the applicability of exceptions to national treatment. The clause gives retroactive effect of new exceptions to national treatment included for proposes of environmental protection. This retroactive effect is an exception to the BIT's rule that the *status quo ante* applies in relation to national treatment for a specific investment. The Sweden-Russia BIT (1995) is the only treaty in the sample that contains such a clause. Its provision states:

> Each Contracting Party may have in its legislation limited exceptions to national treatment provided for in Paragraph (2) of this Article. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, except when the exception is necessitated for the purpose of the maintenance of defence, national security and public order, **protection of the environment**, morality and public health.[73]

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70 Canada-Peru BIT (2006). Paragraph 1(f) of the treaties prohibits the enforcement of performance requirements "to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement;"

71 NAFTA, article 1106(6): "6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures: (b) necessary to protect human, animal or plant life or health; or (c) necessary for the conservation of living or non-living exhaustible natural resources."

72 United States-Rwanda BIT (2008); United States-Uruguay BIT (2005).

73 Russian Federation-Sweden BIT (1995), Article 3(3).

4. Precluding non-discriminatory regulation as a basis for claims of indirect expropriation

Treaty provisions that preserve policy space to regulate environmental matters do not automatically preclude compensation claims based on changes of environmental regulation or similar measures. States that limit their treaty provisions to a mere reservation of policy space may thus be exposed to compensation claims for "indirect expropriation" that could discourage modifications of environmental regulation or make them onerous.

Ten countries have – beginning with Canada and the United States since 1990 – included in some of their treaties a clause that clarifies the conditions under which environmental regulation cannot be considered indirect expropriation. These clauses state:

> The Parties confirm their shared understanding that: […] 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.[74]

These clauses remain relatively rare and only 12 occurrences, plus the Canada and US model BITs, were found in the treaty sample.

5. Environmental matters and investor-state dispute settlement

Some BITs involving parties of NAFTA contain procedural provisions on the consultation of experts on environmental law in arbitral tribunals. Such clauses first appear in NAFTA (1992)[75] and appear from 2004 on in a few BITs concluded by NAFTA parties Canada, Mexico and the United States as well as in several United States FTAs.[76] Canada and the US also use these clauses in their Model BITs. Only four BITs in the sample include such clauses. The clauses read:

> Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more **experts to report to it in writing on any factual issue concerning environmental, health, safety**, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.[77]

One of the treaties concluded by Belgium/Luxembourg excludes the application of the treaty's dispute settlement mechanisms for the provisions regarding environmental concerns. The clause reads:

> The dispute settlement mechanisms under articles […] of this agreement shall not apply to any obligation undertaken in accordance with this article.[78]

Some United States BITs also exclude the environment article from the list of provisions that may give rise to investment arbitration.[79]

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74 United States Model BIT 2004 Annex B; Canada Model BIT (2004) Annex B.13(1); Belgium/Luxembourg-Colombia BIT (2009); Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005).

75 NAFTA (1992), Article 1133.

76 The clause has now spread to non-NAFTA parties for related types of international agreements, e.g. the Australia-Chile Free Trade Agreement (2008), art. 10.25.

77 Canada-Jordan BIT (2009); Canada-Peru BIT (2006); Mexico-United Kingdom BIT (2006); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005) US Model BIT (2004), Article 32; Canada Model BIT (2004), Article 42.

78 Belgium/Luxembourg-Colombia BIT (2009), article 7(5). "This article" refers to article 7 of the treaty, which contains the provisions referring to environmental concerns.

6. Not lowering standards – discouraging relaxation of environmental standards to attract investment

Certain countries include in some of their IIAs a clause that discourages "lowering of standards" – that is, providing regulatory incentives to investors to the detriment of environmental protection. These clauses seek to ensure the respect of existing environmental standards and to avoid that States compete for investment by lowering environmental standards. The immediate addressees of these clauses are the States Parties themselves.

Such clauses have appeared in BITs since 1990 and in NAFTA in 1992.[80] In the sample, 49 individual IIAs include such a clause, as do the Canada and US Model BITs.

Language used varies quite widely, including the following:

> The [Contracting; Both Contracting] Parties recognize that it is inappropriate to encourage investment by **relaxing [domestic/national[81]] health, safety or environmental measures**. [Accordingly, a Party/To this effect each Contracting Party] shall strive to ensure that it does 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 or an investor.[82]
>
> 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, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment or an investor.[83]
>
> 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.[84]
>
> [The/Both] Contracting Parties recognise that it is inappropriate to encourage investment by investors of the other Contracting Party by **relaxing environmental measures**. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its territory of investments **by investors of the other Contracting Party [and of a non-Contracting Party[85]]**.[86]

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79 See, e.g., the 2004 US model BIT Art. 24 (1), which provides for submission of claims to arbitration for breaches of "Articles 3-10", whereas the provision on Investment and Environment is in Article 13.

80 Article 1114(2) NAFTA reads: "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.."

81 Belgium/Luxembourg-Serbia BIT (2004) only.

82 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-Togo BIT (2009); Mexico-Switzerland BIT (1995).

83 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996).

84 United States-Rwanda BIT (2008); United States-Uruguay BIT (2005); US Model BIT (2004).

85 Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008) only.

86 Japan-Korea BIT (2002), Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008); Japan-Vietnam BIT (2003).

> [Understanding that[87]] No Contracting Party shall [change or[88]] **relax its domestic environmental** [and labour] **legislation** to encourage investment, or investment maintenance or the expansion of the investment that shall be made in its territory.[89]

Nuances in the purpose and effect of such clauses result from different variations of such clauses with respect to the territorial scope of the origin of an investment: Some clauses cover only inward investments originating in the respective treaty partner, while others seem to cover inward investment of any foreign origin, and the wording of again other treaties suggests that they even include domestic investment without any necessary relation to the treaty partner.[90]

Some of the treaties that contain a provision on the inappropriateness of relaxing environmental standards complement it with a procedural provision on the settlement of issues related to alleged relaxations:

> 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[91]].[92]

This type of procedural provision is found in at least 7 BITs signed by Canada and the United States and was first included in a BIT in 1990.[93] A similar procedural provision is found in NAFTA.[94]

7. General promotion of progress in environmental protection and cooperation

Some BITs contain clauses that promote the furtherance of environmental objectives without featuring a particularly tight link to the treaties' primary purpose of investment protection or promotion. Such clauses include a general call for the strengthening of environmental standards. A number of clauses fall in this category including the following:

> […], each Contracting Party shall strive to ensure that its legislation provides for high levels of environmental protection and shall strive to continue to improve this legislation.[95]

Some Belgium/Luxembourg BITs contain additional language that makes an explicit reference to international environmental agreements:

> The Contracting Parties reaffirm their commitments under the international environmental agreements [, which they have accepted/in force in their territories[96]].[97] They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.[98]

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87 Belgium/Luxembourg-Korea BIT (2006).

88 Belgium/Luxembourg-Korea BIT (2006); Belgium/Luxembourg-United Arab Emirates BIT (2004) only.

89 Belgium/Luxembourg-Korea BIT (2006); Belgium/Luxembourg-Panama BIT (2009), Art. 5(2), Belgium/Luxembourg-United Arab Emirates BIT (2004).

90 Belgium/Luxembourg-Panama BIT (2009), Art. 5(2).

91 Not in Mexico-Switzerland BIT (1995).

92 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); Mexico-Switzerland BIT (1995); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005); US Model BIT 2004, article 12 I.

93 Canada-Czech Republic BIT (1990).

94 NAFTA Article 1114 (2).

95 Belgium/Luxembourg-DRC BIT (2005); Belgium/Luxembourg-Colombia BIT (2009), Article 7(1).

96 Belgium/Luxembourg-Peru BIT (2005) only.

97 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005);

Some treaties concluded by Belgium/Luxembourg contain a clause about general cooperation in environmental matters that is sometimes complemented by a procedural provision.

> The Contracting Parties recognise that co-operation between them provides enhanced opportunities to improve environmental protection standards.[99] [Upon request by either Contacting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.[100]]

IV. IIA language on specific environmental concerns

The IIAs in the sample cover environmental concerns either under the umbrella term "environment" or explicitly mention specific concerns. This section reviews the more specific environmental concerns that are mentioned in the treaty sample and also seeks to identify environmental concerns that are absent or rare in such treaties. Multilateral investment agreements and international environmental law provide an orientation of what elements may now be considered part of the internationally agreed set of environmental concerns.

1. Environmental concerns explicitly addressed in international investment agreements

The BITs in the sample used for the present study mention a fairly limited set of environmental concerns explicitly. These are formulated as objectives of environmental protection or refer to methods of to achieve these objectives. Explicitly mentioned objectives include

- "human, animal or plant life or health"; "prevention of disease and pests in animals or plants"; or similar;
- "conservation of living or non-living exhaustible natural resources", occasionally phrased as "protection of natural and physical resources"; and
- "protection of national treasures of artistic, historic or archaeological value".

Some IIAs list the following methods to achieve these objectives, which in themselves refer to intermediary objectives:

Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005).

98 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005).

99 Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

100 Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

- prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; and
- protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

The list of environmental objectives explicitly mentioned in IIAs is thus limited to: sanitary and phytosanitary objectives and conservational objectives. These issues cover a broad range of aspects that have occupied mankind for decades, if not centuries, albeit not necessarily under the umbrella term "environment".

2. Common environmental concerns that do not appear in IIAs

Internationally, thinking about environmental issues has evolved rapidly. A database on "binding" international environmental agreements contains, as of 2010, over 2700 treaties, of which 1538 were bilateral treaties, 1039 multilateral treaties and 159 other agreements. Over 2300 of these treaties were adopted after 1950, and the rate of adoption accelerated significantly during the 1990s.[101] Examples of major agreements include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[102] the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal,[103] the 1992 Convention on Biological Diversity,[104] and the 1992 UN Framework Convention on Climate Change.[105]

As a result of all this activity, the list of environmental concerns has expanded dramatically in the past decades. Global threats such as climate change, declining biodiversity, depletion of the ozone layer and maritime waters have emerged, with some of them taking centre stage among environmental concerns. Likewise, more recent developments in environmental norms point toward a shift away from a narrow anthropocentric paradigm and from a focus on local risks to a consideration of global risk scenarios.[106]

Some States who include no reference to environmental concerns in their investment agreements may view their BITs and FTAs with investment provisions as leaving enough policy discretion to address any present and future environmental concerns without specific language. However, this survey of treaty language provides some support for the view that investment treaty negotiators are at least partially insulated from the thinking behind the broader evolution of international environmental norms. While growing awareness of environmental threats has arguably driven the increasing use of environmental language in IIAs, the set of issues that are explicitly mentioned in IIAs as well as the underlying paradigms of environmental protection appear to penetrate the investment treaty community slowly, if at all.

None of the bilateral IIAs in the sample have strayed away from traditional approaches to environmental protection, and none, even the very recent ones, touch explicitly upon issues that dominate the debate on environmental protection today. Only the Energy Charter Treaty (ECT) a multilateral

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101 See Ronald B. Mitchell, 2002-2010, *International Environmental Agreements Database Project (Version 2010.2).*

102 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243.

103 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989, I.L.M. 657 (1989).

104 Convention on Biological Diversity, 5 June 1992, 31 I.L.M. 818 (1992).

105 United Nations Framework Convention on Climate Change, 29 May 1992, 31 I.L.M. 849 (1992).

106 For a discussion of the ethical foundations of international environmental law, see Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, Oxford University Press, Chapter 1(3) and (4) "Why protect the environment?" and "The environment as a problem of international concern."

investment agreement signed in 1994, seems to embrace an updated set of environmental concerns. The treaty's preamble contains explicit references to some of these concerns:

> Recognizing the necessity for the most **efficient exploration, production, conversion, storage, transport, distribution and use of energy**;
>
> 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 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, […]

Article 19(3)(b) of the ECT mentions further aspects:

> (b) "Environmental Impact" means any effect caused by a given activity on the environment, including **human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments** or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

Generic language that is often found in the treaty sample, such as references to general "environmental concerns," will arguably absorb certain emerging concepts, but more specific language may be less open to evolution of interpretation. The frequent references to "human, animal and plant life and health", even with the addition of "conservation of living or non-living exhaustible natural resources", may already prove less versatile when it comes to adapting it to regulation favouring biodiversity or attenuating climate change, for example. This being said, analysis on the effect of including any kind of environmental language in IIAs has yet to be done and, therefore, no judgement of the merits of specific kinds of references to environmental concerns in IIAs can be made, based on this study.

V. Further considerations on the use of references to environmental concerns in IIAs

This survey restricts itself to a statistical analysis of the use of environmental language in IIAs – it does not seek to attribute legal significance to the differences in State treaty-writing practice. Nonetheless, the considerable variation in States' approaches to reconciling openness to foreign investment and the public policy concern of environmental regulation invites such reflection.

Of notable interest in this regard are the following questions:

- Does the inclusion of references to environmental concerns in IIAs bring benefits for reconciling openness to foreign investment and protection of environmental concerns?
- If so, does the approach – for example, use of references in the preamble or body of the treaty text – have an impact on the outcome of the reconciliation?
- Do certain approaches favour a dynamic adaption to the rapid evolution of environmental concerns and the thinking about environmental protection observed in this parallel policy community?

Annex 1: Methodology

The sample for this survey consists of 1623 IIAs, in large majority bilateral investment treaties (BITs) plus a limited number of bilateral free trade agreements with investment provisions. The sample covers the 49 countries that participate in the Freedom of investment Roundtables have concluded with any other county.[107] The sample includes bilateral investment treaties that were available in July 2010 on the UNCTAD BIT database; and free trade agreements that were available in July 2010 on other sites.[108] Treaties that are posted on these sites have been included regardless of whether they are in force, or – in a limited number of cases – whether the Parties have signed the documents.[109]

The sample contains 185 treaties signed among OECD members, 1,201 treaties signed between an OECD and a non-OECD Member and 237 treaties signed between two non-OECD Members. Some treaties signed just prior to mid-2010 may not yet be posted in these databases and thus would not be included in this survey. This is a source of potential bias; more recent treaties of countries who take longer to make treaties available to international treaty databases or to post treaties on their own websites will be absent from the sample. Where the date of signature was not available from the documents in the sources themselves, this information has been taken from the website of ICSID.

The qualitative analysis also covers some multilateral investment agreements, including NAFTA and the Energy Charter Treaty, and 19 model investment treaties drawn from publicly available sources.

The analysis sought to identify any kind of reference to environmental concerns, i.e. issues that are commonly associated with the protection of the environment. Treaties that made reference to "public health" in conjunction with "public order" and "public morals" were not included, unless other elements with a connection to environmental issues were also mentioned.

Participants in the FOI Roundtables include Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

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107 The term "country" is used for linguistic ease. Its use does not imply any judgement b the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded treaties considered in this document jointly as Belgium-Luxembourg Economic Union; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* countries.

108 These include dedicated websites of the OAS and the Australian Government, the US Government, and the legal database of Belgium.

