AEL 2022/05
Academy of European Law
European Society of International Law Paper

WORKING PAPER

The Role of Investor-State Arbitration in Promoting Climate Change Mitigation: From “Shield” to “Sword Through Renewable Energy Disputes?

Hui Helen Pang

European University Institute

Academy of European Law

European Society of International Law

Research Forum, Catania, April 2021

The Role of Investor-State Arbitration in Promoting Climate Change Mitigation: From "Shield" to "Sword" Through Renewa Energy Disputes?

Hui Helen Pang

ESIL Paper Series editors:

Adriana Di Stefano (University of Catania)
Evelyne Schmid (University of Lausanne)
Catharine Titi (University Paris II Panthéon-Assas)

ISSN 1831-4066

© Hui Helen Pang, 2022

This work is licensed under a Creative Commons Attribution 4.0 (CC-BY 4.0) International license.

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

Published in April 2022 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in Cadmus, the EUI Research Repository:

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.
Papers presented at ESIL events in 2011-2019 can be downloaded from SSRN. As of 2022, the papers are available in the EUI CADMUS Research Repository.

More information about the Academy of European Law

European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

More information about ESIL

ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

More information about the ESIL Paper Series

2021 ESIL Research Forum, Catania, 15-16 April 2021

The ESIL Research Forum is a scholarly conference that promotes engagement with research in progress by early-career researchers, who have the opportunity to present their works and receive comments from members of the ESIL Board and invited experts during the Forum. The 2021 ESIL Research Forum was hosted by the University of Catania on 15-16 April 2021 and addressed the topic "Solidarity: The Quest for Founding Utopias of International Law"

More information about the 2021 ESIL Research Forum

EUI ACADEMY OF EUROPEAN LAW

esil sedi EUROPEAN SOCIETY OF INTERNATIONAL LAW

Abstract

In international investment law, the principle of solidarity has contributed to the growing concern for the protection of the public interests in the host state, particularly in environmental protection. It is demonstrated in three aspects: first, the definition of development has evolved from merely referring to economic development to include social development; second, the increasing inclusion of stand-alone provisions on environmental protection and labor standards in bilateral and multilateral investment treaties; and lastly, the rising number of cases that touch upon environmental concerns relating to the host state's right to regulate, particularly the newest development of allowing the host state to invoke counterclaims against the investor for environmental damages, as demonstrated in *Burlington v. Ecuador*, as well as claims referring to the host state's obligation under international environmental agreements. Apart from the opportunities above, there are also challenges in environmental protection under international investment law. For instance, it is questionable whether investor-state dispute settlement (ISDS) can provide adequate protection to renewable energy investments, since the question remains unanswered whether the retraction of the subsidies from the host state constitutes a breach of legitimate expectations under international investment agreements, as is the case with several EU member states and Canada. These renewable energy investment cases present a paradox. On one hand, the host state should enjoy regulatory autonomy over the energy sector and should not be required to compensate investors for the change of energy regulation in good faith; on the other hand, the protection and promotion of renewable energy and reducing greenhouse gas emission represents a global common interest reflected in international environmental agreements, UN declarations, the Energy Charter Treaty and several investment treaties. This paper explores the opportunities and challenges of the contribution that international investment law can make towards mitigating climate change. Through analyzing investor-state arbitration cases concerning renewable energy investment, as well as cases that touch upon the applicability of international environmental agreements, this paper advocates for a re-conceptualization of important investment law concepts such as legitimate expectations to utilize the ISDS mechanism as a tool to compel states to mitigate climate change.

Keywords

Investor-State Arbitration; Climate Change Mitigation; Environmental Obligations; International Investment Law

Author Information and acknowledgment

Ph.D. Candidate, University of New South Wales, Faculty of Law & Justice, hui.pang@unsw.edu.au**.** This working paper is a part of the author's PhD thesis, under the generous support of UNSW Scientia Scholarship and Herbert Smith Freehills China International Business and Economic Law (CIBEL) Centre. The author thanks her supervisors Professor Lucas Lixinski, Professor Heng Wang, Professor Xiaochuan Weng, the organizers and participants of the 2021 ESIL Research Forum IEL IG, the organizers and participants of the 2020 UTS New Research in International Law Workshop, the organizers and participants of the Inaugural ASIL-JIEL Junior Scholar Forum, in particular Professor Olabisi Akinkugbe, for their invaluable comments and support. All errors are my own.

Table of Contents

I. Introduction: Convergence and Conflicts in International Investment Law and Climate Change Mitigation 1

II. Applying International Environmental Obligations in Investor-State Arbitration: From Co-option to Human Rights Upfront? 5

A. Starting with "Co-Option": S.D. Myers v. Canada and Allard v. Barbados 5

B. Using International Environmental Obligations as Counterclaims: Constraining Investors to International Environmental Obligations 9

C. Preliminary Conclusion 12

III. Addressing Climate Change Mitigation in Investor-State Arbitration: The Case of Renewable Energy Feed-in Tariffs 13

A. Possible Links between Renewable Energy Investments and International Environmental Agreements 13

B. The Elusive Concept of "Legitimate Expectations" 17

a) General Regulations as "Specific Commitments" or with "Stability Expectations" 18

b) Legitimate Expectations Beyond "Specific Commitments" 22

C. The Tribunal's Avoidance on Addressing International Environmental Agreements 23

D. Advocating for A Holistic Interpretation of Legitimate Expectations 24

a) Redefine Legitimate Expectations and Avoid Negative Spill-Overs 25

b) Bring Competing Interests and Broader Policy Implications to the Table 25

I. Introduction: Convergence and Conflicts in International Investment Law and Climate Change Mitigation

Generating sustainable energy to reduce greenhouse gas emission is a target that connects domestic law with international investment agreements and international environmental agreements. Private party participation, especially investments in renewable energy is an important contributor in assisting the transition to sustainable energy consumption, as recognized in both the Energy Charter Treaty[1] and the Paris Agreement.[2] The rise of renewable energy investments demonstrates a welcoming synergy between international economic law and international environmental law, as clashes often emerge between the two.

In 2007, the EU issued the *2020 Climate & Energy Package* ('*Package*'), which is a set of directives and regulations to ensure that climate and energy target are met before 2020, and is now amended by the 2030 Climate and Energy Framework.[3] In the Framework, cutting

[1] The Energy Charter Treaty, art. 19 (1) (d), Dec. 17, 1994, 2080 UNTS 95. (Article 19 Environmental Aspects (1) (d): have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution;)

[2] Paris Agreement to the United Nations Framework Convention on Climate Change, art.6(4), art.6(8), Dec. 12, 2015, T.I.A.S. No. 16-1104. (hereinafter "Paris Agreement").

[3] See 2020 Climate & Energy Package, available at: https://ec.europa.eu/clima/policies/strategies/2020_en**,** this package was subsequently amended by the 2030 Climate & Energy Framework, available at:

greenhouse gas emissions by 40% from 1990 levels and boosting the share of renewable energy to at least 32% are the key targets for 2030. In order to facilitate the implementation of such targets, the EU issued a range of supportive legal documents, including the Renewable Energy Directive, which sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption and requires member states to set national targets[4]. Responding to the Framework and the requirement of the Renewable Energy Directive, many member states of the EU, including Spain, Italy and Germany issued laws and policies to provide incentive schemes to renewable energy investors, such as feed-in tariff and tax exemptions.[5] These changes generated the renewable energy investment bloom in Europe in the first decade of 21st century.

However, the rapid growth of renewable energy has also resulted in the frequent adjustment of national energy regulations. Renewable energy investors that were once granted preferential treatment such as feed-in-tariffs and reduced taxes are facing substantial retraction of support from several states through changes in domestic energy regulations.[6] These retraction and frequent change of incentives for renewable energy in regulatory frameworks induced many transnational disputes in renewable energy investments, occurring first and foremost in Europe. From 2010, Spain issued a number of royal decrees to adjust the previous incentive framework for renewable energy and then completely repealed the previous regime.[7] Due to the dramatic policy change, investors have filed 48 cases against Spain,[8] and most of these cases arise under the Energy Charter Treaty. At the time of writing, 20 of these cases have been concluded, with 16 decided in favour of the investor and only 3 in favour of the state.[9] The factual basis of these cases all revolve around regulation change, however, the

https://ec.europa.eu/clima/policies/strategies/2030_en; see also *Energy and Climate Change – Elements of the Final Compromise*, Council of The European Union 17215/08, Brussels, 12 December 2008, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/104672.pdf**.**

[4] Directive 2009/28/EC, of The European Parliament and of The Council of 23 April 2009 On The Promotion Of The Use Of Energy From Renewable Sources, [2009] OJ L 140/16, amended by Directive 2018/2001, of The European Parliament and of The Council of 11 December 2018 On The Promotion Of The Use Of Energy From Renewable Sources, [2018] OJ L 328/82 [hereinafter "Renewable Energy Directive 2018"]; 2030 Climate and Energy Framework, European Council on October 2014, EUCO 169/14, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0015**.**

[5] See the National Energy and Climate Plans of member states, including the relevant regulations and polices at the European Commission website: https://ec.europa.eu/info/energy-climate-change-environment/overall-targets/national-energy-and-climate-plans-necps_en (last access April 11, 2021)

[6] López-Rodríguez, 'The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU', *Transnational Environmental Law* (2019) 24 , at 283–285.

[7] Dromgool and Enguix, 'The Fair and Equitable Treatment Standard and the Revocation of Feed in Tariffs—Foreign Renewable Energy Investments in Crisis-Struck Spain', in V. Mauerhofer (ed.), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (2016) 389 , at 396–397.

[8] Figures gathered from the UNCTAD Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA; and the Energy Charter Treaty Website with Spain as the respondent in advanced search, available at https://www.energychartertreaty.org/cases/list-of-cases/. Please note that these are the known cases filed with the International Center for Settlement of Investment Disputes under the World Bank Group. There are 48 cases filed against Spain concerning the retraction of the subsides, however*, Solarpark v, Spain* was discontinued, thus, until the time of writing there are 27 cases still pending against Spain regarding the retraction of subsidies for renewable energy investments.

[9] The 16 cases decided in favour of the investors are:

1) *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R. I. v. Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/13/36, 4 May 2017) ('*Eiser v. Spain*');

2) *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain (Final Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No 2015/063, 15 February 2018) ('*Novenergia v. Spain*');

3) *Antin Infrastructure Services Luxembourg S.a.r.l and Antin Energia Termosolar B.V v. Spain (Award)* (ICSID Tribunal, Case No. ARB/13/31, 15 June 2018) ('*Antin v. Spain*');

tribunals have reached different conclusions based on varying interpretation of what constitutes legitimate expectations. Out of the cases decided in favour of the investors, Spain has initiated several annulment proceedings pending further review.

Similarly, other EU members, such as Italy, the Czech Republic, Romania and Bulgaria have also retracted or substantially diminished their supportive framework for renewable energy investments. At the time of writing, 7 cases were filed against the Czech Republic for the amendments of the pre-existing incentive regime on photovoltaic electricity generators. Out of the 7 cases, 6 of them were decided in favour of the state. [10] *Natland v. Czech*, the only case

4) *Masdar Solar & Wind Cooperatief U.A v. Spain (Award)* (ICSID Tribunal, Case No. ARB/14/1, 16 May 2018) ('*Masdar v. Spain*');

5) *Foresight Luxembourg Solar I S.a.r.l and others v. Spain (Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 2015/150, 14 November 2018) ('*Foresight v. Spain*');

6) *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (Decision on Responsibility and on the Principles of Quantum)* (ICSID Tribunal, Case No. ARB/13/30, 30 November 2018) ('*RREEF v. Spain*');

7) *Nextera Energy Global Holdings B.V. & Nextera Energy Spain Holdings B.V. v. The Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/14/11, 31 May 2019) ('*Nextera v. Spain*');

8) *9REN Holding v. The Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/15/15, 31 May 2019) ('*9REN v. Spain*');

9) *Cube Infrastructure Fund Sicav and Others v. The Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/15/20, 15 July 2019) ('*Cube v. Spain*');

10) *SolEs Badajoz GmbH v. Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/15/38, 31 July 2019) ('*SolEs v. Spain*')

11) *InfraRed Environmental Infrastructure GP Limited and others v. The Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/14/12, 2 August 2019) ('*InfraRed and Others v. Spain*');

12) *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain (Award)* (ICSID Tribunal, Case No. ARB/15/36, 9 September 2019) ('*OperaFund v. Spain*').

13） *Hydro Energy I and Hydroxana v. Spain* (Award) (ICSID Tribunal, Case No. ARB/15/42, 20 August 2020) (' *Hydro Energy v. Spain*')

14) Watkins Holdings v. Spain (Award) (ICSID Tribunal, Case No. ARB/15/44, 21 January 2020) ('Watkins v. Spain')

15) RWE Innogy v. Spain (Award) (ICSID Tribunal, Case No. ARB/14/34, 18 December 2020) ('RWE v. Spain')

16) The PV Investors v. Spain (Award) (PCA Case No. 2012-14, 28 February 2020) ('PV Investors v. Spain)

The two cases decided in favour of the state are:

1) *Charanne B.V. and Construction Investments S.a.r.l. v. Spain (Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 062/2012, 21 January 2016) Unofficial English Translation by Mena Chambers ('*Charanne v. Spain*'); and

2*) Isolux Netherlands, BV v. Kingdom of Spain (Final Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No V2013/153, 17 July 2016) ('hereinafter *Isolux v. Spain*').

3) Stadtwerke München and others v. Spain (Award) (ICSID Tribunal, Case No. ARB/15/1, 2 December 2019) ('Stadtwerke München and others v. Spain').

One case discontinued: *Solarpark v, Spain*

[10] The 7 cases are:

1) *JSW Solar GmbH & Co.KG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v. Czech Republic (Award)* (Permanent Court of Arbitration, Case No 2014-03, 11 October 2017) ('*JSW Solar v. Czech*');

2) *Antaris Solar GmbH and Dr, Michael Göde v. The Czech Republic (Award)* (Permanent Court of Arbitration, Case No. 2014-012 May 2018) ('*Antaris v. Czech*');

3) *WA Investments-Europa Nova v. The Czech Republic (Award)* (Permanent Court of Arbitration, Case No. 2014-19, 15 May 2019) ('*WA Investment v. Czech*');

4) *Voltaic Network v. The Czech Republic (Award)* (Permanent Court of Arbitration, Case No. 2014-20, 15 May 2019) ('*Voltaic v. Czech*');

5) *Photovoltaik Knopf Betriebs v. The Czech Republic (Award)* (Permanent Court of Arbitration, Case No. 2014-21, 15 May 2019) ('*Photovoltaik v. Czech*');

6) *I.C.W. Europe Investment Limited v. The Czech Republic (Award)* (Permanent Court of Arbitration, Case No. 2014-22, 15 May 2019) ('*I.C.W. Europe v. Czech*');

that was decided in favour of the investor through a partial award in 2017 is still not made public, although summary of the findings has been provided.[11] Italy has 13 cases under its belt for a series of governmental decrees to cut tariff incentives for solar power projects, causing the bankruptcy of several solar power energy companies. 7 cases have been decided out of the 13, with 4 ruled for states and 3 against.[12] There are 4 cases filed against Romania and 3 against Bulgaria for their regulatory change on incentives for renewable energy. Currently only 1 case for each of these two countries have been resolved and despite the tribunals having ruled in favour of the state in both, the awards are still not made public and only summaries of the findings are available.[13]

This is not an issue specific to Europe, for instance, recent changes of regulations for renewable energy by the Mexican Government to favor state-owned oil and gas company in the energy sector has resulted in threats of litigation against the government in both domestic and international venues.[14] Many Asian countries are also accelerating their transitioning process to clean energy. The outcome of current renewable energy investor-state arbitration might induce developing countries to reflect on their energy policies and reconsider whether feed-in-tariff is still a desirable measure for renewable energy investments. On one hand, this could disincentive developing states from supporting the renewable energy sector; on the other hand, such pressure might push the industry to innovate technology and learn to survive in this competitive market.

In these renewable energy cases, it seems that the state who are retracting subsidies have chosen to protect one public good (tariff stability) over another global common (climate change), which has also caused negative effects to renewable energy investors. It is important to note that domestic regulations are driven by many influential factors, including domestic political and economic changes. Such changes could result in the protection of a domestic public good over the protection of a global common good, which could amount to the breach

7) *Natland and Others v. The Czech Republic (Partial Award)* (Permanent Court of Arbitration, Case No. 2013-34, 20 December 2017) ('*Natland v. Czech*') (partial award not made public, see summary of the partial award at https://www.iareporter.com/articles/natland-v-czech-republic-part-2-of-2-on-the-merits-tribunal-finds-stabilisation-commitment-in-czech-legislation-and-breach-of-that-commitment-with-introduction-of-solar-levy/**).**

[11] Ibid., *Natland v. Czech*.

[12] The four cases that ruled in favour of the state are:

1) *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (Award)* (ICSID Tribunal, Case No ARB/14/3, 27 December 2016) ('*Blusun v. Italy*');

2) Belenergia v. Italy (Award) (ICSID Tribunal, Case No. ARB/15/40, 28 August 2019) ('*Belenergia v. Italy*').

3) Eskosol S.p.A. in liquidazione v. Italian Republic (Award) (ICSID Tribunal, Case No. ARB/15/50, 4 September 2020) ('Eskosol v. Italy')

4) Sun Reserve Luxco Holdings SRL v. Italy (SCC Case No. 132/2016, 25 March 2020) ('Sun Reserve v. Italy')

The three cases decided in favour of the investors are:

1) *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic (Final Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 2015/095, 23 December 2018) ('*Greentech and Others v. Italy*');

2) *CEF Energia v. Italy (Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 158/2015, 16 January 2019) ('*CEF Energia v. Italy*').

3) ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (Award) (ICSID Tribunal, Case No. ARB/16/5, 14 September 2020) ('ESPF and others v. Italy')

The two cases decided in favour of the investors are: *Greentech and Others v. Italy*, and *CEF Energia v. Italy*.

[13] The two cases that have been decided are: *Alpiq AG v. Romania (Award)*, awards not public for summary of the findings see https://www.iareporter.com/articles/icsid-tribunal-dismisses-claim-against-romania-over-electricity-supply-contracts-2/; and *EVN AG v. Republic of Bulgaria (Award)*, award not made public for summary of the findings see https://www.iareporter.com/articles/tribunal-members-diverge-in-final-ruling-in-intra-eu-ect-arbitration-against-bulgaria/.

[14] *Protecting RES Investments in Mexico - Update on Legislative Measures: Clyde & Co*, available at https://www.clydeco.com/insights/2021/03/protecting-res-investments-in-mexico-update-on-leg (last visited 10 October 2021).

of international obligations. Therefore, there exists an odd situation that has seldom been explored under international investment law—the investor's rights are in alignment with the protection of a global public good whereas the state's regulation impedes such protection. It currently remains unclear whether foreign investors may invoke international environmental agreements in investor-state arbitrations to support their claim that, due to the state's non-compliance to these environmental agreements, the investment has suffered losses that amount to a breach of obligations under the investment treaties. In other words, this paper is trying to address whether it is possible to integrate international environmental law with international investment law so that the environmental obligations are not only used by the state as a "shield" to relieve states from investment-protection requirements, but also as a "sword" to compel the state to fulfil the international environmental obligations it has been ratified by member states.

Section II will review several investor-state arbitration cases that have addressed the applicability of international environmental agreements. The tribunals' attitude toward applying these agreements have been vague and inconsistent. However, with the emergence of states filing counterclaims and using international environmental agreements to hold the investors accountable, arbitral tribunals have been more inclined to explore the roles and responsibilities of both the state and the investor under international environmental agreements and public international law in general. Section III will review the relevant renewable energy investment cases to first illustrate the current problem of interpreting what constitute as legitimate expectations and its incompatibility with climate change law. Then the paper will proceed to advocate for a holistic interpretation of legitimate expectations and outline the reasons for such advocacy.

II. Applying International Environmental Obligations in Investor-State Arbitration: From Co-option to Human Rights Upfront?

A. Starting with "Co-Option": S.D. Myers v. Canada and Allard v. Barbados

International investment law is not completely foreign to international environmental obligations. A limited number of cases have previously touched upon the use of international environmental agreements both as a defense for the state, as well as the source of a claim from the investors. The following paragraphs will focus on the tribunals' approach toward applying international environmental obligations in investor-state arbitration. However, it is important to note that direct reference to international environmental agreements by investor-state tribunals remain scarce.

The first case that directly addressed the applicability of international environmental agreements in investor-state arbitration is the *S.D. Myers v. Canada* case,[15] where Canada invoked the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal[16] to justify its ban on the transit of Polychlorinated Biphenyl ("PCB") to the United States.[17] While Canada had ratified the Basel Convention, the United State only became a signatory state without receiving ratification from Congress at the time of the dispute. Nevertheless, the tribunal addressed the applicability of the Basel Convention, which required signatories to ensure that the transboundary movement of hazardous waste is reduced to the minimum in environmentally sound manner that would protect human health and the

[15] S.D. Myers v. The Government of Canada, 40 I.L.M 1408, Partial Award (NAFTA Arb. 2002). (hereinafter S.D. Myers v. Canada)

[16] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, opened for signature 22 March 1989, 1673 UNTS 126 (hereinafter Basel Convention).

[17] The PCB is a hazardous waste listed under the Basel Convention that can cause serious harm to human health and the environment.

environment from the adverse effect of such movement.[18] The Basel Convention also prohibited exports and imports of hazardous waste from and to states that are not parties to the convention, unless there exists a bilateral or multilateral agreement that would not detract from the environmentally sound management of waste.[19]

The reason for the tribunal's analysis of international environmental law is that *S.D Myers v. Canada* arose under the North American Free Trade Agreement ("NAFTA"), which recognizes the preemptive nature of previously concluded multilateral and bilateral environmental agreements in Article 104 of NAFTA[20] and also in the North American Agreement on Environmental Cooperation (the "NAAEC"),[21] more commonly known as the NAFTA's side agreement on environmental cooperation. To include a direct deference to international environmental obligations was a rare phenomenon in investment treaties at that time, instead, the more common approach was to address international environmental agreements in the preamble, thus making environmental obligations more hortatory and difficult to be applied directly[22] Another reason for the tribunal's application of the Basel Convention is that the provisions at issue are not in conflict with, but rather complement, the investment treaty itself. The Basel Convention defers to non-parties to establish bilateral agreements on hazardous waste and does not outlaw transboundary movement between parties. This deference renders

[18] Basel Convention, Article4(2)(d) (ensure that the transboundary movement of hazardous wastes and other waste is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement)

[19] Basel Convention, Article 11.1 (Notwithstanding the provisions of Article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.)