109 The signature date of 31 treaties – less than 2% of the sample – could not be determined.

Annex 2: Policy purpose of environmental language in IIAs

The following list includes only treaties that contain at least one reference to environmental concerns. All treaties that a participant in the Freedom of Investment Roundtables has concluded are listed; that leads to duplicate mentioning of a certain number of treaties in the table. Treaties are sorted by alphabetical order of the treaty partner, and, in second order, by the year of signature. Shading of rows groups treaties of the same country to enhance readability.

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Argentina-New Zealand BIT (1999)		•					
Australia-India BIT (1999)		•					
Australia-Singapore FTA (2003)	•	•					
Australia-Thailand FTA (2004)		•					
Australia-United States FTA (2004)	•		•				
Australia-Chile FTA (2008)	•	•	•	•			
Belgium/Luxembourg-Guinea BIT (?)		•			•		•
Belgium/Luxembourg-Libya BIT (2004)		•			•		•
Belgium/Luxembourg-Serbia BIT (2004)		•			•		•
Belgium/Luxembourg-United Arab Emirates BIT (2004)		•			•		•
Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005)		•			•		•
Belgium/Luxembourg-Guatemala BIT (2005)		•			•		•
Belgium/Luxembourg-Madagascar BIT (2005)		•					
Belgium/Luxembourg-Mauritius BIT (2005)		•			•		•
Belgium/Luxembourg-Nicaragua BIT (2005)		•			•		•
Belgium/Luxembourg-Peru BIT (2005)		•			•		•
Belgium/Luxembourg-Sudan BIT (2005)		•			•		•
Belgium/Luxembourg-Ethiopia BIT (2006)		•			•		•
Belgium/Luxembourg-Barbados BIT (2009)		•			•		•
Belgium/Luxembourg-Colombia BIT (2009)		•		•	•		•
Belgium/Luxembourg-Panama BIT (2009)		•			•		
Belgium/Luxembourg-Tajikistan BIT (2009)		•			•		•
Belgium/Luxembourg-Togo BIT (2009)		•			•		
Canada-Czech Republic BIT (1990)		•		•	•		
Canada-Ukraine BIT (1994)		•					
Canada-Philippines BIT (1995)		•					
Canada-South Africa BIT (1995)		•					
Canada-Trinidad and Tobago BIT (1995)		•					
Canada-Barbados BIT (1996)		•					

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Canada-Chile FTA (1996)	•	•	•		•	•	•
Canada-Ecuador BIT (1996)		•					
Canada-Egypt BIT (1996)		•					
Canada-Panama BIT (1996)		•					
Canada-Romania BIT (1996)		•		•	•		
Canada-Venezuela BIT (1996)		•					
Canada-Armenia BIT (1997)		•					
Canada-Croatia BIT (1997)		•					
Canada-Lebanon BIT (1997)		•					
Canada-Thailand BIT (1997)		•					
Canada-Uruguay BIT (1997)		•			•		
Canada-Costa Rica BIT (1998)		•					
Canada-El Salvador BIT (1999)		•					
Canada-Peru BIT (2006)		•	•	•	•	•	
Canada-Colombia FTA (2008)	•	•	•		•	•	•
Canada-Peru FTA (2008)	•	•	•		•		•
Canada-Jordan BIT (2009)		•		•	•	•	
Canada-Latvia BIT (2009)		•		•	•		
Canada-Panama FTA (2010)	•	•	•	•	•	•	•
Chile-Canada FTA (1996)	•	•	•		•	•	•
Chile-United States FTA (2003)	•	•	•	•		•	
Chile-Colombia FTA (2006)	•	•	•		•	•	•
Chile-Peru FTA (2006)	•	•	•			•	•
Chile-Japan EPA (2007)	•				•	•	
Chile-Australia FTA (2008)	•	•	•	•			
China-Trinidad and Tobago BIT (?)	•						
China-Singapore BIT (1985)		•					
China-Sri Lanka BIT (1986)		•					
China-New Zealand BIT (1988)		•					
China-Guyana BIT (2003)	•						
China-Peru FTA (2009)	•						
Czech Republic-Canada BIT (1990)		•		•	•		
Czech Republic-Singapore BIT (1995)		•					
Czech Republic-India BIT (1996)		•					
Czech Republic-Mauritius BIT (1999)		•					
Egypt-Canada BIT (1996)		•					
Finland-Bosnia and Herzegovina BIT (2000)	•						
Finland-Tanzania BIT (2001)	•						
Finland-Kyrgyzstan BIT (2003)	•						
Finland-Nicaragua BIT (2003)	•						
Finland-Armenia BIT (2004)	•						

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Finland-Algeria BIT (2005)	•						
Finland-Guatemala BIT (2005)	•						
Finland-Nigeria BIT (2005)	•						
Finland-Serbia BIT (2005)	•						
Finland-Uruguay BIT (2005)	•						
Finland-Zambia BIT (2005)	•	•					
Finland-Belarus BIT (2006)	•						
Finland-Ethiopia BIT (2006)	•						
Germany-Trinidad and Tobago BIT (2006)	•						
Hungary-Russian Federation BIT (1995)		•					
India-Czech Republic BIT (1996)		•					
India-Korea BIT (1996)		•					
India-Mauritius BIT (1998)		•					
India-Australia BIT (1999)		•					
Indonesia-Japan EPA (2007)					•		
Japan-Korea BIT (2002)	•				•		
Japan-Vietnam BIT (2003)	•	•			•		
Japan-Mexico EPA (2004)		•	•		•	•	
Japan-Malaysia EPA (2005)					•		
Japan-Philippines EPA (2006)		•			•		
Japan-Brunei EPA (2007)	•				•		
Japan-Chile EPA (2007)	•				•	•	
Japan-Indonesia EPA (2007)					•		
Japan-Singapore EPA (2007)		•					
Japan-Thailand EPA (2007)					•		
Japan-Lao PDR BIT (2008)	•	•			•		
Japan-Peru BIT (2008)	•	•			•		
Japan-Uzbekistan BIT (2008)	•	•			•		
Japan-Switzerland EPA (2009)	•				•		
Korea-India BIT (1996)		•					
Korea-Japan BIT (2002)	•				•		
Korea-Trinidad and Tobago BIT (2002)	•						
Latvia-Canada BIT (2009)		•		•	•		
Malaysia-Japan EPA (2005)					•		
Mexico-Bolivia FTA (1994)	•	•			•		
Mexico-Costa Rica FTA (1994)	•	•			•		
Mexico-Switzerland BIT (1995)					•		
Mexico-Nicaragua FTA (1997)	•	•			•		
Mexico-Cuba BIT (2001)		•					
Mexico-Uruguay FTA (2003)			•				
Mexico-Japan EPA (2004)		•	•		•	•	

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Mexico-United Kingdom BIT (2006)						•	
Morocco-United States FTA (2004)	•	•				•	
Netherlands-Costa Rica BIT (1999)		•					
Netherlands-Mozambique BIT (2001)	•						
Netherlands-Namibia BIT (2002)	•						
Netherlands-Suriname BIT (2005)	•						
Netherlands-Dominican Republic BIT (2006)	•						
Netherlands-Burundi BIT (2007)	•						
New Zealand-China BIT (1988)		•					
New Zealand-Hong Kong, China BIT (1995)		•					
New Zealand-Argentina BIT (1999)		•					
Peru-Belgium/Luxembourg BIT (2005)		•			•		•
Peru-Canada BIT (2006)		•	•	•	•	•	
Peru-Chile FTA (2006)	•	•	•			•	•
Peru-United States FTA (2006)	•	•	•	•	•		
Peru-Canada FTA (2008)	•	•	•		•		•
Peru-Japan BIT (2008)	•	•			•		
Peru-Singapore FTA (2008)		•	•				
Peru-China FTA (2009)	•						
Romania-Canada BIT (1996)		•		•	•		
Romania-Mauritius BIT (2000)		•					
Russian Federation-Hungary BIT (1995)		•					
Russian Federation-Sweden BIT (1995)			•				
South Africa-Canada BIT (1995)		•					
Sweden-Russian Federation BIT (1995)			•				
Sweden-Mauritius BIT (2004)	•						
Switzerland-El Salvador BIT (1994)		•					
Switzerland-Mexico BIT (1995)					•		
Switzerland-Mauritius BIT (1998)		•					
Switzerland-Mozambique BIT (2002)	•						
Switzerland-Syria BIT (2007)	•						
Switzerland-Japan EPA (2009)	•				•		
United Kingdom-Mexico BIT (2006)						•	
United States-Georgia BIT (1994)	•						
United States-Trinidad and Tobago BIT (1994)	•						
United States-Uzbekistan BIT (1994)	•						
United States-Albania BIT (1995)	•						
United States-Honduras BIT (1995)	•						
United States-Nicaragua BIT (1995)	•						
United States-Croatia BIT (1996)	•						
United States-Azerbaijan BIT (1997)	•						

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
United States-Jordan BIT (1997)	•						
United States-Bolivia BIT (1998)	•						
United States-Mozambique BIT (1998)	•						
United States-Bahrain BIT (1999)	•						
United States-El Salvador BIT (1999)	•						
United States-Chile FTA (2003)	•	•	•	•		•	
United States-Singapore FTA (2003)	•	•	•		•	•	
United States-Australia FTA (2004)	•		•				
United States-Morocco FTA (2004)	•	•				•	
United States-Uruguay BIT (2005)	•	•	•	•	•	•	
United States-Oman FTA (2006)	•	•	•		•	•	
United States-Peru TPA (2006)	•	•	•	•	•		
United States-Rwanda BIT (2008)	•	•	•	•	•	•	

The following table contains the same information as the previous, but for non-BIT IIAs, i.e. FTAs and EPAs. Shading of rows groups treaties of the same country to enhance readability.

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Australia-Singapore FTA (2003)	•	•					
Australia-Thailand FTA (2004)		•					
Australia-United States FTA (2004)	•		•				
Australia-Chile FTA (2008)	•	•	•	•			
Canada-Chile FTA (1996)	•	•	•		•	•	•
Canada-Colombia FTA (2008)	•	•	•		•	•	•
Canada-Peru FTA (2008)	•	•	•		•		•
Canada-Panama FTA (2010)	•	•	•	•	•	•	•
Chile-Canada FTA (1996)	•	•	•		•	•	•
Chile-United States FTA (2003)	•	•	•	•		•	
Chile-Colombia FTA (2006)	•	•	•		•	•	•
Chile-Peru FTA (2006)	•	•	•			•	•

Treaty (year of signature)	Preamble Language	Explicit language reserving policy space for environmental regulation	Explicit language reserving policy space for environmental regulation in relation to specific provisions of the treaty	Limiting the scope for claims of "indirect expropriation" on the basis of non-discriminatory environmental regulation	Explicit language on not lowering environmental standards for the purpose of attracting investment	Provisions on environmental matters and investor-state dispute settlement	Explicit language on general promotion of progress in environmental protection and cooperation
Chile-Japan EPA (2007)	•				•	•	
Chile-Australia FTA (2008)	•	•	•	•			
China-Peru FTA (2009)	•						
Indonesia-Japan EPA (2007)					•		
Japan-Mexico EPA (2004)		•	•		•	•	
Japan-Malaysia EPA (2005)					•		
Japan-Philippines EPA (2006)		•			•		
Japan-Brunei EPA (2007)	•				•		
Japan-Chile EPA (2007)	•				•	•	
Japan-Indonesia EPA (2007)					•		
Japan-Singapore EPA (2007)		•					
Japan-Thailand EPA (2007)					•		
Japan-Switzerland EPA (2009)	•				•		
Malaysia-Japan EPA (2005)					•		
Mexico-Bolivia FTA (1994)	•	•			•		
Mexico-Costa Rica FTA (1994)	•	•			•		
Mexico-Nicaragua FTA (1997)	•	•			•		
Mexico-Uruguay FTA (2003)			•				
Mexico-Japan EPA (2004)		•	•		•	•	
Morocco-United States FTA (2004)	•	•				•	
Peru-Chile FTA (2006)	•	•	•			•	•
Peru-United States FTA (2006)	•	•	•	•	•		
Peru-Canada FTA (2008)	•	•	•		•		•
Peru-Singapore FTA (2008)		•	•				
Peru-China FTA (2009)	•						
Switzerland-Japan EPA (2009)	•				•		
United States-Chile FTA (2003)	•	•	•	•		•	
United States-Singapore FTA (2003)	•	•	•		•	•	
United States-Australia FTA (2004)	•		•				
United States-Morocco FTA (2004)	•	•				•	
United States-Oman FTA (2006)	•	•	•		•	•	
United States-Peru TPA (2006)	•	•	•	•	•		

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ORIGINAL PAPER

Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspectives

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Abstract
In international disputes between investors and host-States, the traditionally asymmetric nature of international investment agreements (IIAs) may prevent States from bringing claims against investors for harm caused, including environmental damage. At the same time, allowing host-State counterclaims for environmental damage is a potentially useful tool for rebalancing the asymmetric nature of IIAs. Yet, in the highly fragmented area of international investment law, the availability of host-State counterclaims is not always clear. This article analyses the procedural and legal bases available for host-State counterclaims for environmental damage, including newly developing human rights and transnational public policy approaches to such claims. The question that this article seeks to evaluate is to what extent host-State counterclaims are available to rebalance the asymmetric relationship between host-States and investors, specifically concerning environmental damage. To answer this question, the article takes a qualitative approach by examining case law, commentary, and the work of international organizations, and applying the results of the research to the specific context of host-State counterclaims for environmental damage. Future developments are also discussed in the context of ongoing multilateral investor-State dispute settlement reform efforts at the United Nations Commission on International Trade Law. There currently exists a window of opportunity for States to seek cooperative, effective multilateral strategies for partially rebalancing the relationship between investment and the environment. The article posits that harmonization of State approaches towards counterclaims for environmental damage is desirable and States should take a permissive approach towards host-State counterclaims for environmental damage in their IIA treaty negotiation practice.

Keywords Investor-State dispute settlement (ISDS) · International investment agreements (IIAs) · Counterclaims · Environmental damage · Human rights

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1 Introduction

International investment law is often perceived to be in conflict with other important societal goals, including environmental protection. Typically, investors who believe that they have been aggrieved by host-State conduct can use International Investment Agreements ('IIAs'), whether bilateral investment treaties ('BITs') or multilateral agreements, which include the Investor-State Dispute Settlement ('ISDS') mechanism, to bring an arbitration claim against the host-State outside of that State's judicial system. These agreements have traditionally been asymmetric in nature, meaning that they impose obligations on host-States, but not investors who accrue rights thereunder. This asymmetry has been described as being '[h]ardwired into the very structure of investment treaties' (Kryvoi 2012, p. 218). Practically speaking, this creates a situation under international law whereby States have legal obligations towards qualified foreign investors, while those same investors do not necessarily have reciprocal obligations towards host-States. This has contributed to the perception that ISDS is by nature one-sided in favour of foreign investors to the detriment of host-States (Kalicki 2013). The asymmetric nature of IIAs can act as a barrier to counterclaims against investors using ISDS, even where an investor causes significant harm to the host-State, including environmental damage. This is a result of international investment law having given investors a privileged position and is evidence of States favouring investment and trade over other important societal matters and concerns, including the environment (Douglas 2013, p. 416).

The perceived imbalance between investors and host-States in this field has led to public outcry in various contexts.[1] The paradigm of foreign investment has shifted as many private parties now have more economic resources than many States (Boeckstiegel 2007, p. 95). By way of example, in 2018, the 500th company on the Forbes Global 500 list had more yearly revenue than the nominal GDP of 72 countries (Fortune Global 500 2018; World Bank GDP 2018). Moreover, and perhaps more importantly, traditionally capital-exporting States who shaped contemporary investment law have increasingly found themselves on the receiving end of investor claims under various IIAs. As a result, States have increased scrutiny of ISDS, and are currently examining reform options in a multilateral setting. In 2017, the United Nations Commission on International Trade Law ('UNCITRAL') established Working Group III ('WGIII') with a broad mandate concerning ISDS reform, whose work is ongoing.

The reform efforts are timely. Foreign-direct-investment has been on the decline in recent years for a variety of reasons (WIR 2019, p. 3), and proponents of ISDS and international investment law must be willing to reform to preserve. As highlighted by Angel Gurría, Secretary General of the OECD, '[i]f we want things to stay as they are, things will have to change,' and such changes cannot be superficial (Gurría 2017). The United Nations Conference on Trade and Development ('UNCTAD') has recognized that '[t]he investment dispute settlement system must be designed to produce just outcomes that are viewed as reflecting key societal values' (Issues Note 1 2019, p. 27). This requires State action. In line with UNCTAD's approach, and in the current climate of ISDS reform, State action needs to be directed towards balancing investor rights with support for other important societal goals. One potentially impactful way to do this is for States to authorize limited

[1] E.g., the German public's opposition to the *Vatenfall v. Germany* case concerning nuclear power production, and opposition to the Philip Morris cases against both Australia and Uruguay.

counterclaims through their treaty drafting practice (Bjorklund 2013, p. 466). Counterclaims can allow a host-State to enforce obligations on an investor, including environmental obligations (Kjos 2007, p. 7). Increasing the availability of counterclaims, particularly in the context of environmental damage, could achieve greater balance between the rights of States and investors by creating a more equal and efficient system for ISDS (Kryvoi 2012, p. 218).

Additionally, leading scholars have called on WGIII to address asymmetry in ISDS as part of reform efforts (Issues Note 1 2019, p. 21). In particular, the missing framework for host-State counterclaims has been identified as an area deserving reform efforts (WGIII 2020, p. 3).[2] Yet, it remains unclear to what degree States will agree to discuss host-State counterclaims. WGIII discussions may focus only on procedural elements of ISDS, or may venture into substantive discussions concerning the legal basis for counterclaims and obligations to be imposed on investors relating to human rights, the environment, compliance with domestic law, etc. (*Ibid.*, pp. 40, 41). What is clear is that ISDS is at a crossroads, and a window of opportunity currently exists. Foreign-investment and environmental protection have the possibility to move from being potentially conflicting to potentially supportive realities (Viñuales 2010, p. 6), and States have a chance to put environmental considerations on equal footing with trade and investment concerns.

This article seeks to explore to what extent host-State counterclaims can rebalance the relationship between States and investors in the specific context of environmental damage. It takes a qualitative approach to answering this question by first examining case law and scholarly commentary concerning host-State counterclaims generally; and then more specifically by surveying additional relevant materials (cases, commentary, and documents from the UN System) regarding counterclaims based on domestic and international law, respectively. The results of this research are then applied to the particular context of environmental damage caused by investors in host-States, through both human rights, and transnational public policy lenses. As such, the article first outlines the general legal basis for counterclaims in treaty-based ISDS, highlighting the current fragmented approach existing in international law. Then it will focus on the patchwork of possible legal bases of counterclaims for environmental damage, specifically examining counterclaims from emerging human rights and transnational public policy perspectives. Finally, the article will focus on future developments in this rapidly changing area of law and provide suggestions concerning the harmonization of approaches concerning this issue in light of the ongoing multilateral reform discussions at UNCITRAL.

2 Availability of host-State counterclaims in treaty-based ISDS

Investment law is highly fragmented as there are thousands of treaties protecting investment in force in the world today. As a fundamental matter, ISDS requires consent of the disputing parties to use the mechanism, however, '[t]here is no room for general sweeping statements about whether counterclaims are within the consent to arbitrate investor claims' (Lalive and Halonen 2011, p. 7.26). The language of arbitration agreements in IIAs is not homogenous, and it is this language that determines whether consent to counterclaims

[2] Scheduled for discussion during WGIII's 39th session from 30 March—3 April 2020, postponed to October 2020 due to COVID-19.

exists (Kjos 2007, pp. 14, 19). Even if host-State counterclaims are within the parameters of the parties' consent, the enquiry does not end there. Counterclaims must also be based on obligations owed by the investor to the host-State founded in law that the Tribunal has the authority to apply (Lalive and Halonen 2011, pp. 7.18, 7.23). Accordingly, the availability of host-State counterclaims under the current state of international investment law can only be examined on a case-by-case basis.

Nonetheless, some generalities can be observed. Importantly, the two main procedural frameworks governing ISDS, ICSID and UNCITRAL Arbitration Rules, both allow counterclaims as long as they are within the jurisdiction of the Tribunal. Yet, the simple inclusion of ICSID or UNCITRAL Rules in an IIA is not sufficient to indicate consent to host-State initiated counterclaims. Under both frameworks, parties can derogate from the general rule that counterclaims are permissible. It is therefore essential to understand how the agreement permitting disputes to be submitted to ISDS proceedings defines the types of disputes subject to arbitration.

Even where host-State counterclaims are authorized by both procedural rules and the parties' language of consent, some arbitral decisions have constructed an additional barrier to counterclaims, focusing on whether the counterclaims are closely affiliated with the investor's underlying claims (Bjorklund 2013, pp. 473–474). This has been described as the connectedness requirement, or *connexion* (Kjos 2007, p. 5). Case law offers no uniform view concerning how *connexion* is met, and there is doctrinal debate concerning whether a factual connection[3] between the investor's claims and the host-State's counterclaims is sufficient, or whether there needs to be a legal nexus[4] as well (Lalive and Halonen 2011, pp. 7.40–7.41; Atanasova et al. 2014, p. 387). One of the first publicly known investment arbitration awards comprehensively addressing the availability of host-State counterclaims was *Saluka v. Czech Republic*. The broad treaty language granting jurisdiction to 'all disputes…concerning an investment' in conjunction with the UNCITRAL Rules was found to allow counterclaims in principle (*Saluka*, p. 39). Yet the counterclaims were not admitted since the Tribunal found mere factual *connexion* to be insufficient, requiring legal *connexion* as well (*Ibid.*, pp. 78, 79). Various subsequent cases followed this approach. A notable example is *Paushok v. Mongolia,* where the Tribunal rejected a counterclaim for 'violation of environmental obligations' for lack of a legal *connexion* as it related to Mongolian legislation and regulation and not the applicable treaty (*Paushok*, pp. 678, 696).

The *Saluka* approach is problematic for host-States who have suffered damage caused by an investor. Under an asymmetrical IIA the host-State will be hard-pressed to identify a legal basis for counterclaims within the IIA itself, for environmental damage or otherwise. That is not to say that investors do not have legal obligations to host-States, however counterclaims for environmental damage are most often based on domestic environmental law, not IIAs. Despite procedural rules authorizing counterclaims generally, the *Saluka* line of cases indicates that unless there is express language in the operative treaty allowing for application of host-State domestic law, domestic law will not form a valid basis for admissible counterclaims since the requisite legal *connexion* would be missing. This renders environmental counterclaims virtually impossible under most circumstances and has been criticized by various authors as too demanding (Kjos 2007, p. 46; Lalive and Halonen 2011, pp. 7.41–7.42; Douglas

[3] That the investor's claims and host-State's counterclaims are based on the same facts.

[4] That the investor's claims and host-State's counterclaims are based on the same law, e.g., a BIT.

2013, pp. 430–431; Atanasova et al. 2014, p. 383) and 'makes the apparent availability of counterclaims a mirage' (Lalive and Halonen 2011, p. 7.40).

Nevertheless, a preponderance of recent cases suggests that legal *connexion* is not necessary (Hussin 2019, p. 6) indicating that tribunals are moving away from this requirement. For example, the *Goetz v. Burundi* Tribunal unanimously found a factual nexus between the claims brought by the investor and the counterclaims brought by the State to be sufficient (*Goetz*, pp. 282–285). As the applicable BIT permitted claims to be resolved based on the BIT, as well as national and international law, when read in conjunction with the ICSID regime it was interpreted as authorizing counterclaims (*Ibid*., pp. 276–281). More recently, in *Urbaser v. Argentina*, the investors objected to Argentina's counterclaims based on the asymmetric nature of the operative BIT. However, the Tribunal found that the BIT's dispute resolution clause containing neutral language clearly indicated that a factual connection between the original and counterclaims was sufficient to take jurisdiction over the counterclaims (*Urbaser*, p. 1151). It recognized that while '[i]t is certain and undisputable that the BIT's main and manifestly prevailing focus is on a number of standards of protection for the investors rights and interests… there is no provision stating that the…host-State would not have any rights under the BIT' (*Ibid*., pp. 1183–1184).

Doctrinal approaches have also evolved. Zachary Douglas has discerned a general principle from the practice of various international tribunals that the subject matter jurisdiction of an international tribunal 'extends to counterclaims unless expressly excluded by the constitutive instrument' (Douglas 2013, p. 427). While this 'express exclusion' approach has by no means been uniformly adopted (Atanasova et al. 2014, pp. 386–387), the approach is very much a deviation from the *Saluka* line of cases, and a welcome development for advocates of allowing host-State counterclaims for environmental damage.

Moreover, there is growing evidence that arbitral practice is moving in a more permissive direction concerning host-State counterclaims for environmental damage in particular. ISDS tribunals are not immune from the global shift towards increased awareness on environmental issues (Hussin 2019, p. 10) and have recently identified the importance of reconciling the at times seemingly disparate areas of foreign direct investment and environmental law. Counterclaims for environmental damage were recently granted in the related cases of *Perenco v. Ecuador* and *Burlington v. Ecuador*. Notably, the *Perenco* Tribunal stated:

> Proper environmental stewardship has assumed great importance in today's world. The Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law. (Interim Decision on Counterclaims, p. 34)

Nevertheless, whether counterclaims are permissible remains a grey area depending on many legal factors (Atanasova et al. 2014, p. 358). The *Perenco* Tribunal recognized the fragmented nature of this field of law as it qualified its decision to grant full reparation to Ecuador by stating that this is generally possible only if 'the legal relationship between the investor and the State permits filing' of a counterclaim for environmental damage (Interim Decision on Counterclaims, p. 34). Unless and until there exist multilateral efforts clarifying the availability of counterclaims in ISDS generally, this lack of clarity will persist.

3 Possible legal bases of counterclaims for environmental damage in treaty-based ISDS

Even where procedurally permissible, host-State counterclaims for environmental damage are only effective if based on legal obligations owed by the foreign investor to the host-State. Once the applicable law subject to the Tribunal's mandate is determined, the host-State must point to an obligation owed by the foreign investor based on that law. Careful analysis of the operative agreement is required to determine whether claims can be made under (a) the IIA only, (b) the IIA alongside customary international law, (c) the IIA, customary international law and domestic law, or (d) some other combination of applicable laws. The importance of this issue cannot be understated since a breach of legal obligations by the investor will often be based on domestic, rather than international law, which may not be subject to ISDS depending on the relevant treaty language.

3.1 Legal obligations based on host-State domestic law

Thus, the question arises, when can domestic law form the basis of host-State counterclaims? Due to the fragmented nature of international investment law, the answer is that classic legal answer of 'it depends'. With broad treaty language and factually connected claims, domestic legal obligations should be permitted as the legal bases of such claims (Douglas 2013, pp. 424, 433, 442–443; Lalive and Halonen 2011, pp. 7.32–7.33). For example, wording such as 'all disputes relating to the investment' would likely support counterclaims based on domestic environmental law (Viñuales 2010, p. 19). Naturally, this is also the case when a treaty expressly references the domestic law of the host-State as being applicable, as in *Goetz*, or where an investor does not contest that a tribunal is the appropriate forum for resolution of the counterclaims as was the case in *Burlington* and *Perenco*. Where domestic law is applicable, a tribunal may need to resort to expert testimony from local legal experts concerning application of domestic environmental laws. This is not problematic per se as investment arbitration tribunals regularly rely on such experts appointed by the parties when examining complicated issues of local law.

On the other hand, a treaty may contain a narrowly drafted applicable law provision restricting a foreign investor's obligations to those found in the operative treaty, if any. In such cases, there is no realistic avenue for counterclaims based on host-State domestic law to be successful. As an asymmetrical IIA typically imposes no obligations on a foreign investor, the substantive legal base for such claims will be lacking. Examples of such narrowly tailored language can be found in the Energy Charter Treaty[5] and the former NAFTA.[6] That is not to say that domestic environmental law is completely irrelevant in such circumstances, however, domestic laws and investor compliance would be issues of fact, not law. (*Ibid*.)

Additionally, treaty language is not always clear concerning the issue of applicable law. For example, an IIA may have no express language concerning the applicable substantive law. Here, reference to the governing procedural rules is useful. ICSID Convention Art. 42(1) states that where parties failed to agree on applicable law, 'the Tribunal shall apply the law of the Contracting State party to the dispute…and such rules of international law as

[5] Art. 26(1).

[6] Arts. 1116 and 1117.

may be applicable.' UNCITRAL Rules Art. 35 provides that where parties fail to designate applicable law, 'the arbitral tribunal shall apply the law which it determines to be appropriate.' In both situations it is possible that host-State environmental laws could form the basis of counterclaims, if a factual *connexion* to the investor's claims is present. Such situations must be addressed on a case-by-case basis.

3.2 Legal obligations based on international law

Treaty language permitting, international law may provide a separate basis for host-State counterclaims. This leads to an additional question concerning which sources of international law impose international legal obligations on foreign investors. Treaties and customary international law, for environmental protection or otherwise, generally impose obligations directly on States, not private parties. Nevertheless, there are various international legal obligations which can *potentially* be imposed upon investors.

3.2.1 Counterclaims based on human rights obligations

Since IIAs give investors the right to invoke international legal instruments, the question arises whether such investors can conversely be subject to obligations under international law, including human rights obligations. In this context, the *Urbaser* Award is notable for its consideration of a host-State counterclaim concerning the human right to water. It rejected the notion that 'corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations' (*Urbaser*, p. 1194). The Tribunal reasoned that since corporations have rights under international law, they may also have obligations. Specifically, 'international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce…it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law' (*Ibid.,* p. 1195). Moreover, the operative BIT's broad wording permitted the Tribunal to determine that it was not 'to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors' (*Ibid.*, pp. 1188, 1189). Instead, the BIT was interpreted in light of relevant rules of international law applicable in the relations between the parties, including those relating to human rights (*Ibid.*, pp. 1200, 1201). Accordingly, the Tribunal cited Art. 25(1)[7] and Art. 30[8] of the Universal Declaration of Human Rights ('UDHR'), Art. 5(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),[9] and the International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy to support the conclusion that there is an obligation on all parties, *public and private*, not to engage in activities aimed at destroying the human rights of others (*Ibid.,* pp. 1196, 1199).