[20] North America Free Trade Agreement, Can. Mex. U.S., Dec.17 1992, 32 ILM 289, 605 (1993) (hereinafter NAFTA).

(Article 104: Relation to Environmental and Conservation Agreements)

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,

b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,

c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or

d) the agreements set out in Annex 104.1,

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

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

Annex 104.1: Bilateral and Other Environmental and Conservation Agreements

1. The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986.

2. The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.)

[21] North American Agreement on Environmental Cooperation, art.40, Can. Mex. U.S., Sep.14 1993, 32 I.L.M. 1480 (1993) (hereinafter NAAEC)

[22] K. Gordon & J. Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD Working Papers on International Investment, 2011/01).

legitimacy and support to the transboundary movement of PCB and allowed the tribunal to interpret the legality of the movement through a bundle of international agreements holistically. Through interpreting the bundle of rules under NAFTA and relevant bilateral treaties between Canada and the US, the tribunal came to the conclusion that even if the Basel Convention was ratified by the US, it would not have shielded Canada from prohibiting PCB exports to the US.[23] In reaching this conclusion, the tribunal looked to the objectives of the NAAEC, which included "support for the environmental goals and objectives of NAFTA"[24] and "avoidance of new barriers of distortions in cross-border trade"[25], as well as the preamble, which emphasized the goal of trade liberalization in a manner consistent with environmental protection and conservation.[26] Through a textual interpretation of NAFTA, NAAEC and the Canada-US Transboundary Agreement, the tribunal decided that the following principle should apply: parties enjoy the regulatory autonomy to impose stricter environmental standards, as long as, these standards are should be mutually supportive of economic development and avoid creating trade distortions. In other words, whether a preemptive international environmental agreement could be successfully invoked as a defense to relieve the host state of its investor protection obligations depended upon whether "a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means", in which case, "it is obliged to adopt the alternative that is most consistent with open trade."[27] It is not surprising that this line of interpretation was criticized by environmental groups and the international law community in general to have co-opted environmental obligations into investment liberalization[28] and has since prompted a new generation of investment treaties that renders more space for regulatory autonomy.[29]

Unlike *S.D. Myers v. Canada*, in *Allard v. Barbados*, the international environmental agreement in question was invoked by the Canadian investor as a sword to demonstrate the state's breach of investor protection obligations.[30] The investor acquired and developed a wetland area in Barbados for an eco-tourism attraction and had complied with a series of planning and environmental impact assessment approved by the government. The acquired land underwent construction for several years and finally opened up to the public in Spring 2004 as a sanctuary eco-tourist spot. In 2005, due to a failed operation by the South Coast Sewage Treatment Plant operated by the Barbados Water Authority resulted in discharge of raw sewage into the sanctuary. The investor claimed that the sewage spill, together with the mismanagement of the Sluice Gate by Barbados (intended for tidal exchange between the sanctuary swamps and

---

[23] S.D. Myers v. Canada, *supra* note 15, at §215.

[24] NAAEC, *supra* note 21, art.1(d).

[25] *Id*., art.1(e).

[26] S.D. Myers v. Canada, *supra* note 15, at §220 (the Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles:

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

[27] *Id.*, at §221.

[28] D. Behn & M. Langford, *'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration',* 18 *J. of World Inv. & Trade* (2017) 14, 15.

[29] K. Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?', 15 *J. of World Inv. & Trade* (2014) 612, 623.

[30] P. A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/1955. (hereinafter Allard v. Barbados), at §198 (The Claimant adds that Barbados' environmental treaty obligations confirmed and reinforced the specific representations made by Barbados to Mr. Allard.)

sea water), as well as reclassification of adjacent polluted land to the sanctuary, deteriorated the sanctuary's ecological environment and diminished the value of the investment.[31]
To support the claim that the state had a responsibility to protect the ecological value of the sanctuary, the investor invoked the United Nations Convention on Biological Diversity ("CBD"[32] and the Convention on Wetlands of International Importance especially as Waterfowl Habitat ("Ramsar Convention") [33] alleging that Barbados's accession to these international treaties confirmed and enhanced the state's specific commitment to adequately protect the investment in question due to its sanctuary status. The investor made two claims under the Barbados-Canada BIT that referred to the Ramsar Convention. First, the investor claimed that Barbados's failure to protect its own environmental habitat violated the investor's legitimate expectation that the investment value would not decrease substantially, which amounted to a breach of fair and equitable treatment under the investment treaty.[34] Second, the investor alleged that Barbados failure to adequately manage the Sluice Gate and enforce its environmental laws, such as the Marine Pollution Control Act breached Article II (2) "full protection and security" clause of the Barbados-Canada BIT, where the host state has the obligation to act with due diligence to protect the investment against injury.[35] In particularly, the investor referred to the *Trail Smelter* case, which established that pollution to private property is actionable for damages under customary international law.[36]
The tribunal rejected both of investor's claims, mainly on the grounds that the sanctuary did not suffer environmental derogation, and hence there was no loss of investment value.[37] The tribunal's analysis of the applicability of international environmental agreements in these claims is worth noting for two reasons, first is the tribunal's confirmation the state's obligation under an international environmental treaty, and second is tribunal's analysis for dismissing the relevance of the environmental treaty in connection with legitimate expectations. For the first part, the tribunal indirectly recognized that the state's obligation under an international environmental treaty might be used to confirm or reinforce the legitimate expectation of the investor on a case-by-case basis subject to the existence of a prior "direct and specific commitment" made by the state.[38] However, after finding there were no such direct or specific commitment by Barbados to take specific actions in protecting the environment of the sanctuary, the tribunal dismissed the relevance of the CBD and the Ramsar Convention in forming legitimate expectations.[39] Here, the tribunal did not regard the letter sent by a competent Barbados authority assuring the investor of the sanctuary status of the investment as a direct or specific commitment, which is debatable considering past tribunal decisions and prominent scholarly works.[40] Besides, the investor claimed that it had reasonable expectations

[31] *Id.*, at §174-179.

[32] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, 31 ILM 818 (1993) (hereinafter *UN Convention on Biodiversity*)

[33] Convention on Wetlands of International Importance especially as Waterfowl Habitat*,* Feb. 2, 1971, 996 UNTS 245 (hereinafter Rasmar Convention).

[34] Allard v. Barbados, *supra* note 30, at §170-179.

[35] *Id.*, at §230-234.

[36] Trail Smelter Case (U.S.A. v. Canada), UNRIAA, vol. III (Sales No. 1949. V.2), p. 1965 (1938, 1941).

[37] Allard v. Barbados, *supra* note 30, at §139.

[38] *Id.,* at §208.

[39] *Id.,* at §199.

[40] W. M. Reisman, M. H. Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes', 19(2) *ICSID Rev. - Foreign Inv. L. J.* (2004) 328, 341 (Where a host State which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host State should […] be bound by the commitments and the investor is entitled to rely upon them in instances of decision); M. Potestà, *'Legitimate Expectations in Investment Treaty Law: Understanding The Roots And The Limits Of A Controversial Concept',* 28 *ICSID Rev. - Foreign Inv. L. J.* (2013) 88, 114 (Thus, one finds support also in the public international law rules on unilateral acts for the contention that representations made by a state, from which it later relies, engender expectations that are worthy of protection.

that Barbados would "uphold its environmental policies, particularly those that reflected a commitment to conservation and protection of the biodiversity of the Sanctuary"[41]. In other words, Allard expects Barbados to enforce its own environmental laws and policies to preserve and protect the sanctuary as expressed under the CBD.

I find it difficult to understand the reasoning of the tribunal here, which seems to suggest that an additional specific assurance needs to be granted to a foreign investor before the investor could "legitimate expect" the state to abide its laws in the first place. If every domestic law needs a specific assurance before it can be applied to a foreign investor, the national treatment standard (granting foreigners the same treatment as nationals) included in most investment and trade treaties would be obsolete, and the aim and purpose of an investment treaty to protect and promote foreign investment would be meaningless. A possible explanation is that the tribunal considered environmental law as a secondary set of legal norms that needs to be subordinated to international investment protection standards. This "co-opting" reasoning might have been more compelling if the constitutional of the host state stipulates that domestic law contravenes with international law, international law shall prevail. However, if that is the legal reasoning that the tribunal based itself upon, it is puzzling why international environmental agreements were not granted the same legal status.

B. Using International Environmental Obligations as Counterclaims: Constraining Investors to International Environmental Obligations

This section will address the host state's application of international environmental agreements as legal basis for counterclaims against foreign investors for environmental damages. The reason for including this part is two-fold, first to illustrate how tribunals have accepted the connecting between international environmental obligations and domestic law; and second is to demonstrate that since the tribunal has accepted the states to invoke international environmental agreements against investors, according to systemic interpretation under Art.31(3)(c) of Vienna Convention of the Law of Treaties[42], the investor's reference to international environmental agreements should also be considered.

Recent developments in investor-state arbitration suggest that the tribunal is showing a certain level of willingness to integrate international environmental obligations with domestic law of the host state in investor-state arbitration through counter-arguments. Counter-arguments are not common in investor-state arbitration.[43] In fact, one of the major critiques for investor-state arbitration is the unsymmetrical litigation possibilities for investors and the state: the investor can initiate arbitration against the state for breach of investment protection at an international forum, whereas the state cannot initiate such arbitration but can only respond through counterclaims.[44] While counterclaims have always been available in theory, it has only been tested in practice in a few cases. The most influential and relevant counterclaim cases relating

These public international rules could be applied by analogy within the investor-state context.); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (OUP 2008) 135 (there is authority to the effect that 'the investor's legitimate expectations are protected even without a treaty guarantee of FET').

[41] *Id.,* at §199 & n330.

[42] Vienna Convention on the Law of Treaties art. 31(3)(c), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (Article 31: General rule of interpretation...3. There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.)

[43] I. C. Popova and F. Poon, 'From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties', 2 *BCDR Int'l Arb. Rev.* (2015) 223, 228.

[44] *See* generally Z. Douglas, 'Enforcement of Environmental Norms', in P.-M. Dupuy & J. E. Viñuales, (eds.), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP, 2013) 419.

to international environmental obligations are the two cases brought by Ecuador against oil companies for environmental damages in *Perenco v. Ecuador*[45] and *Burlington v. Ecuador*.[46] *Perenco* and *Burlington* share the basic facts and applicable laws. Burlington (US based) and Perenco (French based) formed an oil and gas consortium that are licensed by the Ecuador government to explore hydrocarbons in a sector of Ecuadorian Amazon since the early 2000s.[47] Following the general norm under bilateral investment treaties ("BITs"), the licenses contracts were governed by Ecuador domestic law and the applicable laws were incorporated as reference.[48] Starting in 2005, Ecuador increased its tax rate on profits derived from exploring hydrocarbons and by 2007 the tax rate rose to 99%.[49] Soon after the tax increase, both Perenco and Burlington initiated investor-state arbitrations against Ecuador, claiming that the tax constituted as expropriate of their investment value under the French-Ecuador BIT and US-Ecuador BIT respectively.