[7] 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service'.

[8] 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

[9] 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.'

Nevertheless, private parties are not subject to the same international legal obligations as States, thus, a host-State must identify as a particular cause of action the specific international law obligations imposed upon a private party (*Ibid.,* p. 1206). The *Urbaser* Tribunal made an important distinction between an obligation to perform and an obligation to abstain. It highlighted that a State's obligation to perform certain acts transfers to investors through a contractual framework subject to domestic, but not international law (*Ibid.,* p. 1210). To the contrary, obligations to abstain from committing acts violating human rights under international law can apply to both States and private parties (*Ibid.*). Argentina's human rights obligation to provide drinking water and sanitation services was an obligation to perform and transferred to the investor via contract, not international law. Thus, the Tribunal could not find an independent human rights *obligation of the investor* sourced in international law that corresponded to *Argentina's obligation* to provide water and sanitation (Schacherer 2018, p. 30). The counterclaim consequently failed.

As *Urbaser* engaged in a novel approach to the role of human rights in the ISDS context, it is not without its criticisms. Patrick Abel's analysis of the case argues that the Tribunal's reasoning was obscure (Abel 2018, pp. 68, 72). He takes issue with the conclusion that corporations can have human rights obligations arguing that international law has not arrived at this conclusion (*Ibid.,* p. 83). His position is that corporations can only have non-binding 'responsibilities', and the Tribunal conflated non-binding human rights norms with legally binding human rights obligations (*Ibid*., pp. 77–79). Edward Guntrip argues that Article 30 UDHR and Article 5(1) ICESCR are self-containing and aimed at preventing the deliberate misinterpretation of one human rights obligation found in each respective document to justify the violation of other rights found therein (Guntrip 2017). He contends that a general obligation to abstain is not clearly established by these provisions, since based on a restrictive interpretation they do not apply to rights sourced from other treaties (*Ibid.*).

Despite these disagreements, in the relatively short time since *Urbaser*, at least one other tribunal has been convinced to follow the approach in part. *Aven v. Costa Rica* relied on *Urbaser* for the proposition that while it is primarily to States to enforce environmental law, 'it cannot be admitted that a foreign investor could not be subject to international law obligations in this field, particularly in the light of (the broad treaty language of the applicable IIA)' (*Aven,* p. 737). The Tribunal further opined:

> This Tribunal shares the views of *Urbaser* Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment.' (*Ibid.,* p. 738).

Nevertheless, Costa Rica did not prevail on its counterclaims. First, the Tribunal stated that the articles of the IIA upon which Costa Rica based its counterclaims did not 'in and of themselves – impose any affirmative obligations on investors' (*Ibid.*, p. 743). In other words, Costa Rica failed to base its counterclaim on international law obligations of the investor. Whether this impliedly adopted the *Urbaser* approach juxtaposing an affirmative obligation to perform with a negative obligation to abstain is not clear. The Tribunal did not engage in this analysis, likely because Costa Rica also failed to make adequate factual allegations, thus contributing to the failure of the counterclaims (*Ibid.,* p. 745).

Similarly, in his Partial Dissenting Opinion in *Bear Creek Mining v. Peru*, Philippe Sands cited *Urbaser* for the notion that even though a convention may not impose obligations directly on a private party investor, this does not mean that it is without legal effects for the investor (*Partial Dissenting Opinion,* p. 10). Sands directly quoted *Urbaser*

concerning the obligation of private parties not to engage in activity aimed at destroying human rights and highlighted that a BIT 'has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights' (*Ibid. citing Urbaser,* pp. 1199, 1200). He then used this reasoning to invoke ILO Convention 169,[10] stating:

> This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation (*Ibid.,* p. 11).[11]

Under Article 15 of ILO Convention 169, indigenous people have a right to participate in the use, management and conservation of natural resources. Ultimately, Professor Sands found that the Claimant did not fully allow local communities to exercise legitimate interests and rights in their land,[12] failed to engage in proper community relations, and did not provide an adequate opportunity for members of certain communities to participate in essential consulting processes (*Ibid*., pp. 35, 36). The dissenting opinion did not explicitly differentiate between whether the rights at issue were based on obligations to perform or abstain. Yet, that the Claimant prevented, or at least did not allow, legitimate rights and interests to be exercised can properly be construed as a failure to abstain from destroying the rights of others, and conforms with the *Urbaser* approach.

Since ISDS cases are heavily dependent on the language of the operative IIA along with the factual circumstances of the case, and ultimately the interpretation of the Tribunal seized, no general conclusions can be derived concerning whether human rights obligations can be imposed on an investor in a given case. Nevertheless, a roadmap is present. The *Urbaser* line of cases opens the door to human rights-based host-State counterclaims and the obligation to abstain from activities aimed at destroying human rights may provide a cause of action for environmental damage caused by an investor in ISDS proceedings. Should States find the approach to be desirable, ongoing multilateral discussions are capable of defining the parameters of human rights-based counterclaims and clarifying how and when they may be used in future investor-State disputes.

3.2.2 Counterclaims for environmental damage based on human rights obligations

In *Urbaser*, the specific human right at issue was the right to water, officially recognized as a human right by the UN in 2010 (Resolution 64/292). However, unlike the right to water, there is as of yet no expressly recognized universal international human right to a safe, clean, healthy, and sustainable environment ('right to a healthy environment'). While the ongoing work of the UN Human Rights Council Special Rapporteur on Human Rights and the Environment ('Special Rapporteur') may lead to recognition of such a right in some form, the international community has not expressly arrived at this point. This does

[10] Indigenous and Tribal Peoples Convention 1989.

[11] Importantly, the applicable law clause of the operative IIA provided that the Tribunal '*shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*' allowing for ILO Convention 169 to be taken into consideration as a rule of international law applicable to Peru. *See Partial* Dissenting Opinion at p. 11.

[12] E.g., participating in the use, management, and conservation of natural resources, as well as participating in the benefits of the investment project.

not indicate that human rights and environmental protection are disparate areas of law, in fact, the contrary is the case. Since at least the Stockholm Declaration of 1972 there has been international recognition of the link between human rights and environmental protection and it has been 'firmly established…that environmental degradation can and does adversely affect the enjoyment of a broad range of human rights' (Knox 2013, p. 17). Additionally, 155 States have recognized the right to a healthy environment in some form, and there have been consistent recommendations in recent years that the right be globally recognized as fundamental. (Knox and Boyd 2018, p. 36; UN Experts 2019).

Moreover, the Special Rapporteur recently outlined that all States, including those yet to recognize the right to a healthy environment, have obligations as set out by the Framework Principles on Human Rights and the Environment ('Framework Principles') (Boyd 2019, p. 8). Said principles do not create new obligations, '[r]ather, they reflect the application of existing human rights obligations in the environmental context.' (Knox 2018, p. 8). Yet, in many cases, resort to non-binding concepts such as those elaborated by the principles will not be required in practice. Once again, fragmentation prevails. As more than 80% of UN Member States legally recognize the right to a healthy environment in some form (Boyd 2019, p. 13), a universally recognized right will often not be necessary to form the basis of a host-State counterclaim against a private party to abstain from destroying that right. Whether a legally recognized right to a healthy environment exists as the basis for a host-State counterclaim must be determined on a case-by-case basis by looking at the host-State's human rights obligations found in regional agreements and national law (Knox 2018, p. 11).

Still, until the right to a healthy environment is fully recognized by the international community, where there is doubt concerning whether the right exists, a host-State counterclaim may be better grounded in other discrete human rights concepts implicated in the context of environmental damage. Under the *Urbaser* approach, a cause of action may be based on allegations that the investor failed to abstain from engaging in activity aimed at destroying some other recognized human right, thus leading to environmental damage. Examples of such rights include environmental threats to the right to the enjoyment of the highest attainable standard of physical and mental health,[13] and the right to an adequate standard of living and its components[14] (Knox 2013, pp. 20, 21). The 2018 Framework Principles acknowledged this 'greening' of existing human rights, but at the same time favoured explicit recognition of the right to a healthy environment, arguing that it raises the profile and importance of environmental protection. (Framework Principles 2018, pp. 12–14). It remains to be seen whether the international community will follow this call to action.

3.2.3 The role of transnational public policy

Should a host-State find it difficult to base a potential counterclaim for environmental damage on domestic legal obligations or international human rights approaches, transnational public policy may provide an additional path for such claims. Transnational public policy refers to generally accepted fundamental international principles across legal systems that

[13] E.g., improper disposal of toxic waste, exposure to radiation and harmful chemicals, oil pollution, and large-scale water pollution.

[14] E.g., improper use of pesticides as a threat to the right to food, waste from extractive industries infringing the right to water.

are part of the public policy of a majority of States (Kreindler 2015, p. 10; Lew 2018, pp. 25–26). It consists of norms relating to a range of issues, from maintenance of international public order to incorporating into law universal moral or ethical foundations linked to the survival of our species (Gowlland-Debbas 2011, p. 245). Further, it signifies an international consensus accepted by 'civilized nations' that must be applied (Lew 2018, p. 22). Such consensus is not demonstrated using any singular source but rather through various sources, including international convention law, national law, arbitral case law, general principles of law, scholarly writings, and customs and usages (Jagusch 2015, pp. 29, 32; Kreindler 2015, pp. 10–11; Lew 2018, pp. 22, 30). Unanimity is not required (*Ibid.*), however, the principles should be 'largely recognized by the international community' (Lew 2018, pp. 22–23). Convergence of national laws on a particular point is a strong indicator that transnational public policy exists (Jagusch 2015, p. 29), as is convergence between various sources in addition to national laws (Lew 2018, pp. 27–28). Rather than consisting of a list of discrete principles, it is perhaps best viewed as a method that examines a combination of sources to determine its existence in specific circumstances (*Ibid.,* pp. 29, 32). 'Which rule or principle should be applied in a particular case will depend on the facts and the way in which the arbitral tribunal "sees" the case at the relevant time' (Hunter and Conde e Silva 2003, p. 369).

Application of transnational public policy in ISDS as a general matter is not novel (Jagusch 2015, p. 45). A well-known example is *World Duty Free v. Kenya* where the Tribunal expressly applied transnational public policy against bribery and corruption (*World Duty Free*, p. 157). In the context of transnational public policy, there is clearly consensus that corrupt behaviour is prohibited (Kreindler 2015, pp. 10–11). Consensus exists despite divergent approaches between jurisdictions and international legal instruments concerning important issues such as how an arbitral tribunal determines that actions are corrupt (Lew 2018, pp. 34–35, 39). The *World Duty Free* Tribunal found consensus by looking to the national law of many countries, numerous international conventions, and arbitral jurisprudence (*World Duty Free*, p. 141 *et seq*; Jagusch 2015, p. 35). It noted that since transnational public policy demonstrates international consensus, norms considered transnational public policy are applicable in all *fora* (*World Duty Free*, pp. 139, 141; Lew 2018, p. 58).

The *World Duty Free* approach towards transnational public policy can be transposed to human rights and environmental damage. Despite divergent approaches between national and international legal instruments concerning human rights and the environment, consensus concerning various fundamental rules, principles, and norms can be observed. The Special Rapporteur identified this consensus and established that a great majority of countries have recognized the right to a healthy environment at the national or regional level, while simultaneously acknowledging a 'greening' of other human rights principles by treaty bodies, regional tribunals, and other special rapporteurs (Framework Principles 2018, pp. 11–13).

The rationale behind treating principles concerning human rights and the environment as transnational public policy is clear. Both human rights and environmental law have principles and rules of a fundamental character whose binding force is derived from their underlying rationale and relevance for protection of fundamental global interests (Gowlland-Debbas 2011, p. 246). Accordingly, it should be generally accepted that such principals have a role in international arbitration (Jagusch 2015, p. 45). Giving effect to such policy in ISDS proceedings is fundamentally logical. ISDS tribunals are capable of advancing

transnational public policy concerning human rights,[15] and simultaneously the environment,[16] by enforcing such policy in the context of environmental damage (Miles and Nichols 2017, p. 126; *World Duty Free,* pp. 142–157). Transnational public policy upholding minimum standards of conduct accepted in most countries concerning environmental damage and human rights does not conflict with trade and investment, rather it increases predictability and stability. Thus, the question arises, in the context of a host-State counterclaim for environmental damage, what transnational public policy is relevant? While this is dependent on the specificities of a given case, it could take various forms.

The first concerns the responsibility of private parties under international law. The principle that corporations themselves have a responsibility to respect human rights is one of the pillars of the normative framework which applies to environmental human rights abuses (Knox 2013, p. 59). While this responsibility has been described as a moral rather than legal obligation, international law is clearly moving towards imposing human rights obligations on private parties, and transnational public policy is arguably already there. Special Rapporteurs Knox and Boyd recognized in their 2018 joint report that, in line with the UN Human Rights Council Guiding Principles on Business and Human Rights ('Guiding Principles') businesses have a responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm (Knox and Boyd 2018, p. 18). Guidelines, recommendations, and other instruments created by international organizations can form part of transnational public policy 'because they have been widely accepted by different societies around the world' (Kessedjian 2007, p. 861). Furthermore, Framework Principle 12 states that 'States should ensure the effective enforcement of their environmental standards (which may be derived from international legal obligations) against public and private actors', and as the official commentary clarifies, States should punish and redress violations of environmental standards by private parties (Framework Principles 2018, p. 34). The *Urbaser* line of cases further evidences this movement towards holding private parties responsible as subjects of international law under certain circumstances. While some commentators may disagree with this approach, convergence of a variety of sources on this point is taking place, and a line of cases recognizing that private parties can be subjects of international law is developing in the ISDS sphere.

Second, there is a pertinent question concerning whether the principle that private parties must abstain from destroying rights of others can be considered transnational public policy. Despite criticisms of the *Urbaser* Tribunal's reasoning on this issue, its approach is in line with the Guiding Principles. The Principles articulate a fundamental principle that 'business enterprises…should avoid infringing on the human rights of others' and 'requires that business enterprises…[a]void causing or contributing to adverse human rights impacts through their own activities.' (Guiding Principles 2011, p. 11). While these principles have been said to consist of non-binding responsibilities of corporations, their language imply obligation, and in addition to the transnational public policy indicating that private parties can be subject to international law obligations, evidences growing consensus that, quite simply, corporations must not violate human rights. The commentary to Framework Principle 12 echoes the approach found in the Guiding Principles stating that 'the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing

[15] As reflected by myriad sources, e.g., the International Bill of Rights, Guiding Principles on Business and Human Rights, the Revised Draft, regional instruments, and the work of the UN Human Rights Council.

[16] As reflected by, e.g., the Stockholm and Rio Declarations, the work of the Special Rapporteur, myriad international environmental law treaties, and the law of 155 countries.

or contributing to adverse human rights impacts through environmental harm.' (Framework Principles 2018, p. 35). Similarly, the UN's revised draft Treaty on Business and Human Rights ('Revised Draft') underlines in its Preamble that 'all business enterprises…have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities…' While this instrument is still in its early stages, the international community is clearly moving towards upholding this policy.

Third, while there is no multilateral legal instrument formally recognizing a right to a healthy environment, transnational public policy has also developed in this context. The right enjoys wide recognition by States combined with numerous international conventions concerning affirming the right. Again, 155 States have recognized the right to a healthy environment in some form. An additional 36 States have signed non-binding international declarations explicitly incorporating the right. Thus, of 193 UN member States, only Oman and North Korea have not expressed support for the right to a healthy environment. (Knox and Boyd 2018, pp. 34, 36). Additionally, arbitral jurisprudence has consistently underlined the importance of environmental protection. Despite multilateral foot dragging in developing a formal right to a healthy environment, the international consensus surrounding this issue indicates the existence of applicable transnational public policy. Ongoing ISDS reform efforts provide an additional opportunity to expand on this consensus, as well as define the extent to which transnational public policy can be used in ISDS proceedings.

4 Future developments: towards defragmentation?

As outlined above, proponents of ISDS must engage in non-superficial reforms in an effort to preserve the system to the extent possible. From an environmental protection standpoint the current fragmented, case-by-case basis approach to the availability of host-State counterclaims for environmental damage is undesirable and inefficient. Regulation of business enterprises to protect against human rights abuses resulting from environmental harm is of paramount importance, and remedies for such abuses need to be available (Knox and Boyd 2018, p. 17). One such remedy may be increased use of host-State counterclaims for environmental damage in ISDS proceedings. While counterclaims are not a panacea, they are considered by UNCTAD to be an 'Improved ISDS Procedure' and form part of the reform toolkit for rebalancing of the asymmetrical nature of ISDS (Issues Note 1 2019: Box 1). In evaluating foreign investment projects, many governments, especially those who rely heavily on foreign investment for development, may not have the technical capacity to identify potential human rights abuses and environmental damage until after the fact (Boyd 2020, p. 22). The availability of host-State counterclaims for environmental damage in ISDS could serve a balancing function in such situations. Furthermore, the specter of counterclaims could potentially have an important deterrent effect on bad behaviour. Still, while the window is currently open for cooperative multilateral reforms, enabling host-State counterclaims remains one of the least frequent procedural reforms included in recent IIAs (Issues Note 1 2019, Box 1, Table 4; 10). The question remains whether ongoing UNCITRAL reform efforts could lead to a uniform approach in this regard, and if so, what would it look like?

As treaty language and arbitral jurisprudence provide little uniformity concerning host-State counterclaims for environmental damage, the most effective way to allow such claims is through systemic reform to treaty practice. 'This could take the form either of

interpretative notes about existing treaty text, or more likely the negotiation of specific provisions about counterclaims in new treaties' (Kalicki 2013). Should States so desire, there are few barriers to including clauses permitting host-State counterclaims for environmental damage in the new generation of IIAs. In fact, there has been a clear trend in treaty practice towards including environmental clauses in IIAs in recent years (Viñuales 2016, p. 14; Hussin 2019, p. 4). Practically speaking however, for there to be any semblance of consistency and harmonization, an approach clarifying the availability of host-State counterclaims under existing treaties needs to be simultaneously developed. The majority of ISDS cases are under old-generation IIAs where the availability of counterclaims may not be clear. Of the 71 known treaty-based ISDS cases initiated in 2018, all but one were under treaties signed before 2012 (Issues Note 2 2019, p. 3). If reform is piecemeal and only addresses new-generation IIAs, this could have the adverse effect of creating additional fragmentation, uncertainty, and complexity in an already murky area of the law (Issues Note 1 2019, p. 26). Therefore, modernizing old-generation treaties remains a priority and 'so far such reform actions have addressed a relatively small number of IIAs…(thus) there is broad scope and urgency to pursue them further' (Issues Note 3 2019, pp. 4, 8).

Should States find it desirable, procedural reform of new and existing treaties should expressly authorize host-State counterclaims. Innovative treaty language could make it clear that when an investor accepts a host-State's offer to arbitrate found in an IIA, it is also consenting to the host-State being able to bring a claim against it. In other words, IIAs could give investors the choice to consent to host-State counterclaims or relinquish their rights under the agreement. This would work to rebalance the asymmetry found in old-generation IIAs by avoiding situations whereby an investor can bring claims against a host-State while being insulated from its own wrongdoing in the ISDS sphere. Concerning the substantive elements of IIAs, treaty practice can be modernized to expressly impose obligations linked to domestic environmental obligations upon investors. Regarding newly negotiated treaties, treaty language must simply require that investors follow domestic environmental laws and regulations. For old-generation IIAs, amendments are capable of expressly clarifying whether violation of domestic environmental obligations could provide a valid cause of action upon which a host-State could base a counterclaim.

Treaty practice can also be modernized concerning international norms. As environmental concerns have hitherto been sidelined in favour international economic cooperation, integration of environmental norms into international economic agreements is necessary to prevent them from continued relegation in this context (Sands 2003, p. 53). States regularly use language in investment contracts requiring investors to follow domestic legal obligations as well as international norms (Douglas 2013, pp. 434–435), and the contractual practice should be extended to treaty practice. A potential solution for both old-generation and new treaties is to reference relevant global standards. Doing so would avoid the thorny issue of whether obligations found outside of the four corners of an IIA should be integrated therein, as the obligations would then originate in, or at a minimum be incorporated by reference, in the agreement itself (Abel 2018, p. 83). In addition to the aforementioned Framework Principles and Guiding Principles, reference could be made to the UN Charter, the Universal Declaration of Human Rights, UN Global Compact, OECD Guidelines for Multinational Enterprises, and UN 2030 Agenda for Sustainable Development (Issues Note 3 2019, p. 6). There is evidence that this practice has begun to take root, as voluntary standards and guidelines have started to appear in new-generation IIAs, generally in the

context of corporate social responsibility (Lahlou et al. 2019).[17] Thus, for the advocate of increasing the availability of host-State counterclaims for environmental damage the way forward is for States to engage in treaty practice that expressly allows counterclaims based on domestic law as well as international norms. This requires harmonization of State approaches as well as clear applicable law clauses in IIAs.

While modifying each existing treaty may be overly cumbersome, interpretive notes may provide an additional way forward. Multilateral cooperation (perhaps under the auspices of WGIII) and development of common interpretations of regularly recurring language found in old-generation IIAs could be a novel, but useful way to achieve this. Such interpretations could allow States to harmonize positions concerning various issues such as:

(a) Whether counterclaims can be based on host-State domestic environmental laws and regulations;
(b) Whether, and to what extent human rights obligations can be imposed on investors;
(c) Whether there is a general right to a healthy environment;
(d) Whether, and to what extent transnational public policy can be used in ISDS proceedings.

Another important issue concerns situations where the foreign investor owning an investment in a host-State is protected by the corporate veil from lability for environmental damage caused by its investment. If the local entity in the host-State caused the damage, the question arises as to whether the corporate veil should be pierced to hold a shareholding entity from the investor-State responsible. An in-depth analysis of this important issue is beyond the scope of this article, but as with other concerns regarding host-State counterclaims, issues concerning corporate veil protection when investments have caused environmental damage could also be resolved by treaty language and/or interpretive notes should States so desire. Whether States move in this direction remains to be seen, however, the Revised Draft, as well as the Guiding Principles indicate movement towards holding parties responsible,[18] despite complex business relationships and structures, for transnational human rights violations (Revised Draft 2019, Art. 6; Guiding Principles 2011, Arts. 13, 14).

5 Conclusion

Due to the fragmented nature of investment law, determining whether host-State counterclaims for environmental damage are available in ISDS proceedings can feel comparable to wandering through a labyrinth. Nevertheless, this article has highlighted emerging human rights and transnational public policy bases for host-State counterclaims for environmental damage. As demonstrated above, trends indicate that more permissive approaches towards allowing such claims where they are factually connected to the underlying claims and not

[17] Examples include the EFTA—Indonesia CEPA (2018) and the Canada—EU CETA (2016).

[18] If counterclaims for environmental damage succeed, questions concerning appropriate remedies arise. While this issue is beyond the scope of this article, remedies will generally need to be addressed taking the factual elements of a dispute into consideration, in order to determine whether primary (i.e., preventative or restorative) or secondary (i.e., pecuniary damages) remedies are most appropriate.

outside the parties' consent are prevailing. Still, even where tribunals allow counterclaims, host-States often struggle to ground claims on obligations owed by investors founded on law that the tribunal has the authority to apply. Where claims based on domestic environmental law are unavailable, the emerging human rights-based approach to host-State counterclaims for environmental damage may provide adequate grounds. Moreover, transnational public policy arguments, while yet to be tested in this specific context, may provide additional grounds for environmental counterclaims. In the end however, it is States who shape ISDS, and should States wish to harmonize their approaches and balance the inherent asymmetry of the procedure by uniformly authorizing factually connected counterclaims, they may engage in treaty practice which achieves this. Furthermore, the FDI landscape is not fixed. As development increases, so does the competition between states to attract investment alongside the heterogeneity of FDI projects. Even if available, competing political interests and other factors may steer countries away from pursuing counterclaims. Nevertheless, with the ongoing ISDS reform providing a forum, there presently exists an important opportunity for increased discussions concerning the asymmetric nature of ISDS alongside investment law's relationship with environmental and other societal issues. Whether States ultimately take up their rights remains to be seen.

Author's contribution

I declare that I solely drafted the work, critically revised it for important intellectual content, approved the version to be published, and agree to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved.

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The Guide to Mining Arbitrations

Editors
Jason Fry QC and Louis-Alexis Bret

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

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Being at the centre of the international arbitration community, we often become aware of fertile ground for new books – important topics yet to be covered. Recently, mining disputes emerged as one such gap.

One might blithely assume mining is little different from energy (for which we have *The Guide to Energy Arbitrations*). But as our editors Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face different risks. Unlike a lot of oil and gas exploration, mining projects are on-land and visible, meaning they depend on the blessing of their neighbours, and are more likely to become politicised. It is also much easier to value an early-stage oil and gas asset than a mine, which has implications for both damages and how stakeholders behave. And different substantive principles apply. The *lex mineralia* is not the *lex petrolia* and owes more to rulings from Australia and Canada than Texas.

But above all, the era of hydrocarbons is waning, while that of minerals and metals is in the ascendant. Copper, cobalt, lithium, silicon and zinc are at the heart of our evolution towards a cleaner planet. Without them and a growing array of other rare minerals – no batteries, circuit boards or solar panels, and one day, who knows, no future. But that, in itself, brings tensions to the endeavour.

For all these reasons, we thought it was high time we covered mining disputes in the esteemed GAR Guides series. The book you are reading – *The Guide to Mining Arbitrations* (second edition) – is the result. It is a practical, know-how text, organised in three parts:

- Part I identifies issues most salient in mining arbitrations, which tend to be driven by the unique nature of mining and metals as a business;
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My thanks to the editors for their vision and energy in pursuing this project and to my Law Business Research colleagues in production for achieving such a polished work.

David Samuels
London
May 2021

Contents

Part III: Regional Issues in Mining Arbitration

4

The Rise of Environmental Counterclaims in Mining Arbitration

Yasmine Lahlou and Rainbow Willard[1]

Increased foreign direct investment by multinational mining companies has given rise to a growing number of international arbitration claims, both contract and investment treaty based.[2] Many of these have at least some connection to the environment.[3] Investors regularly invoke violations of the fair and equitable treatment standard or claim an indirect expropriation on the basis of a state's adoption or enforcement of environmental regulations.[4] Meanwhile, in a number of recent investment arbitrations – including in several mining disputes – states, too, have asserted counterclaims relating to the environment

1 Yasmine Lahlou is a partner and Rainbow Willard is a counsel at Chaffetz Lindsey LLP. The authors would like to thank Alicia Yeo for her indispensable assistance in preparing the updated version of this chapter.

2 See, e.g., *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (concerning a gold mining investment in the United States); *Sergei Paushok et al. v. The Government of Mongolia*, UNCITRAL, Award, 28 April 2011 (concerning a gold mining investment in Mongolia); *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (concerning a gold mining investment in Venezuela); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (concerning a silver mining investment in Peru); *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-14, UNCITRAL, Award, 22 November 2018 (concerning a silver mining investment in Bolivia); *Pan African Burkina Limited et al. v. Burkina Faso* (ICC) (discussed in Cosmo Sanderson, 'ICC panel dismisses claim against Burkina Faso', Global Arbitration Review, 13 March 2019) (concerning a manganese mining investment in Burkina Faso).

3 See K Gordon and J Pohl, 'Environmental Concerns in International Investment Agreements: A Survey', OECD Working Papers on International Investment, 2011, p. 6.

4 See, e.g., *Glamis Gold v. United States*, Award (concerning claims that denial of gold mining permits for environmental and cultural reasons breached the North American Free Trade Agreement (NAFTA) standards of treatment).

against investors.[5] This seems to be indicative of a broader trend in states (1) asserting counterclaims more frequently in investment arbitration and (2) negotiating new treaties that may be more amenable to both counterclaims and environmental interests.

While historically states have alleged environmental violations as a defence in the mining context, it is becoming increasingly common for states to use these same environmental violations as a basis for a counterclaim. This growing number of state-asserted counterclaims in the mining context is part of a more general increase in state-asserted counterclaims in investment treaty arbitrations overall.[6] Still, as the number of such counterclaims grows, very few have succeeded. More often than not, they are rejected on jurisdictional or admissibility grounds.[7] Tribunals have struggled to find consent to arbitrate counterclaims in investment treaty language, particularly in the case of counterclaims that are not directly related to the investor's claims.[8] The very few counterclaims that proceed on the merits are usually rejected because tribunals find that the particular treaty does not create a substantive cause of action for a state.[9]

As treaties are often silent regarding the assertion of counterclaims, the customary practice of investment arbitration tribunals has provided the parameters for state-asserted counterclaims. There are three preliminary requirements for a counterclaim to be entertained on

5 See, e.g., *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017 (counterclaiming for violations of local mining regulations and the joint-venture contract); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Guatemala's Counter-Memorial, 7 December 2020 (raising a counterclaim for environmental remediation on the basis that claimants had violated Guatemalan law and were likely to abandon the mining project); *Paushok v. Mongolia*, Award (counterclaiming that the claimants violated their environmental obligations under gold-mining licences); *Rusoro v. Venezuela*, Award (raising environmental protections in the gold-mining sector as both a defence on the merits and a counterclaim). See also *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017 (awarding damages to the respondent on the basis of its environmental counterclaim); *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (upholding the respondent's counterclaim for environmental damage); *David Aven et al. v. The Republic of Costa Rica*, UNCITRAL Case No. UNCT/15/3, Final Award, 18 September 2018 (finding that an environmental counterclaim was available but inadequately pled under the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA)).