Ecuador filed counterclaims against the companies, alleging that the consortium caused soil and underground water contamination. While the 2008 amended environmental regulations of Ecuador holds companies strictly liable for any environmental damages caused by exploring hydrocarbon in the Amazon, the investors argue that these amended regulations cannot apply retroactively against them and the standard of liability for environmental damages should be based on fault.[50]

The tribunal in *Perenco* supported the investor's claim on the non-retroaction of the 2008 Constitution and deemed that for any environmental damages occurred before 2008 should be based the fault standard to evaluate compensation.[51] Although the tribunal in *Perenco* accepted the experts' report on the influence of "sustainable development" in the Rio Declaration on Ecuadorian laws and regulations since the 1970s[52] and emphasized the private contractor's positive obligation to clean up and reforest the area according to "public and private law obligations" when the contractual relationship terminates,[53] the end result is slightly disappointing. The tribunal ruled that when there exists specific environmental laws to govern hydrocarbons, the "background values" incorporated in the 2008 Constitution does not apply.[54] Thus, it precluded the direct application of principles and standards derived from international environmental law, such as the right to full restoration and the population's right to healthy environment, which would impose a more stringent restriction on the level of pollution tolerated by the oil and gas companies, as well as the restoration damages that could be claimed by the state. Regardless of the fact that these principles have been incorporated into the 2008 Constitution,[55] and the 2008 Constitution Article 11 (3) explicitly states that "the rights and guarantees set forth in the Constitution and in human rights international instruments shall be of direct and immediate application".[56]

---

[45] Perenco Ecuador, Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision On the Environmental Counterclaim (2015) (hereinafter Perenco v. Ecuador)

[46] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (2017) (hereinafter Burlington v. Ecuador)

[47] *Id.*, §14; *Perenco v. Ecuador, supra* note 45, §62.

[48] *Burlington v. Ecuador*, *supra* note 46, §20; *Perenco v. Ecuador*, *supra* note 45, §321-322.

[49] *Burlington v. Ecuador*, *supra* note 46, §35; *Perenco v. Ecuador*, *supra* note 45, §109.

[50] *Burlington v. Ecuador*, *supra* note 46, §122; *Perenco v. Ecuador*, *supra* note 45, §134.

[51] *Perenco v. Ecuador*, *supra* note 45, §§355-358.

[52] *Id.,* §331.

[53] *Id.*, §369 & n903.

[54] *Id.*, §321.

[55] *Id.*, §81 (One of Ecuador's legal experts, Professor Ricardo Crespo Plaza, explained that the Environmental Management Law was inspired by the content of international instruments relating to environmental protection, such as the Rio Declaration, which, according to Article 3 of the Law, is a "guiding instrument for Ecuador's environmental policy.)

[56] *Id.*, §120.

Nevertheless, there are positive aspects of *Perenco* that deserves noting. The tribunal in *Perenco* reinforced the state's right to regulate environmental concerns, and recognized the state's autonomy under international law to adjust its environmental laws on extractive industries that pose significant risks to the environment.[57] The tribunal also recognized that favorable constitutional interpretation towards environmental protection should be applied when in doubt.[58] These acknowledgements indicate that there is a general consensus in investor-state arbitration that the non-derogation of environmental protection is a crucial aspect of the state's regulatory autonomy that shall not be subject to review.

In *Burlington*, the tribunal ruled against the investor's arguments that the strict liability standard shall not apply and found that according to Ecuadorian precedents, only *force majeure*, an act of a third party or of the victim can exonerate the investor for environmental damages resulting from a breach of the duty of care.[59]. Having found that the investor did not comply with environmental requirements such as environmental audit, environmental planning and environmental licensing, and have resulted in soil contamination and irregular waste management in highly sensitive ecological areas,[60] the tribunal ruled in favor of Ecuador's counterclaim for environmental damages for strict liability for environmental damages regardless of when the damages occurred.

Another important aspect of the *Burlington* case is the tribunal's in-depth analysis of the incorporation of environmental protection in the 2008 Ecuador Constitution, where the tribunal recognized that the Constitution to have "bestowed rights to nature and codifies the fundamental principle of environmental stewardship".[61] The tribunal in *Burlington* did not need to analyze the applicability of international environmental agreements in investor-state arbitration, as the 2008 Ecuador Constitution incorporated many fundamental principles of environmental law, such as the polluter's pay principle from the Rio Declaration.[62] For instance, Article 71 of the Constitution recognized nature as the bearer of rights, entitled to protection and reparation in the event of environmental harm.[63] Article 395(4) of the Constitution embodies the principle *in dubio pro natura*, and requires that "in the event of doubt about the scope of legal provisions for environmental issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail".[64] And the Constitution imposed on all economic actors the duty to prevent environmental harm, to mitigate and repair the damages, as well as the "right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living".[65] In this context, the state is called upon to mitigate climate change, limit greenhouse gas emissions and promote clean technology.[66]

The tribunal recognized all the articles above and concluded that environmental protection is one of the fundamental pillars of the 2008 Ecuador Constitution and that "environmental stewardship has taken on a new dimension in Ecuadorian society".[67] The strong constitutional basis for environmental protection and the precedents from the Ecuador Supreme Court in applying strict liability to environmental damages persuaded the tribunal to grant environmental

[57] *Id.*, §347.

[58] *Id.*, §322.

[59] *Burlington v. Ecuador*, *supra* note 46, §240.

[60] *Id.,* §§242-243.

[61] *Id.*, §195.

[62] Id., §112.

[63] *Id.*, §112 and 163.

[64] *Id.*, §207.

[65] *Id.*, §§201 and 351.

[66] *Id.*, §§215 and 385.

[67] *Id.*, §216.

damages to Ecuador, making *Burlington* the first successful case brought by the state against the investor for environmental damages under an investor-state arbitration tribunal.

C. Preliminary Conclusion

Through reviewing the limited cases that touch upon invoking international environmental agreements in investor-state arbitration, I found that the tribunals are generally unwilling to touch upon whether these instruments are applicable laws, regardless of the references in investment treaties either to general international law or to international environmental agreements specifically. Instead, the tribunals required a nexus to domestic law in order to apply international environmental obligations, either through specific commitments (such as a letter or the stabilization clause in the investment treaty), or through the incorporation of certain international principles into domestic law. And even when the international environmental principles are incorporated in the Constitution of a state, the tribunal could still dismiss its relevance due to the *lex specialis* principle, and decide that only relevant environmental law or administrative law are relevant, as is the case in *Perenco v Ecuador*.

However, there might be a new possibility to approach international environmental obligations through a human right perspective. For example, in *Urbaser v. Argentina*, through analyzing relevant international instruments,[68] the tribunal concluded that the right to water obligation extends to non-state actors not to "destroy such rights".[69] This conclusion is an important contribution. The tribunal did not follow the conventional perspective of invalidating the responsibility of non-state actors to conform to international human rights obligations,[70] instead, it was willing to say that the conventional approach "has lost its impact and relevance" and took a progressive view of the duties of transnational corporations.[71] Here, I argue that there is a possibility to link climate change related international obligations with certain claims of human rights to offer a "human right upfront" narrative to convince the tribunal that "recognized common values" need to be considered in investor-state arbitration, even if the tribunal is *ad hoc* in form and was initially created to address foreign investment business. The international community has a general consensus that recognized "common value" should be respected as the objective of international law.[72] Public participation could play a role in forming that story.

---

[68] *Urbaser s.a. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, (Dec.8, 2016) §1198 (hereinafter *Urbaser*). The tribunal reviewed the following international human rights documents on the right to water: Article 5(1) of the International Covenant on Economic, Social and Cultural Rights (this provision precludes rights contained in the ICESCR from being interpreted in a manner that permits States and non-State actors to destroy or limit other rights set out in the ICESCR); General Comment No. 15 of CESCR (to support the position that the ICESCR encompasses the right to water); United Nations' General Assembly Resolution 64/292; and the requirement that corporations respect the UDHR and the ICESCR, which it sourced from Article 8 of the International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (of 1977, as amended in 2006). The tribunal also indirectly referred to un Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5, 7 April 2008.

[69] *Urbaser*, *supra* note 68, §1199.

[70] C. Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in M. Noortmann, C. Ryngaert (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* 60, 78 (Routledge, 2010).

[71] *Urbaser*, *supra* note 68, §1194.

[72] See generally on the role and status of "common values" in international law: B. Kingsbury and M. Donaldson, 'From Bilateralism to Publicness in International Law', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma* (OUP, 2011) 79; N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Models* (CUP, 2007) 377; V. P. Tzevelekos and L. Lixinski, 'Towards a Humanized International "Constitution"', 29 *LJIL* (2016) 343, 357; J. D. and J. Trachtman, 'A Functional

In *Biwater v Tanzania*, where more than 300 civil representatives submitted amicus briefs to the tribunal and 38 countries sent written letters in support of the state's position of the right to water,[73] in the end, the tribunal acknowledged the regulatory autonomy of the host state to terminate concession contracts due to its human right duty to provide affordable water to its citizens.[74] Although it is not reasonable to make the claim that the public participation in *Biwater* decided the outcome of the case, several scholars have commented that it did have a significant impact on forming the tribunal's conclusion.[75]

III. Addressing Climate Change Mitigation in Investor-State Arbitration: The Case of Renewable Energy Feed-in Tariffs

A. Possible Links between Renewable Energy Investments and International Environmental Agreements

Although the tribunals in the mentioned cases have not directly applied international environmental treaties to investor-state arbitration, it would be hasty to conclude international environmental treaties are inapplicable at all. To begin with, neither of these tribunals denied their jurisdiction to hear the claims invoking international environmental obligations, and secondly, neither of the tribunals directly rejected the applicability of international environmental agreements in investor-state arbitrations. In fact, the tribunal in *Allard* had positively confirmed the possibility to invoking environmental obligations to compel the host state to conform to certain obligations if there exist specific commitments.

The conflict and potential convergence between environmental conservation and investment promotion has been frequently introduced, hypothesized and studied based on specific environmental treaty or investment protection provisions. While these provisions create a general background and linkage between investment law and environmental law, most of the scholarship is focused on the conflict between the environmental law regime and the investment treaty regime.[76] The conflict can be divided into two themes: a) the conflict between the state's right to regulatory public domain and the state's obligation to protect investment (the conflict between domestic rules and international obligation); and b) the conflict between the requirement to differentiate low carbon emission investments from carbon intensive investments according to international environmental agreements, and the non-discriminatory requirement under international investment agreements that requires the state to treat investors of "like circumstances" equally (the conflict between international regimes).

Approach to International Constitutionalization' in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009).

[73] L. Choukroune, 'Human Rights in International Investment Disputes — Global Litigation as International Law Re-Unifier' in L. Choukroune (ed.), *Judging the State in International Trade and Investment Law, International Law and the Global South* (Springer, 2016) 179, 191.

[74] Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award, §387 (Jul. 24, 2008).

[75] L. Choukroune, *supra* note 73; J. E. Viñuales and F. Grisel, 'Amicus Intervention in Investor-State Arbitration: A Contemporary Reappraisal', in *Handbook on International Arbitration and ADR* (American Arbitration Association, 2nd ed., 2010) 34; E. Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', 29 *Berkeley J Int'l L* (2011)1, 200–224; J. Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?', in P. Dupuy et al. (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2010) 396, 396–420.

[76] M. Cordonier Segger, M. W. Gehring, and A. Newcombe, *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) is one the earliest and most comprehensive books that deal with sustainable investment law, containing 30 chapters addressing the relationship between investment and a wide range of environmental protection topics, including water governance and climate change.