6 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bishkaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Anglo-American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019; *Burlington v. Ecuador*, Decision on Counterclaims; *Aven v. Costa Rica*, Final Award.

7 *Burlington v. Ecuador* and the companion case of *Perenco v. Ecuador* are the only instances we know of where a state succeeded on its counterclaim on the merits and won damages against the investor. In both of these cases, the investors asserted claims pursuant to the applicable investment treaty as well as under investment agreements or concession contracts. The counterclaims were largely decided on the basis of provisions contained in the contracts.

8 See Zachary Douglas, *The International Law of Investment Claims* (Oxford University Press 2009), ¶ 496 et seq. (discussing the requirement imposed by both ICSID and UNCITRAL tribunals that the counterclaim share a nexus with the investment).

9 See, e.g., *Rusoro v. Venezuela*, Award at ¶ 628; *Anglo-American v. Venezuela*, Award at ¶¶ 529–30.

the merits.[10] First, the investment instrument – whether an investment treaty or an investment agreement negotiated directly between the investor and the state – must provide consent to arbitrate counterclaims. Second, the investment instrument must provide a cause of action for the relevant counterclaim. Third, the claim must meet other procedural and substantive requirements, often arising from the governing arbitration rules.

State negotiators are actively engaged in drafting free trade agreements (FTAs), bilateral investment treaties (BITs) and other investment instruments that may change these tribunal-constructed parameters and make environmental counterclaims a strategic reality for states. Some new treaties squarely address counterclaims. Many of these treaties also acknowledge the states' right to regulate in the public interest, as well as recognising that a range of environmental and social impacts may arise from foreign direct investment (thus potentially creating causes of action that states can assert against investors).[11] Many of these treaties have yet to enter into force so no case law interpreting them yet exists.[12] Therefore, it remains to be seen whether these new treaty provisions will permit state-asserted counterclaims to meet jurisdictional and admissibility requirements, whether more environmental counterclaims will proceed on the merits, and whether any could lead to a state recovering damages on its counterclaim.

This chapter addresses state-asserted counterclaims in the investment treaty context. In particular, we examine the potential for environmental counterclaims in mining arbitrations asserted under an investment treaty. We do not address counterclaims asserted solely in the commercial context or pursuant only to investment agreements.[13] Nor do we address claims initiated by states pursuant to investment treaties.[14]

We first analyse how investment treaty tribunals have struggled to find consent to state-asserted counterclaims in treaties with vague or imprecise language, and then we discuss how some new treaties address this issue head on. We then examine how states have sought to articulate a cause of action when treaties stop short of imposing express obligations on investors and survey new treaty provisions that may give rise to more colourable causes of action. We examine some requirements and challenges that arise from institutional

10 These requirements are based on an analysis of publicly available arbitral decisions where tribunals have examined counterclaims.

11 See Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review*, 2018, p. 2806; Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties', *Chicago Journal of International Law*, 2017, p. 324.

12 Some (but not all) of these new treaties have been signed by states with developed mining industries. Even where the signatories do not have mining industries, these new provisions are important as they may be adopted by states that have rich mining resources. And even where these provisions are not in play, they may impact how tribunals address environmental counterclaims in the mining context.

13 For example, some of the earliest instances of state-asserted counterclaims arose in the context of contracts and investment agreements negotiated directly between the state and investor. See, e.g., *Klockner Company v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision, 21 October 1982; *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID, Decision, 6 January 1988; *Atlantic Triton v. Government of Guinea*, ICSID, Award, 21 April 1986. While we do not address cases that arose solely under investment agreements, we do discuss *Perenco v. Ecuador* and *Burlington v. Ecuador*, in which the investors raised claims arising both under treaties and under investment agreements.

14 For a discussion of investment arbitrations where the host state acted as claimant, see Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration', 1, *J. Int'l Disp. Settlement* 97–122 (2010).

rules, and briefly discuss how negotiators are now incorporating these requirements into express treaty terms. Finally, we conclude with general observations about the future of environmental counterclaims in this new treaty landscape.

A changing panorama: from implied to express consent

In most investment disputes, the scope of the parties' consent for purposes of jurisdiction – including whether the parties have consented to arbitrate counterclaims – is determined by the host state's offer to arbitrate (usually contained in a treaty).[15] While some tribunals have interpreted an investor's submission of a dispute to International Centre for Settlement of Investment Disputes (ICSID) or under the United Nations Commission on International Trade Law (UNCITRAL) Rules as sufficient to determine consent to state-asserted counterclaims,[16] in this section we focus solely on how tribunals have analysed consent that arises from the investment treaty and how treaty negotiators are addressing consent to arbitrate counterclaims in a new breed of treaties.

When an investor files an investment dispute against a host state, the investor accepts the state's standing offer to arbitrate on the same terms contained in the offer.[17] As a result, states unilaterally control the scope of consent. If the state offers its consent to arbitrate disputes including counterclaims, then the investor through its acceptance also consents to arbitrate counterclaims.[18]

Despite state control of the scope of consent, consent has historically been the most significant barrier to counterclaim jurisdiction in investment arbitration. This is because investment treaties historically focused on giving investors the right to seek a remedy in an international forum, as a means to attract investment, so consent to counterclaims was not expressly contemplated. Under these treaties, consent to arbitrate counterclaims exists

15 See Andrea M Steingruber, *Consent in International Arbitration*, § 14.16–14.17 (Oxford Int'l Arb. Series, First Edition, 2012) (interpreting Article 46 of the ICSID Convention to encompass exactly the same scope of counterclaims as agreed upon in the investment treaty or investment agreement) ('the provision expresses the fact that "the parties may vary or exclude the tribunal's power to deal with ancillary claims in their consent agreement or subsequently"', and 'the tribunal . . . has no discretion to refuse considering ancillary claims') (quoting G Petrochilos, S Noury and D Kalderimis, 'Convention of the Settlement of Investment Disputes between States and Nationals of Other States', in *Concise International Arbitration*, 2010, at ¶ 2 at Article 46 (The Hague: Kluwer Law International); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, ¶ 866 (indicating that whether the parties have consented to arbitrate counterclaims 'must be determined in the first place by reference to the dispute resolution clause contained in the BIT'.)

16 See, e.g., *Antoine Goetz & Consorts et S.A. Affinage des Metaux v. Republic du Burundi*, ICSID Case No. ARB/01/02, Award, 21 June 2012, ¶¶ 278–79 (adopting the Separate Opinion of Prof. Reisman in *Roussalis v. Romania* to find that election of a remedy under ICSID – including Article 46 of the ICSID Convention providing for counterclaims – 'ipso facto' constitutes consent to arbitrate counterclaims). cf. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 1015 (rejecting the reasoning in *Goetz v. Burundi*).

17 See Douglas, footnote 8, at ¶ 491 ('The consent is perfected by the investor's filing of a request for arbitration, which cannot expand or limit the host state's standing offer to arbitrate in the investment treaty.'); Hege Elisabeth Kjos, 'Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law', 112 (Vaughan Lowe QC et al. (eds), *Oxford Monographs in International Law*, First Edition, 2013).

18 See, e.g., *Urbaser v. Argentina*, Award at ¶ 1147 (noting that any attempt by Urbaser to accept an offer that was different than the one made by Argentina in the BIT would have resulted in no agreement to arbitrate at all).

implicitly or not at all.[19] Some newly negotiated treaties now include express consent to counterclaims. This express consent is, however, often limited in scope. In this section, we first discuss treaty language from which tribunals have interpreted implied consent in the past, and then we explore recent BITs and FTAs that expressly include consent to arbitrate state-asserted counterclaims.

Implied consent to arbitrate counterclaims

Investment tribunals historically have interpreted implied consent to arbitrate counterclaims on the basis of vague language or broad dispute resolution clauses in investment treaties. These tribunals have noted that a number of linguistic formulations provide implicit consent to arbitrate counterclaims, either because they exclude counterclaims under particular, defined circumstances, or because they broadly consent to arbitration of 'any' or 'all' disputes.

Implied consent to arbitrate some counterclaims by excluding others

Many treaties, while not expressly permitting the assertion of counterclaims, do appear to envision them generally by excluding counterclaims in specific circumstances. A common provision in BITs and FTAs prohibits counterclaims in one very limited situation: where a state attempts to invoke an investor's ability to receive indemnification or compensation for a claim under an insurance policy or guarantee contract. Based on basic canons of treaty construction, the exclusion of this single type of counterclaim would appear to allow for all other types of counterclaims.[20]

This was the case in *Aven v. Costa Rica*, where 'the only provision [of the Dominican Republic–Central America FTA (DR–CAFTA)] referring to "counterclaims"' provided:

> *A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.*[21]

19 One notable exception to this rule was the recent Decision on Counterclaims in *Burlington v. Ecuador*, where the investor signed an agreement consenting to arbitrate Ecuador's environmental counterclaims midway through the arbitration, essentially executing a post-dispute arbitration agreement in favour of the counterclaims. *Burlington v. Ecuador*, Decision on Counterclaims at ¶¶ 60–61.

20 M Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems', in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer, 2018) (discussing the application of the principle of *exclusio unis* in public international law).

21 *Aven v. Costa Rica*, Final Award at ¶ 693.

The *Aven* tribunal found that this language meant that counterclaims were, in principle, contemplated by the DR–CAFTA and were therefore within the scope of the parties' consent:

> *It follows that, except for a counterclaim by a respondent State alleging that 'claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract,' Respondent's right to counterclaim under the Treaty is contemplated and falls within the scope of jurisdiction of a tribunal constituted under the Treaty.*[22]

In *Kappes v. Guatemala*, Guatemala has used the *Aven* award to support its assertion of an environmental counterclaim in an investment dispute also brought pursuant to DR–CAFTA.[23] Guatemala seeks US$2 million for environmental remediation of a mining project, which the claimant asserts was expropriated by the state. This arbitration was still pending at the time of writing, so it remains to be seen how the tribunal will address the various questions relating to the state-asserted counterclaim.

Treaty negotiators continue to insert provisions prohibiting states from invoking an investor's ability to receive indemnification or compensation for a claim under an insurance policy or guarantee contract in current investment treaties.[24] For example, the Argentina–Japan BIT, signed in 2018, includes nearly identical language to the DR–CAFTA.[25]

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22 id. at ¶ 694.

23 *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Guatemala's Counter-Memorial, 7 December 2020.

24 Such provisions prohibiting state defences or counterclaims based upon insurance or guarantee contracts have been around since at least the early 1990s. For example, similar language appears in NAFTA. See North American Free Trade Agreement, entered into force 1 January 1994, Article 1137.3 ('In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.'). See also, e.g., Agreement Between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, adopted 24 November 1998, entered into force 10 May 2002, Article 13.8. ('In any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counterclaim, right of set-off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.'); Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment, signed 19 April 1994, entered into force 16 February 1997, Article VI.6 (similar language).

25 Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, signed 1 December 2018, not yet in force, Article 25.14 ('respondent shall not assert, as a defense, counterclaim, right of set off or otherwise, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract'); see also Free Trade Agreement between the Republic of Korea and the Republics of Central America (2018), signed 21 February 2018, entered into force 1 November 2019; Agreement between Australia and the Government of the Republic of Peru on the promotion and protection of investments (2018), signed 12 February 2018, entered into force 11 February 2020; Investment Agreement between the Government of the Hong Kong Special Administrative Region of The People's Republic of China and the Government of the Republic of Chile (2016), signed 18 November 2016, entered into force 14 July 2019.

Interestingly, the 2013 Kuwait–Singapore BIT contains the same prohibition, but implicitly contemplates counterclaims otherwise, noting that:

> *[i]n any proceeding under this Article, any counterclaim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other Contract Party and its subdivisions, agencies or instrumentalities.*[26]

This provision appears to permit any counterclaim or right of set-off to be asserted, provided that it is not based on the investor's right to receive indemnification under an insurance contract or otherwise. Provisions including this broad language may provide an even clearer path to a state-asserted counterclaim than the language of DR–CAFTA that paved the way for consent in *Aven*.

Consent to arbitrate 'any' or 'all' disputes

Meanwhile, many investment treaties provide broadly for arbitration of 'all' or 'any' investment disputes, without distinguishing between claims and counterclaims. Absent other limitations in these clauses, tribunals frequently find that they implicitly permit counterclaims. For example, in *Saluka v. Czech Republic*, the tribunal found that Article 8 of the Czech–Netherlands BIT, consenting to arbitrate 'all disputes . . . concerning an investment', authorised arbitration of counterclaims in principle.[27] However, without more, this language often leads to confusion as to whether treaty drafters intended to include consent to state-asserted counterclaims.

No consent to arbitrate counterclaims

Many tribunals have interpreted certain treaty language that imposes limitations on the scope of arbitral disputes as prohibiting counterclaims entirely. For example, some seemingly broad clauses that permit the submission of 'any' or 'all' disputes to arbitration only contemplate submission by an investor. The Canada–Venezuela BIT provides for arbitration of 'any dispute', but only provides that 'an investor may submit a dispute' to arbitration.[28] The tribunal in *Rusoro v. Venezuela* interpreted this language as providing standing to investors only

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26 Agreement between the State of Kuwait and the Republic of Singapore for the Encouragement and Reciprocal Protection of Investments, signed 5 November 2009, entered into force 15 April 2013, Article 9(6).

27 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004, ¶ 39; see also *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 410–11 (reaching a similar conclusion under the Israel–Uzbekistan BIT); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, ¶ 432 (reaching a similar conclusion under the Germany–Ukraine BIT). See also *Urbaser v. Argentina*, Award at ¶ 1187 (finding that reference in the investment agreement to arbitration of 'disputes' generally, authorised arbitration of counterclaims in principle); *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶ 661 (same). Notably, the Spain–Argentina BIT at issue in *Urbaser* also allows either the investor or the host state to submit an investment dispute to arbitration.

28 *Rusoro v. Venezuela*, Award at ¶ 622.