First, the conflict between the state's right to regulate public domain and the state's obligation to protect investment under the international investment agreement has been explored intensively in recent literature due to a number of highly publicized cases that challenged the state's regulatory right to safeguard public policy (e.g. public health). As environmental awareness improved dramatically over the past few decades, paired with the growing environmental activism, states are under political pressure to reform previous environmental standards and thereby ensure higher levels of protection to the environment.[77] To impose higher environmental standards concerning inbound foreign investments could clash with the protection rendered to investors under international investment agreements.[78] For instance, under the fair and equitable treatment provision, investors are entitled to "legitimate expectations," which includes legitimate expectations of the stability of regulations and laws relating to the investment. This provision was introduced to prevent the state from manipulating the legal system to infringe on the investor's property rights.[79] It also serves to counter some of the political risks that investors incur in a foreign country.[80] This is simply one example of how an investor-protection clause can conflict with domestic regulatory changes meant to enhance environmental protection. The scholarship in this area has analyzed how substantial provisions such as the stabilization clause,[81] the national treatment clause,[82] the fair and equitable treatment clause[83] and the expropriation clause[84] under international investment agreements could negatively impact the state's regulatory autonomy, resulting in certain public interest being comprised. Some of the scholarship also aim to draw the line between what is acceptable regulatory change and regulatory change that is a breach of investment treaty. The general opinion is that if the regulatory change is a general application enacted proportionality to safeguard a public interest, then the regulatory change is not considered as a violation of investment treaty.[85] The scholarship also acknowledged the solutions to ensure the safeguard

[77] J. E. Viñuales, *Foreign Investment and the Environment in International Law* (CUP, 2012) 51.

[78] Ibid, 346-347.

[79] R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP, 2011) 74; see also J. W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Lawyer* 655,659.

[80] R. Ginsburg, 'Legitimizing Expectations in Arbitration through Political Risk Analysis' in A. K. Bjorklund (ed) *Yearbook on International Investment Law and Policy 2014-2015* (OUP, 2016) 215, 217.

[81] A. Sheppard and A. Crockett, 'Are Stabilization Clauses a Threat to Sustainable Development' in M. Cordonier Segger, M. W Gehring, and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 333, 333-348; Antony Crockett, 'Stabilisation clauses and sustainable development: drafting for the future' in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) ch 22.

[82] Kate Miles, 'Sustainable Development, National Treatment and Like Circumstances in Investment Law' in Marie-Claire Cordonier Segger, Markus W Gehring, and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 265, 268-273.

[83] R. Kläger, ''Fair and Equitable Treatment' and Sustainable Development' in M. Cordonier Segger, M. W. Gehring, and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 241, 241-259; E. de Brabandere, 'States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation'' in A. Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP, 2016) 285, 285-308.

[84] M. Paparinski, 'Regulatory Expropriation and Sustainable Development' in M. Cordonier Segger, M. W. Gehring, and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 299, 299-326; P. Vargiu, 'Environmental Expropriation in International Investment Law' in T. Treves, F. Seatzu and S. Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge, 2013) 458, 458-486; A. Asteriti, 'Regulatory Expropriation Claims in International Investment Arbitrations: A Bridge Too Far?' in Andrea K. Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (OUP, 2014) 451, 451-473.

[85] A. D. Mitchell, D. Heaton, and C. Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing, 2016) ch 4; L. Wandahl Mouyal, Intenrational Investment Law and the Right to Regulate: A Human Rights Perspective (Routledge, 2016) 175-176; C. Titi, *The Right to Regulate in International Investment Law* (Hart Publishing, 2014) 99-103; A. Necombe, 'The Boundaries

of public interests within the international investment regime, including incorporating carve out provisions,[86] asserting exception clauses[87] and interpreting the public purpose exception provision to assert the police power of the state in foreign investments.[88]

The conflict between international regimes has also been examined. The scholarship in this field explores the conflict between the international environmental obligations of the state and its investor-protection obligations under the investment agreements.[89] The Kyoto Protocol and the United Nations Framework Convention on Climate Change are often the subjects of review in this area. The scholarship in this area analyzed the conflict between the objectives of the climate change treaty with the standards of investment protection,[90] and the compatibility and possible conflict between carbon trading and supportive schemes encouraged under climate change treaties and the non-discrimination rule among investors of "like circumstances" under investment treaties.[91] The scholarship also examines the procedural flaws of investment treaty arbitration that could prevent the adequate protection of public interests.[92] Some scholarship also proposed to reform ISDS through legislative and adjudicative means, such as by including the recognition of international environmental treaties, and recognizing that carbon-intensive investment is not "alike" low-carbon emission investments.[93]

Apart from the focus on the conflicts, the scholarship also recognizes the convergence between environmental protection and investment promotion. However, it seems that when considering the convergence between climate change and international investment law, there is an underlying assumption that investment treaty itself is the convergence,[94] suggesting that having an international instrument to protect green investments seems to be adequate to tackle climate change, regardless of its sufficiency and effectiveness. With the renewable energy cases, another layer of complication is added. Indeed, the withdrawal of subsidies from green investments could be viewed as another clash between the investor-protection obligations and a state's domestic regulation, as is illustrated in the first theme of conflict summarized above.

---

of Regulatory Expropriations in International Law' (2005) 20(1) *ICSID Review-Foreign Investment Law Journal*, 1,1-57.

[86] J. E. Viñuales, *supra* note 77, 393.

[87] A. Newcombe, 'The use of general exceptions in IIAs: increasing legitimacy or uncertainty?' in A. De Mestral and C. Lévesque (eds) *Improving International Investment Agreements* (Routledge, 2013) ch 15; B. Legum and I. Petculescu, 'GATT Article XX and international investment law' in R. Echandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (CUP 2013) ch 22.

[88] C. Titi, *supra* note 85, 99-103.

[89] M. Potestà, 'Mapping Environmental Concerns in International Investment Agreements: How Far Have We Gone' in T. Treves, F. Seatzu, and S. Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns* (Routledge, 2013) 421, 421-457.

[90] F. Baetens, 'The Kyoto Protocol in Investor State Arbitration: Reconciling Climate Change and Investment Protection Objectives' in M. Cordonier Segger, M. W. Gehring, and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 681, 683-714.

[91] K. Miles, 'Arbitrating Climate Change: Regulatory regimes and investor-state dispute' 1 *Climate Law* (2010) 63, 63-92.

[92] E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP, 2014) ch 5.

[93] K. Miles, *supra* note 91, 87-92; M. Cordonier Segger and A. Kent, 'Promoting Sustainable Investment through International Law' in M.Cordonier Segger, M. W. Gehring, and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 771, 771-790; L. Cotula and K. Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' in K. Sauvant (ed) *Yearbook on International Investment Law & Policy 2011-2012* (OUP 2013), 281–310.

[94] E. Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' in M. Cordonier Segger, M. W Gehring, and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 771, 771-790; A. Boute, 'Combating Climate Change through Investment Arbitration' (2012) 35 *Fordham International Law Journal*, 625-663; S. Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All', (2013) 14 *Melbourne Journal of International Law* 18, 27-39.

However, this paper believes that there is another side that is being ignored, namely the convergence of international environmental obligations with investor protection, that is in conflict with domestic regulation change. This hybrid version does not fit into the traditional conflict and convergence themes of environmental and investment law.

To date, the scholarship that addresses the retraction of subsidies to green investments has mainly focused its attention within the investment law framework, analysing whether the state's decision to retract subsidies is compatible with the relevant international investment agreement,[95] in other words, the traditional conflict of the regulatory right of the state and investor protection. In contrast, the state's obligation under international environmental treaty to protect and promote these green investments are overlooked.

Furthermore, renewable energy investment cases differ from those cases in several aspects. Most of the host states in the renewable energy investment cases are members of the European Union, which means that besides the Paris Agreement, they are also bound by EU rules regarding climate change and renewable energy, which mandate the measures that each country must take to reach their goals of cutting down carbon emission. For example, the 2018 EU Renewable Energy Directive stipulated the specific renewable energy targets for each member states for 2030.[96] In contrast with the voluntary nature of the Paris Agreement, the EU rules have a binding effect on member states. Besides, even though the Paris Agreement does not mention renewable energy specifically, it does stress on the importance of private participate in climate change mitigation in Art.6.4(b) and Art.6.8(b) and emphasized the development of sustainable technology to reduce GHG emissions in Art.10.[97]

Also, the Energy Charter Treaty, the investment treaty that most of the renewable energy investment cases rely on as the applicable investment agreement is more advanced in its treatment of environmental concerns than most BITs. In a report by the Organisation for Economic Co-operation and Development ("OECD"), the researchers concluded that most BITs have not yet strayed from the traditional approach of using vague concepts such as" environmental protection" generally, whereas the Energy Charter Treaty is an exception, addressing current environmental concerns.[98] For instance, the preamble "recalls 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". Furthermore, the Energy Charter Treaty also has a side protocol on energy efficiently and environmental aspects, including the promotion of energy efficient technology both domestically and internationally.[99] In addition, Article 19(3)(b) is relatively comprehensive in terms of environmental impact, which includes "any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape…".[100]

---

[95] F. Dias Simoes, 'When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking' 45 *Denver Journal of International Law and Policy* (2017) 251, 263-275; Y. S. Selivanova, 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases', *33 ICSID Review - Foreign Investment Law Journal* (2018), 433, 433–455; T. Dromgool and D. Ybarra Enguix, 'The Fair and Equitable Treatment Standard and the Revocation of Feed in Tariffs-Foreign Renewable Energy Investments in Crisis-Struck Spain' in V. Mauerhofer (ed), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (Springer, 2016) 389, 389-422; V. Vadi 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' *Vanderbilt Journal of Transnational Law* (2015) 1285, 1285-1319

[96] Directive 2018/2001, of The European Parliament and of The Council of 11 December 2018 On The Promotion of The Use Of Energy From Renewable Sources, [2018] OJ L 328/82

[97] Paris Agreement, supra note 2, art.6.4(b), art.6.8(b), art.10.2, art.10.5.

[98] Gordon & Pohl, *supra* note 22, 24-25**.**

[99] Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, art.7, art.8 and art.9, Dec. 17, 1994, 2080 UNTS 95.

[100] Energy Charter Treaty, *supra* note 1, art.19(3)(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

However, bridging the gap between climate change mitigation goals in the international environmental agreements with investment promotion in the Energy Charter Treaty faces both opportunities and challenges. The most substantial challenge is the obscure and often inconsistent interpretation of the legitimate expectations in investment treaties. What constitutes as legitimate expectations of the investors and the relevant state responsibility are longstanding issues in international investment law. The tribunals of renewable energy investment cases have taken divergent paths in solving these issues. One path is deeming the regulatory change as a breach of legitimate expectation and requiring the state to compensate the investors. The second path is accepting the regulatory change as a legitimate act of sovereignty. In the following paragraphs, this paper will use legitimate expectations as the nexus to discuss: a) the problems with the tribunals' current approach in interpreting legitimate expectations; b) the tribunals' neglect of international environmental obligations raised by the parties; and c) the reasons for advocating for the inclusion of international environmental obligations as a holistic interpretation approach.

B. The Elusive Concept of "Legitimate Expectations"

The boundaries of the "legitimate expectation" of the renewable energy investment under the Energy Charter Treaty has been the point of ferocious debate, mainly because the concept of fair and equitable treatment (where legitimate expectation derives from) is unspecified of the scope and breadth of the concept in many treaties, thus resulting in the debate in literature on whether it extends beyond international minimum standards.[101] Of the awards rendered, the tribunals have not once decided that the investors' legitimate expectation could freeze the regulatory regime, however, many still ruled the change of regulation constitute a breach of the legitimate expectation clause under the Energy Charter Treaty. There is a disagreement over whether general regulations can contain specific commitments or a stability expectation that the state must abide without alteration. Alternatively, even when no specific commitment or stability clause were found, the tribunals disagree over whether the regulation changes nevertheless violated the "stability expectations" of the investors under the fair and equitable treatment of the Energy Charter. The following paragraphs will review the inconsistent arbitral jurisprudence in renewable energy cases in detail and point out the underlying problems of these reasoning.

---

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).

[101] See NAFTA, *supra* note 20, art. 1105. (Minimum Standard of Treatment 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

See Energy Charter Treaty, *supra* note 1, art 10. (Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.) See Chapter 10 "Investment Treatment" of the Regional Comprehensive Economic Partnership (2020), Article 10.5: " Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens" (there was no mentioning of legitimate expectations throughout the text. See Ortino, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?', 21 *Journal of International Economic Law* (2018) 845 , at 76. See R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP: 2011) 154.; See *generally* Paparinskis, 'Introduction', in *The International Minimum Standard and Fair and Equitable Treatment* (2013).

a) General Regulations as “Specific Commitments” or with “Stability Expectations”

Whether regulations can be considered as specific commitments is debatable under international investment law. This is mainly because the concept itself and its function remain contested among scholars. While some consider specific commitment as one of the ways of formulating legitimate expectations,[102] and regards it as an exception to the rule of the state’s regulatory autonomy;[103] others view specific commitment, together with the concept of legitimate expectation, as notions conjured by neoliberal arbitrators seeking to promote investors’ interests.[104]

The arbitral jurisprudence over this issue is equally divided. The decisions range from concluding any breach of the domestic laws as treaty violation,[105] to deciding that only contractual guarantees could give rise to specific commitment.[106] The latter interpretation is more commonly applied in treaty-based investment cases arising out of NAFTA, as the agreement provides no additional protection to fair and equitable treatment than customary international law.[107] For instance, this narrow interpretation was applied in cases against Canada’s regulatory change to renewable energy investment, where the tribunal did not analyse specific commitment nor legitimate expectations, but focused more on the reasonableness and transparency aspect of the fair and equitable treatment.[108]

Here it is important to address the cases concerning Argentina’s regulatory change in utilities during the 2001 economic crisis, since these cases also deal with regulatory change of the host state and bear impact on energy policies. Both the renewable energy cases under consideration here and the Argentina cases touch upon the issue of regulation change for a public purpose during economic struggles of the state. The regulation change in Argentina occurred during its economic crisis from the end of 1990s to early 2000s; whereas the regulatory change in renewable energy investments occurred after the 2008 global financial crisis. Both regulatory changes are enacted for public purposes and have an impact over the price of utility service rendered to the general public. Furthermore, these cases have broader implications on the host state’s right to regulate for public purposes in times of economic recession.[109] Besides these similarities, the Argentina cases created important jurisprudence

---

[102] United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, *UNCTAD Serious on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2011/5, xvi (hereinafter “UNCTAD Fair and Equitable Treatment Report”).

[103] L. Johnson and O. Volkov, ‘Investor-State Contracts, Host-State 'Commitments' and the Myth of Stability in International Law’, 4 *American Review of International Arbitration* (2013) 361, 370.

[104] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, 2015) 284-293.

[105] Ioannis Kardassopoulos v. Georgia (ICSID Tribunal Case No. ARB/05/18, Decision on Jurisdiction, (Jul. 6, 2007) §191-§192, §194.

[106] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Tribunal, Case No. ARB/10/7, Award, (Jul.8, 2016) §426; TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Tribunal, Case No. ARB/10/23, Award (Dec. 19, 2013) §617-§619.

[107] NAFTA, *supra* note 20, article 1105; For arbitral jurisprudence under NAFTA that requires specific representation to deter regulatory changes, see Glamis Gold Ltd. v. The United States of America, UNCITRAL, Award (Jun.8, 2009) §766- §767; William Ralph Clayton and others v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar.17, 2015) §589.

[108] Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award (Sep. 27, 2016) §376 -§382; Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award (Mar.24, 2016) §515 -§541.

[109] There is abundant literature discussing the host state’s right to regulate, just to name a few: Y. Levashova, *The Right of States to Regulate in International Investment Law : The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Kluwer Arbitration: 2019); C. Titi, , *supra* note 85; L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge, 2016) 1; A. D. Mitchell, E. Sheargold, and T. Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar Publishing, 2017) 36-40; E. De Brabandere, *Investment Treaty Arbitration*

that was often referred by other tribunals when adjudicating whether regulatory changes of the host state breached the fair and equitable treatment standard.

In *Total S.A. v. Argentina*, the tribunal decided that the dollar denominated gas tariff and its subsequent adjustment cannot be construed as a "promise" to the investor, as it was incorporated in the *Gas Decree*, a general regulation not specifically directed at the investor.[110] Based on the same facts, the tribunal in *LG&E v. Argentina*, ruled that the *Gas Decree* and its implementing regulations created 'specific expectation' among investors that the government would not derogate from these guarantees.[111] Also, concerning the changes made to the *Gas Decree*, the tribunal in *CMS v. Argentina* assumed that favourable terms granted to the gas utility investors constituted as specific commitment without providing further justification.[112] This statement was frequently referred by other tribunals that chose to acknowledge the host state's right to regulate but believes that it should not fundamentally change the regime previously offered to investors.[113]

The tribunal in *Continental v. Argentina* and *El Paso v. Argentina* was more explicit in their explanation of what constituted specific commitment and attempted to search for a middle ground. They concluded that general legislative statement "engender reduced expectations" and is naturally subject to modifications or withdrawal but should be done within the limit of fundamental human rights and *jus cogens*.[114] As can be seen from the cases above, despite sharing similar factual backgrounds, the tribunals in the Argentina cases had different opinions over whether general regulations could constitute as specific commitment that required a freeze over existing regulations.

This problem of imprecise definition as well as inconsistent interpretation is also reflected in the renewable energy investment cases. In *Charanne v. Spain*, the first of many green energy investment cases, the tribunal ruled that Spain's Royal Decrees that offered subsidies and feed-in tariffs to renewable energy investors could not be deemed as specific commitments, despite being "directed to a limited group of investors", [115] which is controversial as specific commitments are often induced when the receiving subjects are specific and limited. The tribunal believed that allowing any regulatory standard to be construed as a specific

as Public International Law: Procedural Aspects and Implications (CUP, 2014) 148-174; J. Delaney and D. Barstow Magraw, 'Procedural Transparency' in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 721; A. Kulick, *Global Public Interest in International Investment Law* (CUP, 2012) 70; P. Drahos, 'The Regulation of Public Goods', 7 *Journal of International Economic Law* (2004) 321, 322; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (OUP, 2012) 69.

[110] Total S.A. v. Argentina Republic*,* ICSID Arbitral Tribunal Case No. ARB/04/1, Decision on Liability (Dec.27, 2010) §145 - §150 (hereinafter "Total v. Argentina").

[111] LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc. v. Argentine Republic, ICSID Tribunal, Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) §132] - §139. ("LG&E v. Argentina").

[112] CMS Gas Transmission Company v. Argentine Republic*,* ICSID Tribunal, Case No. ARB/01/8, Award, (May 12, 2005) §277 ("CMS v. Argentina").

[113] Murphy Exploration and Production Company International v. Republic of Ecuador II*,* Permanent Court of Arbitration, Case No. 2012-16 (formerly AA 434), Partial Final Award, (May 6, 2016) §206; Jan Oostergetel and Theodora Laurentius v. Slovak Republic UNCITRAL, Final Award (Apr.23, 2012), §223-§224; Alpha Projektholding GmbH v. Ukraine ICSID Tribunal, Case No. ARB/07/16*,* Award, (Nov. 8, 2010) §420; Mohammad Ammar Al-Bahloul v. Republic of Tajikistan, Arb. Inst. of SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, (Sept.2, 2009) §185; National Grid P.L.C. v. Argentina Republic, UNCITRAL, Award, (3 Nov. 3, 2008) §173; Plama Consortium Limited v. Republic of Bulgaria, ICSID Tribunal, Case No. ARB/03/24, Award, (Aug.27, 2008) §176-177; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Tribunal, Case No. ARB/01/3, Award (May 22, 2007) §260-§268.

[114] Continental Casualty Company v. Argentine Republic, ICSID Tribunal, Case No. ARB/03/9, Award (Sept.5, 2008) §264 –§266. ("Continental v. Argentina"); El Paso Energy International Company v. Argentina, ICSID Tribunal, Case No. ARB/03/15*,* Award, (Oct. 27, 2011) §371-§379 ("El Paso v. Argentina*"*).

[115] *Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, SCC Case No. 062/2012, Award, (Jan.21, 2016) (Unofficial English Translation by Mena Chambers) §493. (hereinafter "Charanne v. Spain*"*)

commitment "would constitute an excessive limitation on the power of states to regulate the economy in accordance with the public interest".[116]

However, there are also tribunals that recognize the possibility of specific commitment derived from general legislations. For instance, in *Blusun v. Italy*, the tribunal recognized that 'a representation as to future conduct of the state could be made in the form of a law'.[117] Despite recognizing such a possibility, the tribunal did not find specific commitment within general legislation, and concluded that "these incentives were subject to modification in light, *inter alia*, of changing cost and improved technology".[118]

Due to fear of criticism and attack, when the case was rendered in favour of the investors, the tribunal explicitly acknowledged that the host state is inherently entitled to adjust its regulations according to the change of circumstances in public interests, before deeming the regulatory changes as a breach of treaty obligation. [119] To avoid controversy, some tribunal would side-step this issue through finding specific commitment beyond the regulatory framework. For instance, in *Masdar v. Spain*, the tribunal found that the letters sent out by Spain confirming the solar plants' qualification for a fixed level of feed-in-tariffs during their operational lifetime as specific commitments made by Spain not to alter the incentive regime. Together with the correspondence exchanged between Masdar and the Spanish government confirming the right of the investors, the tribunal found no need to decide whether the regulation (Royal Decree 661/2007) constitute as specific commitment.[120]

There are also decisions that explicitly decided that the regulation itself contained a stabilization clause which shall be viewed as specific commitment made to the investors. For instance, the tribunals of *Cube v. Spain*, *Novenergia v. Spain*, *9Ren v. Spain* and *OperaFund v. Spain* found Article 44 (3) of the *Royal Decree 661/2007*[121] to be a "stability assurance" that would constitute as a specific commitment for Spain to relinquish its right to change the regulatory framework.[122]

---

[116] *Id*.

[117] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No ARB/14/3, Award (Dec.27, 2016) §371. (hereinafter "Blusun v. Italy").