(i.e., it did not permit a state to assert a counterclaim).[29] Similarly, in *Karkey v. Pakistan*, the tribunal found that the Pakistan–Turkey BIT contemplated only the investor submitting a dispute to arbitration and choosing the relevant arbitral institution. As a result, the tribunal found no consent to arbitrate counterclaims submitted by the host state.[30]

One very clear example of a prohibition on counterclaims was found recently in *Anglo-American PLC v. Bolivarian Republic of Venezuela*.[31] There, the UK–Venezuela BIT provided:

> *[t]he jurisdiction of the arbitral tribunal shall be limited to determining whether there has been a breach by the Contracting Party concerned of any of its obligations under this Agreement, whether such breach of its obligations has caused damage to the national or company concerned, and, if such is the case, the amount of compensation.*[32]

The tribunal found that this language imposed clear limitations on the tribunal's jurisdiction and excluded the possibility of counterclaims.[33]

What's new? Express consent to arbitrate counterclaims

Burlington v. Ecuador, although it did not arise in the mining context, is the only public award in which a tribunal has analysed an express agreement to arbitrate a state-asserted counterclaim.[34] The consent was based on a post-dispute agreement between the parties, however, not on the language of an investment treaty. In the companion case of *Perenco v. Ecuador*, Perenco (Burlington's consortium partner) did not expressly consent to arbitrate the state-asserted counterclaim.[35] Nonetheless, the tribunal rejected Perenco's objections

29 See *Rusoro v. Venezuela*, Award at ¶ 622–27. The tribunal in *Rusoro* was likely also influenced by the fact that Venezuela's counterclaim arose under Venezuelan law and could not 'be adjudicated by applying the Treaty or principles of international law'. id. at ¶ 628. See below.

30 *Karkey v. Pakistan*, Award at ¶¶ 1012–14 ('The BIT contains no particular or general language that would enable the Tribunal to conclude, if interpreted in accordance with the Vienna Convention on the Law of Treaties, that the arbitral agreement between Pakistan and Karkey includes consent by Karkey to the submission of counterclaims by Pakistan'). The tribunal in *Naturgy Energy v. Colombia* reached a similar result, noting that although the Colombia–Spain BIT included a broad reference to 'all disputes', a close reading demonstrated that the 'precisely defined' dispute resolution process contemplated by the treaty only permitted claims 'by an investor'. *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia S.L.) v. Republic of Colombia*, UNCITRAL, Award, 12 March 2021, ¶¶ 611–21.

31 *Anglo-American v. Venezuela*, Award.

32 id. at ¶ 526 (quoting UK–Venezuela BIT, Article 8(3)).

33 id. at ¶¶ 527–28. Similarly, the tribunal in *Roussalis v. Romania* found that there was no consent to arbitrate counterclaims under a treaty providing for arbitration of 'disputes between an investor . . . and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former'. *Roussalis*, Award at ¶ 886 (quoting Greece–Romania BIT). The tribunal found that this clearly indicated that the parties only consented to arbitrate disputes related to the state's alleged breaches, meaning that there was no consent to arbitrate any counterclaims concerning possible breaches of obligations by the investor. Roussalis, Award at ¶¶ 870–71. See also *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, ¶ 948 (same).

34 See *Burlington v. Ecuador,* Decision on Counterclaims.

35 *Perenco v. Ecuador*, Interim Decision on the Environmental Counterclaim.

to the counterclaim, noting that Perenco had delayed in raising them. In some new investment treaties, drafters and negotiators have incorporated consent to arbitrate state-asserted counterclaims. However, to our knowledge, no reported decision has yet considered an investment treaty provision that expressly permits counterclaims.

Providing for express consent

Several new BITs and FTAs expressly permit state-asserted counterclaims. Some examples are the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[36] the 2007 Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area,[37] the 2018 Argentina–UAE BIT[38] and the 2016 Slovak Republic–Iran BIT.[39] Each of these expressly envisions, and permits, state-asserted counterclaims. For example, the Argentina–UAE BIT provides that 'the respondent may submit a counterclaim directly related with the dispute'.[40] Similarly, the Slovak Republic–Iran BIT notes that the respondent 'may . . . assert . . . [a] counterclaim'.[41] And the CPTPP provides that 'the respondent may make a counterclaim'.[42] Thus, at least in terms of consent, these treaties provide a much clearer path for a state to assert a counterclaim.

Limiting the consent

Notably, while these treaties clearly allow counterclaims, they limit their subject matter. The limitations take two broad forms: (1) in some treaties, the counterclaim must be directly related with the dispute raised by the investor; and (2) in others, the counterclaim must be based on an investor's failure to comply with the investment treaty, including a failure to comply with host state laws.

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36 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, entered into force 30 December 2018, Article 9.19.2.

37 Investment Agreement for the COMESA Common Investment Area, signed 23 May 2007, not in force ('A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.').

38 Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed 16 April 2018, not in force, Article 28(4).

39 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed 19 January 2016, entered into force 30 August 2018, Article 14(3).

40 Argentina–UAE BIT, Article 28(4).

41 Slovak Republic–Iran BIT, Article 14(3).

42 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP,) Article 9.19.2 ('When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.').

Incorporating a connectedness requirement

Both the CPTPP and the Argentina–UAE BIT incorporate a 'connectedness' requirement into the consent to a counterclaim. The Argentina–UAE BIT only permits a counterclaim that is 'directly related with the dispute'. Ultimately, this language will lead to several treaty interpretation issues.[43] What does 'directly related' mean? How 'direct' must the relation be? And if an investor has employed creative pleading to block a state from asserting a counterclaim, can the standard be relaxed?

The CPTPP incorporates a more permissive 'connectedness' requirement. Article 9.19.2 establishes that, in response to certain investor claims, 'the respondent may make a counterclaim in connection with the factual and legal basis of the claim'. Again, this provision may give rise to several treaty interpretation issues. What does 'in connection with' mean? Is this a lower standard than 'directly' connected? And does the counterclaim have to have both a factual and legal connection to a claim, or could it be one or the other?

Limiting counterclaims to violations of host state law

The 2016 Slovak Republic–Iran BIT also limits the subject matter of counterclaims, by establishing that '[t]he respondent may assert as a defense, counterclaim, right of set off or other similar claim that the claimant has not fulfilled its obligations under this Agreement to comply with Host State law or that it has not taken all reasonable steps to mitigate possible damages'.[44] This language, which permits the assertion of a counterclaim for any violation of host state law that also constitutes a breach of the BIT, could give rise to a broader range of counterclaims than the language in the Argentina–UAE BIT. The Slovak Republic–Iran BIT appears to allow a state to assert a counterclaim on the basis of a failure to comply with environmental laws or regulations, even if an investor's claims have no connection to environmental issues. But how this limitation will be interpreted in the context of the governing arbitration rules and tribunal practice, remains to be seen.

The next step: creating a cause of action

Even where a tribunal finds that a treaty provides consent to state-asserted counterclaims, the respondent cannot prevail unless the treaty also provides a cause of action for the particular counterclaim.[45] Few tribunals have found that a cause of action exists for counterclaims under an investment treaty.[46] This is because investment treaties have traditionally protected the rights of investors by imposing international obligations on states; they did not historically impose reciprocal obligations on investors. However, in several

43 As discussed below, tribunals have often applied a connectedness requirement based on the arbitration rules applicable to a given dispute. As a result, tribunals may use this same analysis to analyse the connectedness requirement now included in some investment treaties.

44 Slovak Republic–Iran BIT, Article 14(3).

45 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 1066 (rejecting the respondent's counterclaim on the basis that it did not 'concern the existence or scope of a legal right or obligation' contained in the Treaty).

46 Respondents have been more successful asserting counterclaims under investment agreements negotiated directly with investors. See, e.g., *MINE v. Government of Guinea*, Decision on Annulment at 8.01 (upholding the award of damages on Guinea's counterclaim as res judicata).

relatively recent arbitrations, tribunals found that the treaty incorporated domestic and international law obligations to provide a cause of action.[47] Moreover, treaty negotiators have taken steps to reference such domestic and international law obligations in the text of investment treaties, perhaps in the hope of incorporating them as treaty obligations incumbent on foreign investors.

In this section, we first discuss counterclaims based on violations of host state law, and the support for these causes of action in newer treaties and then we explore counterclaims based on international obligations, and how these obligations are being incorporated into treaties.

Breach of domestic law

Incorporating domestic law into investment treaties

In the context of state-asserted counterclaims, tribunals have historically found that they can only adjudicate causes of action arising under the treaty in question.[48] For example, in *Rusoro v. Venezuela*, Venezuela counterclaimed that Rusoro Mining had breached its mining plan for the gold mine it operated, resulting in damage to Venezuelan resources and increased costs for future operation of the mine by the state. The tribunal found that if Rusoro had any obligation to comply with the mine plan, the obligation arose pursuant to Venezuelan law and not under the Canada–Venezuela BIT. And nothing in the BIT gave the tribunal authority to adjudicate a cause of action arising under Venezuelan law.[49]

As a result, the traditional thinking has been that 'the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction'.[50] Multiple tribunals have suggested that a state could only assert a counterclaim based upon domestic law if the treaty incorporated some sort of umbrella clause raising an investor's breaches of contractual or domestic law obligations to the level of international law obligations.[51]

From a state's perspective, language in newer treaties may solve the problem that Venezuela faced in *Rusoro*. For example, the 2016 Slovak Republic–Iran BIT, discussed above, expressly permits a state to assert a counterclaim based on a violation of the investor's 'obligations under this Agreement to comply with Host State law'.[52] Thus, while this treaty does not impose express obligations on an investor, its counterclaim consent provision could create a potential cause of action for a violation of host state law.

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47 See, e.g., *Aven v. Costa Rica*, Final Award at ¶¶ 733–34; *Urbaser v. Argentina*, Award at ¶ 1192.

48 *Roussalis v. Romania*, Award at ¶¶ 870-71 (noting that where the BIT does not incorporate domestic law obligations, only a cause of action arising under the BIT falls within the tribunal's jurisdiction).

49 See *Rusoro v. Venezuela*, Award at ¶ 628. See also *Anglo-American v. Venezuela*, Award at ¶¶ 529–30 (finding that the treaty provided no cause of action for counterclaims based upon the investor's alleged breaches of Venezuelan law).

50 P Lalive and L Halonen, 'On the availability of Counterclaims in Investment Treaty Arbitration'. *Czech Yearbook of International Law*, 2011 p. 141, No. 7.19.

51 See, e.g., *Oxus v. Uzbekistan*, Final Award at ¶ 958. See also *Roussalis v. Romania*, Award at ¶¶ 871–73 (rejecting the state's argument that the umbrella clause could elevate domestic law breaches to breaches of the BIT, because the particular umbrella clause only required that the state observe its obligations, and did not apply to obligations of investors).

52 Slovak Republic–Iran BIT, Article 14(3).

Acknowledging a state's right to regulate

Nonetheless, in at least one instance, a tribunal found that treaty language supported a counterclaim based on a violation of host state law. In *Aven v. Costa Rica*, the tribunal found that language protecting the state's right to regulate and enforce measures in the interest of the environment imposed treaty obligations on investors.

The DR–CAFTA investment chapter at issue in *Aven* provides:

> *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 concerns.*[53]

The *Aven* tribunal interpreted this language to incorporate the state's domestic environmental measures into the treaty. The tribunal found that any investor who ignored or breached the state's environmental measures would violate 'both domestic and international law'.[54] As a result, while the DR–CAFTA did not impose any express affirmative obligation on investors to protect the ecology of the host state, the tribunal found it could elevate breach of domestic environmental regulations to a treaty breach, forming the cause of action for a counterclaim.[55]

Although the standard may differ slightly, many new investment treaties include the same, or similar, language. For example, the 2018 Comprehensive Economic Partnership Agreement between the European Free Trade Association States and the Republic of Ecuador provides that 'nothing in this Chapter shall be construed to prevent a Party from imposing maintaining or enforcing measures . . . necessary to protect human, animal or plant life or health'.[56] The 2016 Hong Kong–Chile BIT includes similar language.[57]

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53 *Aven v. Costa Rica*, Final Award at ¶ 733.

54 id., at ¶ 734.

55 Nonetheless, the tribunal in *Aven v. Costa Rica* found that the respondent failed to meet the UNCITRAL pleading requirements to state a counterclaim; therefore the counterclaim was dismissed as inadmissible. See Final Award at ¶¶ 745–47.

56 Comprehensive Economic Partnership Agreement between the European Free Trade Association States and the Republic of Ecuador, signed 25 June 2018, Article 6.3. This language establishes a standard that a state must meet for the measures to be permissible – they must be 'necessary' to protect human, animal or plan life or health.

57 Hong Kong–Chile BIT, Article 15.1. ('Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.'). This language establishes a somewhat lower standard. The state only needs to show that it found it appropriate to adopt, maintain or enforce the environmental measure in question. These provisions, which permit a state to enforce its own environmental measures, can be contrasted with similar provisions that expressly carve out public health, social and environmental and security protections from indirect expropriation claims. The United Arab Emirates–Uruguay BIT provides that regulatory measures that are not discriminatory or arbitrary and designed and applied to protect legitimate objectives of public health, security, the environment and social questions do not constitute indirect expropriation. Agreement between the United Arab Emirates and Uruguay for the Promotion and Reciprocal Protection of Investments, signed 24 October 2018, Article 8. Thus, with several caveats, this provision prevents

However, the award in *Aven* suggests that a state likely could make a convincing argument that asserting a counterclaim based on the violation of an environmental measure is one way of 'enforcing' that measure.[58] Of course, there are also convincing arguments to the contrary. These arguments will centre around treaty interpretation issues. What did the treaty drafters mean by 'enforcing' a measure? Does the assertion of a counterclaim based on a violation of the 'measure' constitute 'enforcing' it? If the state has other means (and is employing them) to enforce the measure, is it also permissible to assert a counterclaim in international arbitration on the same basis? And ultimately, did treaty drafters intend to give states a substantive cause of action by including this provision?[59] Given the variations in the treaty landscape, tribunals likely will need to examine these questions anew.

International obligations

Similar to domestic law, international obligations arising under international instruments external to the investment treaty cannot provide a cause of action against an investor, unless they are incorporated into the applicable treaty explicitly or by reference.[60] However, the majority of international law instruments applicable to corporations are non-binding and voluntary. As the tribunal in *Urbaser v. Argentina* noted, the voluntary nature of these instruments makes it difficult to point to affirmative obligations that can serve as a basis for a treaty-based counterclaim.[61] Analysing a counterclaim alleging that Urbaser denied Argentine citizens the human right to water by failing to adequately furnish drinking water and sewage services, the *Urbaser* tribunal noted that instruments such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic Social and Cultural Rights recognise human rights to water and sanitation as a matter of customary international law.[62] But even as these instruments recognise that people have certain rights, they do not impose affirmative obligations on private parties to promote or implement those rights. At most, these instruments impose a prohibition 'not to engage

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an investor from invoking legitimate environmental regulations as a basis for an indirect expropriation claim. While addressing the same subject matter – a state's environmental (and other) regulations – these provisions could be more difficult to use as a basis for asserting a counterclaim.

58 The tribunal in *Aven* did not consider whether asserting an environmental counterclaim constituted enforcing environmental measures. However, it noted that the environmental enforcement clause was included in Section A of the investment chapter of DR–CAFTA, and Section A forms the basis for causes of action for investment arbitration under DR–CAFTA. Because of the context surrounding the clause, the *Aven* tribunal found that the environmental enforcement clause created an 'obligation, not only under domestic law but also under Section A of Chapter 10 of DR–CAFTA to abide [by] and comply [with] the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal or plant life or health'. *Aven*, Final Award at ¶ 734. It will be interesting to see how the *Kappes v. Guatemala* tribunal analyses these issues as it decides Guatemala's environmental counterclaim in a mining dispute brought pursuant to DR–CAFTA. *Kappes v. Guatemala*, Guatemala's Counter-Memorial.