[118] *Id.*

[119] 1) Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R. I. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, (May 4, 2017) (hereinafter "Eiser v. Spain") §362-363;

2) Antin Infrastructure Services Luxembourg S.a.r.l and Antin Energia Termosolar B.V v. Spain,ICSID Tribunal, Case No. ARB/13/31, Award (Jun.15, 2018)§530-§533 (hereinafter "Antin v. Spain");

3) Nextera Energy Global Holdings B.V. & Nextera Energy Spain Holdings B.V. v. The Kingdom of Spain, ICSID Tribunal Case No. ARB/14/11, Award (May 31, 2019) §591 ('Nextera v. Spain');

4) Cube Infrastructure Fund Sicav and Others v. The Kingdom of Spain, ICSID Tribunal Case No. ARB/15/20, Award (Jul.26, 2019) §397 (hereinafter "Cube v. Spain");

5) Masdar Solar & Wind Cooperatief U.A v. Spain, ICSID Tribunal, Case No. ARB/14/1, Award, (May 16, 2018) §485- §488 (hereinafter "Masdar v. Spain");

6) 9REN Holding v. The Kingdom of Spain, ICSID Tribunal, Case No. ARB/15/15, Award (31 May 2019) §253 ("9REN v. Spain")

7) Foresight Luxembourg Solar I S.a.r.l and others v. Spain, SCC Case No. 2015/150, Award (Nov.14, 2018) §356] ("Foresight v. Spain");

[120] Masdar v. Spain, supra note 119, at §520 - §521.

[121] Article 44(3) of RD 661/2007 ("The revisions of the regulated tariff and the upper and lower limits indicated in this section shall not affect facilities for which the commissioning certificate had been granted prior to January 1 of the second year following the year in which the revision had been performed.") See OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Tribunal Case No. ARB/15/36, Award, (Sept.9, 2019) §482.

[122] Cube v. Spain, supra note 119, §401; 9REN v. Spain, supra note 119, §257. §294; OperaFund v. Spain, *supra* note 121, at §483- §485. Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No 2015/063, Final Award, (Feb.15, 2018) §666 -§667 (hereinafter "Novenergia v. Spain").

Similarly, the inconsistent ruling regarding the same regulatory change can also be found in the renewable energy cases filed against Italy. In *Greentech v. Italy* and *CEF v. Italy*, the tribunals determined that the *Conto Energia* Decree, together with the contract agreement between GSE (the state-owned energy regulatory agency that renders the subsidies) and the investor, constitute as specific guarantee to the investor of a stable legal regime.[123] Whereas in *Belenergia v. Italy*, with almost identical facts, the tribunal ruled that the neither the *Conto Energia* Decree nor the subsequent contract between GSE and the investor gave rise to specific commitment.[124]

There are less discrepancies in the disputes brought against the Czech Republic, with only one out of seven cases ruled for the investor. In *JSW and Others v. Czech,* the first decided case regarding the regulatory change, the tribunal reached an conclusion that the state did not guarantee an absolute feed-in-tariff price level in its regulatory framework; instead the regulatory framework only promised a 15-year payback of capital expense and an annual return of investment of at least 7% over 15 years.[125] As these two key guarantees were not abolished in the regulation change, there is no breach of legitimate expectation. In *Antaris v. Czech*, the tribunal deemed that specific commitment could be inferred from domestic legislations and official statements (even the ones that do not have legal force), however, it did not dive into analysing whether the regulation contained stabilization clause. Instead, it side-stepped the issue and concluded that because the measures were for a public purpose, rational and proportionate, the regulatory change cannot be deemed as a breach of legitimate expectations.[126] In *WA Investments v. Czech* and other three cases that were adjudicated by the same arbitrators with awards rendered on the same day, the tribunals found that the state did not explicitly undertake any agreed stabilization commitment.[127] The only case that ruled in favour of the investor was not made public, however, from reliable sources, it is known that the tribunal took the view that "a legislation provision could guarantee stabilization intrinsically" and found the change of such guarantee in the legislation as a breach of fair and equitable treatment.[128]

Compared with the Spanish regime change, the regulatory change in Czech was relatively milder. Czech promised an annual return of at least 7% and the change was not retroactively applied; whereas the Spanish regime capped the rate of return to 7% before tax and applies to power plants installed before the regime change. There's also a major difference in facts between the disputes against Italy and the ones against Spain. The Italian state-owned company entered into a contractual agreement with most of its renewable energy investors stipulating the length and rate of tariff subsidies granted. Whereas for the disputes against Spain, apart from Masdar who received a letter stating the terms and rate of tariff from a

---

[123] Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, SCC Case No. 2015/095, Final Award, (Dec.23, 2018) §446-§455 (hereinafter "Greentech v. Italy');

CEF Energia v. Italy*,* SCC Case No. 158/2015, Award, §242-§244 ("CEF Energia v. Italy").

[124] Belenergia v. Italy, ICSID Tribunal Case No. ARB/15/40, Award (Aug.28, 2019) §579-§583 ("Belenergia v. Italy").

[125] JSW Solar GmbH & Co.KG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v. Czech Republic, PCA Case No 2014-03, Award §371-§372 (Oct. 11, 2017) (hereinafter "JSW Solar v. Czech").

[126] Antaris Solar GmbH and Dr, Michael G de v. The Czech Republic, PCC Case No. 2014-01, Award (May 12, 2018) §443- §445. ("Antaris v. Czech");

[127] WA Investments-Europa Nova v. The Czech Republic, PCC Case No. 2014-19, Award §568 - §570 (May 15, 2019) ('*WA Investment v. Czech*'); *I.C.W. Europe Investment Limited v. The Czech Republic*, PCC Case No. 2014-22, Award (15 May 2019) §443-§444 ('*I.C.W. Europe v. Czech*'); Voltaic Network v. The Czech Republic, PCC Case No. 2014-20, Award (May 15, 2019) §486 (hereinafter "Voltaic v. Czech"); *Photovoltaik Knopf Betriebs v. The Czech Republic (Award)* (PCC Case No. 2014-21, May 15, 2019) ('*Photovoltaik v. Czech*') §482.

[128] See Natland V. Czech Republic (Part 2 Of 2): On The Merits, Tribunal Finds Stabilisation Commitment In Czech Legislation And Breach Of That Commitment With Introduction Of Solar Levy' from Investment Arbitration Reporter at https://www.iareporter.com/articles/natland-v-czech-republic-part-2-of-2-on-the-merits-tribunal-finds-stabilisation-commitment-in-czech-legislation-and-breach-of-that-commitment-with-introduction-of-solar-levy/**.**

government agency, there were very little correspondence between the state and the investors. No contractual agreement was concluded, and the subsidies are rendered through administrative licensing.

b) Legitimate Expectations Beyond "Specific Commitments"

Specific commitment is not the only element that would give rise to the investors having legitimate expectations for regulatory stability. The variety of meanings attached to fair and equitable treatment has made determining the extent of the legitimate expectation difficult. In fact, legitimate expectation is rarely defined in investment treaties, and the concept very much depends on the scope of the fair and equitable treatment itself. Due to the vagueness of the concept and the potential role of arbitrators to expand the scope of the concept beyond the intent of the treaty, several countries have adjusted their BITs or investment agreements to impose constraints over the fair and equitable treatment standard.
For instance, in the previous NAFTA and the subsequent Agreement between the United States of America, the United Mexican States and Canada ('USMCA'), fair and equitable treatment do not provide protection beyond the customary international law minimum standard of treatment of aliens.[129] Whereas in the Comprehensive and Economic Trade Agreement between the EU and Canada ("CETA"), the parties attempted to constrain fair and equitable treatment within an exhaustive list of standards.[130] The recent BITs concluded by China noted that the standard does not provide more protection to the foreign investors than the nationals of the host country,[131] which precludes non-discriminatory regulatory changes from its scope. India excluded the fair and equitable treatment provision in its newest 2015 India Model BIT.[132] UNCTAD has attempted to provide more clarification to this issue and stated in its report that:

[129] See NAFTA, supra note 20, art. 1105 and Agreement between the United States of America, the United Mexican States and Canada (signed on November 30, 2018) ("USMCA") art.14.6. The most recent 2012 US Model BITs follows this interpretation of fair and equitable treatment, meaning that for all the states that entered into a BIT with the US after 2012, their investors do not enjoy more than customary international law protection for aliens under the fair and equitable treatment clause, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download**.** The same applies to 2004 Canada Model BIT (the latest published), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download**.**

[130] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23, art.8.10 (hereinafter "CETA").

[131] Since 2010, China has concluded BITs with Turkey, Canada, Congo, Uzbekistan, Libya, and Chad. In the BITs available, fair and equitable treatment was found with respect to restriction, see article 5 of the China-Tanzania BIT:

"2. 'Fair and equitable treatment' means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.

3. 'Full protection and security' requires that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made."

These BITs could be found in English at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china**.**

[132] See 2015 India Model BIT, available at**:** https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download. In 2015, India terminated a bunch of BITs due to abrupt rise of investment cases filed against it, however, in the BITs that were not terminated, the fair and equitable treatment standard can still be found though not elaborated. For example, in the India-United Arab Emirates BIT (signed in 2013, entered into force in 2014), the treaty still had the fair and equitable treatment clause, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download**.** India's most recent BIT, which is with Belarus, signed in 2018 and not yet in force, there's no fair and equitable treatment standard, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download**.**

> 'An investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment.'[133]

This definition suggests that even without a specific commitment, rules that are aimed to induce investment which the investor relied upon can still create legitimate expectation.[134] Several tribunals of renewable energy investments have adopted this line of interpretation when deciding whether regulatory changes constitute as a breach of legitimate expectations without specific commitments. Out of the 15 cases that ruled in favor of the investors, 5 cases concluded that the state had breached the stability requirement regardless of specific commitment.[135] The reasoning of these 8 cases, however, indicate the blurry (sometimes even interchangeable) standards for determining what constitutes as indirect expropriation and what constitutes breach of fair and equitable treatment. The unclear boundaries between indirect expropriation and fair and equitable treatment is problematic due to difference in compensation requirements. Furthermore, several tribunals seemingly transplanted the "substantial deprivation" standard, which is frequently applied to determine whether there was an expropriation, as a standard to determine whether there has been a breach of legitimate expectation.[136]

Besides, even when the tribunal has found substantial deprivation that amount to expropriation, it would then proceed to analyse whether the regulatory act could be considered as non-discriminatory regulation change taken for a public purpose, which precludes wrongfulness and is non-compensable. However, in these renewable energy cases where the tribunals seemingly transplanted the substantial deprivation standard used in determining expropriation to evaluate breaches of fair and equitable treatment, none of the tribunals provided analysis to whether these actions constitute as non-discriminatory regulation change.

C. The Tribunal's Avoidance on Addressing International Environmental Agreements

The applicability of International Environmental Agreements (hereinafter "IEAs") in RE investment cases are not purely theoretically. Both the investor and the state have brought up the relevance of IEAs in their submissions to the tribunal, which were reflected in the tribunals summary of facts and procedures in the awards rendered. Take the *Nextera v. Spain* case for example, the relationship between the fair and equitable treatment standard and the environment aspects provision in the Energy Charter Treaty was raised by the investor. The investor claimed that the fair and equitable treatment under Energy Charter Treaty should be applied "in light of the European Charter's commitment to legal stability and the environmental

---

[133] UNCTAD Fair and Equitable Treatment Report, *supra* note 102, at 69.

[134] *Antaris v. Czech*, supra note 126, at §366. (the tribunal stated that even official statements without binding force could induce legitimate expectations for the investor).

[135] *Eiser v. Spain*, *supra* note 119, at §383, §416- §418; *Antin v. Spain, supra* note 119, §554, §562- 573; *Nextera v. Spain*, *supra* note 119, at §592-601; *Foresight v. Spain, supra* note 119, at §359, §377-§381; *SolEs v. Spain*, *supra* note 119, at §443-§444.

[136] For instance, in Cube v. Spain *supra* note 119, at §412-413, the tribunal stated that:

> "the duty to accord fair and equitable treatment entailed an obligation not to defeat the basic expectations that had been created by the Respondent…the obligation requires that where the Respondent represented that certain provisions would be maintained for a certain time, those provision either are maintained for that time or are adjusted in a manner that does not significantly alter the fundamental economic basis of investment made in reliance on that representation."[136]
>
> These words sound surprisingly similar to the 'substantial deprivation' standard used to determine whether there is an expropriation.

protection goals explicitly identified in the Energy Charter Treaty's Preamble, Article 2 and Article 19".[137] Spain disagreed with this claim and responded in its defense that the purpose of the Energy Charter Treaty as stated in Article 2, and Article 19 (Environmental Aspects) is of minor importance. Spain further rebutted that Article 19 (d) which provides that the Energy Charter Treaty contracting parties shall "have particular regard to improving Energy Efficiency, to developing and using renewable energy sources", does not mandate the granting of "petrified" pubic subsidies and the Energy Charter Treaty respects the State's regulatory power in the area of state aid.[138] The tribunal, however, did not address this claim at all when interpreting legitimate expectations.

Similarly, in *Operafund v. Spain*, the specific purpose of feed-in-tariff measures for renewable energy investments were raised by the parties as well as its the relationship with international environmental obligations. Spain stated in its defence of proportionality that "the Kyoto protocol and EU Directives forced EU Member States to adopt the necessary measures to ensure that the electricity is supplied through renewable energy sources, and that the development of such technologies are expensive and must be enabled to compete with conventional technologies in the market, states are permitted to subsidize within the limits of the State Aid Regulation."[139] Spain also raised the issue that "the regulator must intervene by subsidizing renewable energy producers to ensure that they reach the level playing field with conventional energy, without distorting the competition and without overcompensating".[140] Again, the tribunal chose not to evaluate legitimate expectations against the backdrop of the *Kyoto Protocol* or the EU Directives.

The tribunal's avoidance to address these underlying international/supernational environmental could be driven by the fact that the tribunal regarded itself unfit to privilege one set of norms over the other, particularly when there's no visible hierarchy amongst different branches of international law.[141] However, I argue that despite no formal hierarchy, there are recognized common values within the international community that needs to be acknowledged by all courts and tribunals in different sectors of international law. The notion of common values might not pre-empt investment or trade law generally, but should at least be considered when international disputes give rise to conflict of norms and interests. When international investment treaties fail to specify the term "legitimate expectations", public international law could be referred to as a gap-filling tool.[142]

D. Advocating for A Holistic Interpretation of Legitimate Expectations

As illustrative in the "Elusive Legitimate Expectations" section, even without taking into account relevant international environmental agreements or supranational energy and climate regulations, states could still be held liable if the tribunal deemed specific commitments exist. Then, why is it important to advocate for the inclusion of relevant international environmental agreements? My reasons are two-fold: a) to redefine legitimate expectations and avoid negative spillovers; and b) to bring competing interests and broader policy concerns to the table. I will address these reasons in turn in the following paragraphs.

---

[137] Nextera v. Spain, *supra* note 119, at §393.

[138] *Id.,* at §408.

[139] Operafund v. Spain*, supra* note 119, at §538.

[140] *Id*.

[141] J. L. Dunoff, 'A New Approach to Regime Interaction', in M. A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 136, 155–156.

[142] See generally, S. W. Schill, 'International Investment Law and Comparative Public Law—an Introduction', in *International Investment Law and Comparative Public Law* (OUP, 2010) 3 , at 3–38.

a) Redefine Legitimate Expectations and Avoid Negative Spill-Overs

As can be seen from the renewable energy case and other jurisprudence in investor-state arbitration, the concept of legitimate expectations is not defined, nor is the fair and equitable treatment concept. Bring IEAs in to consideration, as well as other aspects of general public international law, such as the proportionality principle and the margin of appreciation, the concept of legitimate expectations could be complemented to reflect the common values of the international community, instead of simply being confined to technocratic terms. Since the word "legitimate" suggests a normative value, it makes more sense to take into account all relevant norms and standards of international law.
Furthermore, to avoid fossil fuel investors from taking advantage of the non-defined legitimate expectations and threaten to litigate against state for stricter environmental regulations on GHG emission, there is an urgent need to include IEAs into the consideration of the investor-state arbitration. Many investment treaties already include recognition to IEAs in the preamble and some have substantial environmental provisions. If legitimate expectations could be in a holistic way, fossil fuel investors would find it hard to justify its litigation against a government regulation that is meant to protect a public interest and a global common. Understanding legitimate expectations in a holistic manner render more support to common concerns globally, enhance the consistency of the decisions in investor-state arbitration, and provide better jurisprudence for environmentally conscious arbitrators.

b) Bring Competing Interests and Broader Policy Implications to the Table

In the context of the renewable energy cases, by evaluating "legitimacy expectations" against the background of relevant IEAs, competing interests and relevant stakes could be better acknowledged, if not resolved. For instance, in some of the cases against Spain, the tribunal deemed that the level of reasonable rate of return should not be dictated by the state, and a return rate of 3.5%-5% is "neither fair nor reasonable" compared to the previously promised 8%-11%.[143] This line of reasoning seemly suggest that when the state miscalculated the amount of subsidies adequate for the renewable energy investors to survive in the market and overcompensated them,[144] it is a breach of investment treaty obligation to change the previous

[143] *Eiser v. Spain, supra* note 119, at §396 (3.7% pre-tax return was calculated by claimant and 5% pre-tax calculated by the state); *Operafund v. Spain*, *supra* note 119, at §488 (claimant calculated the rate of return to be 1.5%-2% compared to the previously planned 6.7%-8.2%, the tribunal found this change to be unreasonable; the state calculated that a rate of return of 6%-7% was provided in the new regime). The tribunals in the rest of the Spanish cases that ruled for the investor also decided that the investor should not be bound by the rate of return determined by Spain subject to alteration (ranging from 3%-5% pre-tax in different cases), but to the specific rate of return previously promised (ranging from 7%-13%). According to the report of the Council of European Energy Regulators, the estimated rate of return in the electricity sector of Spain around 4.5%, available at: https://www.ceer.eu/documents/104400/-/-/9665e39a-3d8b-25dd-7545-09a247f9c2ff. In the European Energy Industry Investment Report issued by the European Parliament in 2017, it was acknowledge that "in most EU markets the overall returns on conventional thermal plants are not high enough to justify capital expenditures to replace them" and the overall estimated returns on invested capital in EU from 2006 to 2013 was around 5%-6%, available at https://www.eesc.europa.eu/sites/default/files/files/energy_investment.pdf.

[144] Which seems to be the case in most of the renewable energy investment cases, in *Eiser v. Spain*, *supra* note 119, §404, it was documented that the during the hearing process, Mr. Carlos Montoya, the head of the solar department at Institute for Energy Diversification and Saving ("IDAE") of the Ministry of Industry, Tourism and Commerce of Spain acknowledged that the estimated cost of solar power plants which was the basis for calculating the level of subsidies required in the reform was not based on rigorous mathematical analysis of data, stating, "if you are looking for […] a mean mathematical formula, you will not find it." Instead, "there is an analysis of the information on the bibliography and there is prior knowledge that we based ourselves on since we had already developed real plans". In *Antin v. Spain, supr*a note 119, at §564, it was noted that the New Regime base the calculation of the rate of return on the average yield in the secondary market of 10-year Spanish government bonds, plus a differential of 3%, and the 3% difference was based on Mr. Montoya's experience with previous

rules and government resources shall commit to its previous level of support even at the expense of consumers and tax-payers.

Even taking into account the environmental benefit of renewable energy investments to protect global commons, it is still highly controversial whether private property in alignment with public interest deserves priority over other public interests. This is particularly true for developing states that have less expertise in drafting investment treaties or defending themselves in international tribunals. While it is within the Energy Charter Treaty's aim to protect renewable energy investments from unreasonable state interference and demand compensation for losses incurred, is it reasonable to construe that the investors have legitimate expectations to a fix level of profit offered by feed-in-tariff for the entire lifetime of the power plant? If one takes a particularly cynical view towards how renewable energy foreign investment could be supported by higher utility price at the consumer end, one could argue that the investor-state arbitration could opened a can of worms where public funds are reallocated to private means, without due process or transparency, in the name of environmental protection.

However, if we take a step back and compare fossil fuel subsidies with renewables, one might argue that stipulating the state to a fix level of subsidies to renewables is necessary. It is estimated that fossil fuel receives 400 billion USD dollars globally, more than double the amount of subsidies rendered renewables, and until 2017 at least 115 countries provided fossil fuel subsidies, with at 73 countries providing more than 100 million US dollars each.[145] The investor-state arbitration system provides an international forum that allows private parties to hold the state accountable for its ambitious commitments to transit into clean energy consumption to tackle climate change. While this international dispute settlement regime is different from the traditional climate change litigations, it nevertheless could be considered as a peripheral method to hold the state accountable to its commitment and encourage private participate in climate change mitigation. Therefore, the system has its value, however, in order to truly accommodate sustainable development, the tribunal need to take a holistic approach in addressing vague concepts such as legitimate expectations, otherwise, significant policy considerations could be neglected in the process. One question that troubles me: it is environmentally just to hold developing countries liable to a certain level of subsidies to renewables, when they might be dealing with significant development issues, such as poverty or the right to electricity? In a conference held by the International Energy Agency in June 2020, a number of south-east Asian governments committed to providing feed-in-tariffs for

installation cost and revenues. Previously the Spanish government also acknowledged the difficulty in predicting the flow of investment in the solar sector and the level of subsidies require under the previous regime induced overcompensation for the investors, see *Eiser v. Spain, supr*a note 119, at §350.

[145] According to the reports of the International Energy Agency, global subsidies for fossil fuels amounted to 400 billion US dollars, more than double the subsidies estimated for renewables: https://www.iea.org/newsroom/news/2019/june/fossil-fuel-consumption-subsidies-bounced-back-strongly-in-2018.html; the international renewable energy agency summarized global subsidies in recent years and concluded that "in recent years, fossil fuel subsidies have outweighed renewable subsidies by a factor of around four", see 'Global Energy Transformation: A Roadmap to 2050', International Renewable Energy Agency (IRENA) 2019 Edition, p. 32, available at: https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Apr/IRENA_Global_Energy_Transformation_2019.pdf; REN21 (a global community network of renewable energy actors from science, academia, governments, NGOs and industry) estimated that global subsidies for fossil fuel consumption reached 300 billion US dollars, about double the amount of estimate for renewables, and as of 2017 at least 115 countries provide fossil fuel subsidies, with at 73 countries providing subsidies of more than 100 million US dollars each, see 'Global Status Report 2019: Chapter 1 Global Overview' REN21 2019, Figure 5, available at: https://www.ren21.net/gsr-2019/chapters/chapter_01/chapter_01/#target_75. Although estimation of the global fossil fuel subsidies differs, but from the data available, it is fair to conclude that fossil fuel still receives more subsidies than renewables. For general statistics on subsidies on fossil fuels, see D. Coady et al., 'Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates' IMF Working Paper WP/19/89, May 2019.

renewable energy investments,[146] however, whether the commitments would prove beneficial for these developing countries in the long run remain overall unclear.

[146] See 5th Annual Global Conference on Energy Efficiency, International Energy Agency, June 2020, https://www.iea.org/events/5th-annual-global-conference-on-energy-efficiency