59 The *travaux preparatoires*, where they exist, are silent as to these issues.

60 See, e.g., *Urbaser v. Argentina*, Award at ¶ 1192 (opining that the Spain-Argentina BIT's reference to incorporating rights under other international agreements or 'general international law' contemplated a cause of action for claims and counterclaims under sources of international law external to the BIT).

61 id. at ¶ 1195.

62 id. at ¶¶ 1196–98.

in activity aimed at destroying such rights'.[63] Even when a state party assumes an obligation under international law to protect and promote environmental or human rights, that obligation is not transferred to foreign investors operating in that state by virtue of an investment treaty.[64]

However, in the changing treaty landscape, these voluntary standards and guidelines are now appearing in investment treaty provisions. These provisions mostly fall within the rubric of corporate social responsibility (CSR). Generally, CSR provisions are understood to include internationally recognised guidelines for business and investment that address the environment, human rights, community relations and labour issues,[65] and are embodied in instruments such as the OECD Guidelines for Multinational Enterprises.[66] In the mining context, CSR instruments set out guidelines for businesses that are aimed at protecting and managing the environment and undertaking sustainable development.[67]

For example, the Hong Kong–Chile BIT provides that:

> *The Parties reaffirm the importance of each Party encouraging enterprises operation within its area to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.*[68]

The Benin–Canada BIT (based on the Canadian model BIT) has similar language.[69] All of these treaties stop short of imposing direct obligations on investors. They recognise the importance of CSR by agreeing to 'encourage' businesses to adopt these principles. And adoption is voluntary. Commentators have noted that these provisions, on their own, may be unenforceable.[70] Stated in aspirational language, they lack the mandatory nature of many treaty provisions. Nonetheless, in the mining context, they may create a cause of action for states asserting environmental counterclaims.

There are several ways in which a state may impose CSR standards on a mining project. A state may incorporate these standards as regulations, or could expressly add them to a mining licence. Indeed, many investors themselves voluntarily may include CSR standards

63 id. at ¶ 1199.

64 id. at ¶¶ 1209–10.

65 Arcuri and Montanaro, footnote 11, at 2806; Giest, footnote 11, at 324.

66 OECD (2011), 'OECD Guidelines for Multinational Enterprises', OECD Publishing, available at http://dx.doi.org/10.1787/9789264115415-en.

67 See, e.g., Government of Canada, NRCan, 'Corporate Social Responsibility Checklist for Canadian Mining Companies Working Abroad' (2015), available at www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/Corporate%20Social%20Responsibility%20Checklist_e.pdf.

68 Hong Kong–Chile BIT, Article 16.

69 Benin–Canada BIT, Article 16 ('Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption.').

70 Arcuri and Montanaro, footnote 11, p. 2806.

in documents they submit to a state to gain approval for exploration or production. Another possible way these provisions may be incorporated is through concessions or other agreements with state entities.

The 'double incorporation' of these standards could give rise to a counterclaim. If these CSR standards are echoed (in more mandatory terms) in a licence, or an internal regulation, then a state may choose to assert a counterclaim on the basis of an investor's failure to comply with these standards.[71] While the treaty language is only aspirational, a tribunal is unlikely to ignore the fact that the treaty drafters expressly included these CSR provisions. This situation is far different from that in *Urbaser* where the treaty was entirely silent as to these issues.[72] It remains to be seen how tribunals will interpret these aspirational provisions – and whether they may create a cause of action that permits a state-asserted counterclaim to succeed on the merits.

Incorporating other substantive and procedural requirements in investment treaties

Finally, for a tribunal to entertain a counterclaim, the counterclaim must comply with other substantive and procedural requirements, often arising from the relevant arbitration rules. Both ICSID and non-ICSID arbitration regimes provide a pathway to admit counterclaims, so long as they fall within the scope of the parties' consent and are connected to the primary claim or investment. Nonetheless, counterclaims are frequently rejected for failure to meet the pleading requirements of the relevant arbitration rules, or because the state is not the damaged party and therefore lacks proper standing to raise the counterclaim. We address each of these issues briefly below and outline how treaty negotiators appear to take them into account in new treaty language. We analyse how treaties address what has historically been seen as an admissibility requirement. We then discuss counterclaim pleading requirements and how treaties incorporate them. Finally, we discuss standing requirements for the assertion of counterclaims, and options provided in new treaties.

Admissibility of counterclaims

Under the ICSID regime, both the ICSID Convention and the Arbitration Rules provide a pathway for counterclaims, so long as they arise 'directly out of the subject matter of the dispute provided that they are within the scope of consent of the parties and are otherwise

71 These provisions may carry more weight if the relevant investment treaty also includes a provision acknowledging a state's right to enforce its environmental regulations, which could provide an independent cause of action. For example, in *Aven*, the tribunal found that the inclusion of the language regarding Costa Rica's right to enforce its environmental measures in the section of the treaty that creates causes of action for investment arbitration, meant that the environmental right to regulate created a cause of action for a counterclaim. *Aven*, Final Award at ¶ 734.

72 cf. Spain–Argentina BIT, Article IX(6) (providing merely that the arbitration should be governed by the BIT, any additional agreements between the state parties, and principles of host state and international law); *Urbaser v. Argentina*, Award at ¶ 1199 (finding that the reference to principles of international law did not impose affirmative obligations on investors, but could create a negative obligation 'not to engage in activity aimed at destroying' human rights protected by international law).

within the jurisdiction of the Centre'.[73] Meanwhile, the UNCITRAL Rules acknowledge the possibility of counterclaims, provided they 'arise out of the same contract' as the primary claim.[74]

As a result, regardless of which institutional rules apply, there typically must be a direct nexus between the counterclaim and the investor's primary claims (the 'subject matter of the dispute').[75] Historically, this has been interpreted by tribunals as an admissibility requirement.

As discussed above, many of the treaties that now include express consent to counterclaims also incorporate a connectedness requirement into that consent.[76] The Argentina–UAE BIT, for example, only permits a counterclaim that is 'directly related with the dispute'. The inclusion of an express requirement that a counterclaim be directly

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73 See ICSID Convention, Article 46 ('Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre.'); ICSID Arbitration Rules, Rule 40(1) ('Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.').

74 See UNCITRAL (1976) Rules, Article 19(3); UNCITRAL (2010) Rules, Article 21(3). Consequently, tribunals operating under the UNCITRAL Rules rely on the text of the investment instrument to determine jurisdiction over and admissibility of counterclaims. See, e.g., *Saluka v. Czech Republic*, Decision on Jurisdiction Over Counterclaim at ¶ 39 (finding that Articles 19.3, 19.4, and 21.3 of the UNCITRAL 1976 Rules conferred jurisdiction 'in principle' to hear counterclaims, so long as the arbitration agreement in the BIT was broad enough to encompass them). The rationale under other institutional rules, such as the ICC, SCC or LCIA Rules, is largely the same as under the UNCITRAL Rules. Although there are limited public awards where tribunals applying these sets of rules interpreted their ability to hear counterclaims, like the UNCITRAL Rules, these institutions provide generally for the admission of counterclaims, and any limitations would be found in the instrument of the parties' consent to arbitration – the investment treaty or investment agreement. See, e.g., *Limited Liability Company Amto v. Ukraine*, SCC Case 080/2005, Award, 26 March 2008, ¶ 118 ('The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration.'). The *Saluka* tribunal, which was the first to consider the availability of counterclaims in an investment arbitration governed by the UNCITRAL Rules, also found that any legitimate counterclaims should have 'a close connection with the primary claim to which it is a response'. similar to the nexus requirement under the ICSID Convention. Later investment tribunals applying the UNCITRAL Rules have tended to follow *Saluka*, requiring (1) a nexus between the primary claim and counterclaim; and (2) consent under the relevant BIT. See, e.g., *Al Warraq v. Indonesia*, Final Award at ¶¶ 655–59; *Oxus v. Uzbekistan*, Final Award at ¶¶ 945, 954.

75 See *Metal-Tech v. Uzbekistan*, Award at ¶ 407. In practice, most tribunals have interpreted this nexus to require that the counterclaim be against the same party or parties that bring the primary claims in the arbitration. See, e.g., *Saluka*, Decision on Jurisdiction Over Counterclaim at ¶¶ 61, 81 (concluding that the counterclaims were insufficiently connected to the primary claim, because they related to the conduct of a third party that was not the investor); *Paushok v. Mongolia*, Award at ¶¶ 693, 696 (rejecting environmental counterclaims on the basis that they lacked a 'close connection with the primary claim'. because they concerned actions by the claimants' local subsidiary, and 'no evidence was introduced by Respondent tying Claimants themselves to any of the breaches alleged'); *Al Warraq v. Indonesia*, Final Award at ¶¶ 668–71 (dismissing counterclaims on the basis that they referred to the conduct of a third party that was not a party to the investment arbitration); *Inmaris v. Ukraine*, Excerpts of Award at ¶ 432 (same).

76 Slovak Republic–Iran BIT, CPTPP, Argentina–UAE BIT.

related to the investor's claims could elevate the 'connectedness' requirement to an issue of consent under the investment treaty – and therefore a question of jurisdiction – rather than one of admissibility.

Pleading deficiencies

On a number of occasions, tribunals have found that a counterclaim that otherwise falls within their jurisdiction is inadmissible because it fails to meet the pleading requirements of the relevant arbitration rules. In *Aven v. Costa Rica*, the tribunal found that the dispute resolution language in the DR–CAFTA was broad enough to permit adjudication of counterclaims in principle, but the state lost its ability to raise them because it failed to comply with the pleading requirements of Articles 20.2 and 20.4 of the UNCITRAL Rules (2010).[77] The tribunal in *Hamester v. Ghana* reached a similar conclusion under the ICSID Rules, finding that although the treaty provided consent in principle to counterclaims, the respondent failed to adequately particularise its counterclaims.[78]

Standing

Finally, another common question is whether the state is the correct party to assert a counterclaim, particularly counterclaims relating to human rights and environmental protections. Most notably, the tribunal in *Chevron v. Ecuador II* rejected environmental counterclaims raised by Ecuador on the basis that the proper parties to bring those claims were the individuals who suffered harm as a result of the environmental damage.[79] Standing also served as the basis for rejecting the state's mining-related counterclaims in *Tethyan Copper Company v. Pakistan*.[80] In that case, Pakistan asserted counterclaims for breach of an investment agreement entered into by the autonomous province of Balochistan, and breach of Balochistan's

77 *Aven v. Costa Rica*, Final Award at ¶¶ 744–45. There was also some debate under *Aven* as to whether the DR–CAFTA created a cause of action for Costa Rica's environmental counterclaims, but the tribunal was not required to come to a conclusion on this since the claims were inadmissible for improper pleading..

78 *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2012, ¶ 352 (rejecting counterclaims, because the state 'neither specified the basis for the Tribunal's jurisdiction over the counterclaim nor the losses allegedly suffered'). See also *Goetz v. Burundi*, Award at ¶¶ 286–87 (dismissing the counterclaim on the merits on the basis that the state failed to present a prima facie case showing damages or causation). At least one new treaty appears to address this issue, expressly incorporating a pleading standard. The Argentina–UAE BIT requires that 'the disputing party shall specify precisely the basis for the counter-claim'. Argentina–UAE BIT, Article 28.4.

79 *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Partial Award on Track II, 30 August 2018, ¶¶ 7.37–7.45. See also *Hamester v. Ghana*, Award, ¶ 356 (rejecting counterclaim based upon a contract to which the state was not a party); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 5 June 2001, ¶ 378, No. 101 (rejecting the counterclaim on the merits, but also questioning whether the state had standing to bring the counterclaim, since it was not the party damaged by the alleged breach). In some instances, the damaged non-state party may be permitted to intervene in the investment arbitration and file an amicus submission; however, the admissibility of environmental arguments by third-party non-disputants is beyond the scope of this chapter.

80 *Tethyan Copper Company v. Pakistan*, Decision on Jurisdiction and Liability, ¶¶ 1421–22. In this case, Pakistan asserted three counterclaims. The third counterclaim related to the legality of the claimant's investment, and was rejected by the Tribunal on other grounds.

mining regulations. The tribunal explained the asymmetry of attribution under these circumstances, noting that '[w]hile Balochistan's actions can be attributed to Respondent pursuant to the [International Law Commission] Articles for the purposes of Treaty claims, i.e., claims under international law, such attribution does not apply for non-Treaty claims under domestic law'. As a result, Pakistan lacked standing to invoke breaches of a contract entered into by Balochistan or violations of domestic law enacted by Balochistan.[81]

Newer treaties do not address this issue, as it typically must be analysed in the context of a particular dispute.

Conclusion

Despite the efforts of some treaty negotiators to make environmental counterclaims expressly available to states, the treaty landscape continues to be a patchwork of provisions that will leave the many players involved in investor–state dispute settlement guessing. It is unclear if these new treaty provisions will change tribunal practice in interpreting the requirements for the assertion of a counterclaim. While treaties that expressly permit counterclaims address consent head on, they often leave open important issues, such as the creation of a cause of action.

For greater clarity, states may find it helpful to negotiate investment agreements directly with investors that address the issues that may arise in the event of a dispute.[82] Indeed, for better or worse, many countries are now opting for regimes that solely recognise international arbitration claims brought under investment agreements. Brazil, a country rich in mining resources, has long done so.[83] And Ecuador, with a nascent mining sector,[84] has recently withdrawn from its investment treaties and passed a law encouraging the negotiation of investment contracts for foreign direct investment projects.[85] In both *Burlington* and *Perenco*, Ecuador succeeded in environmental counterclaims based on an investment agreement it executed with the two consortium partners. Given the experience of *Burlington* and *Perenco*, some investors may be wary to enter into such agreements. But as the treaty landscape changes, they may nonetheless find some comfort in the predictability of the terms of an investment agreement.

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81 The tribunal also took into account that Balochistan had raised similar counterclaims in a parallel ICC arbitration that the same claimant had instituted pursuant to the contract Pakistan invoked in the investment arbitration.

82 As the only modern instance where a state has fully prevailed on a counterclaim against an investor, it is likely that *Burlington v. Ecuador* will prompt some states to opt towards executing investment agreements that include consent and cause of action for counterclaims directly with major foreign investors.

83 A Di Franco and R Zabaglia, 'Brazil', in J H Carter (ed.), *The International Arbitration Review*, Ninth Edition, August 2018.

84 Stephanie Rokter, 'Ecuador to grow mining industry to 4% GDP by 2021', *Global Mining Review*, 2 November 2018, www.globalminingreview.com/exploration-development/02112018/ecuador-to-grow-mining-industry-to-4-gdp-by-2021/ (last accessed 21 March 2019).

85 A Hurtado-Larrea and C Torres, 'Ecuador', in *The International Comparative Legal Guide to: Investor-State Arbitration 2019*, First Edition, 13 November 2018, https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/ecuador (last accessed 21 March 2019).