ISSN : 1875-4120
Issue : Vol. 20, Issue 1
Published : February 2023

This paper is part of the TDM Special Issue (Volume 1) *"Int'l Investment Arbitration - Environmental Protection and Climate Change Issues".* Editors:

Prof. Dr AFM Maniruzzaman
View profile

Wendy J. Miles KC
View profile

Carla Lewis
View profile

Dr Stephen Minas
View profile

Transnational Dispute Management
www.transnational-dispute-management.com

Current Trends in the Investment Environmental Jurisprudence and Predictions for Investment Disputes Involving Climate Change
by A. Frosch and W. Giemza

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Current Trends in the Investment Environmental Jurisprudence and Predictions for Investment Disputes Involving Climate Change

Annika Frosch, Wojciech Giemza[*]

Abstract

A constantly increasing number of international investment disputes involve the environment. Respondent States try to justify their regulatory activity by invoking environmental concerns and regulations. According to investment law scholarship, there is a growing trend of recognizing environmental protection in arbitral decisions regardless of the treaty wording, which might suggest the change occurred in arbitrators' mindsets. Nevertheless, international investment law and environmental law continuously appear to be irreconcilable.

Climate change is a common concern of humankind requiring immediate joint action of the whole global community on all levels in the form of mitigation and adaptation. States introduce significant regulatory changes to achieve these goals, including cutting carbon emissions. These sweeping measures will inevitably interfere with numerous branches of the economy and give rise to investment disputes.

International law on climate change develops as an increasingly particular field of international environmental law. Until recently, climate change and its law have been absent in investment legal doctrine and jurisprudence. This article presents whether and how these specific rules and principles may find application before arbitral tribunals in the expected investment disputes concerning climate change. While forecasting the trends in investment disputes with environmental components known to date, it will be explained how these trends will play out in the future.

1. Introduction

Recently, international environmental law has been growing rapidly, gaining wider scholarly attention, and posing important governance challenges. This field of public international law has developed its own subfields, and amongst those are the rules addressing one of the most significant contemporary challenges – climate change. Climate change law has developed as a subfield with distinct principles and concepts to ensure mitigation of and adaptation to the issue. As a common concern of humankind, it requires immediate joint action of the whole global community. Thus, climate change law has become tremendously important as it shapes this joint action on various levels.

The effectiveness of international legal rules depends on available dispute settlement mechanisms. International environmental law, particularly climate change law, has not developed institutionalized enforcement mechanisms. Due to its interaction and influence on other legal fields, it can become relevant in disputes within other fields of law. For example,

[*]Annika Frosch is a PhD candidate at the European University Institute (EUI) in Florence (Italy); her research focuses on ocean acidification governance; e-mail: Annika.Frosch@eui.eu.
Wojciech Giemza is a PhD candidate at the European University Institute (EUI) in Florence (Italy); his research focuses on international dispute settlement; e-mail: Wojciech.Giemza@eui.eu.

international environmental and climate law might become relevant as part of an inter-State adjudication before the International Court of Justice. Another possibility might be that environmental or climate concerns constitute part of a complaint against a certain State before regional human rights courts or in domestic litigation.

Arguably, one of the most effective methods of international dispute settlement is investor-State dispute settlement (ISDS) which resolves disputes between foreign investors and States hosting their investments (host States). This mechanism belongs to another specialist international law regime, namely investment law. This particular regime of international economic law has its own goals and paradigms. Under the assumption that foreign investment fosters development, the rules of investment law are subjected to the goal of far-reaching investment promotion and protection at the expense of host States' flexibility in enjoying their police powers and right to regulate. For example, a regulation or measure dictated by a public purpose, such as environmental protection, may still result in damage to a foreign investor and, thus, ample compensation.

Investment law and arbitration are often criticized for insufficient consideration of the States' obligations under different regimes, particularly under international environmental and human rights laws. Until recently, investment treaties focused only on the goals of the field itself, contributing to the fragmentation of international law. This arguably results in 'regulatory chill', which might hamper reforms necessary to combat climate change.

Amending investment law's vast and complex framework to incorporate other issue areas is daunting due to legal and political constraints. It is hardly possible to renegotiate more than 2,500 international investment agreements (IIAs) and introduce clauses facilitating consideration of sustainability concerns in investment disputes, not to mention other difficulties the arbitral tribunals may face when interpreting an IIA to solve an environment-related issue. Some of these might be solved through the systemic interpretation of the treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[1]

Besides investment treaty-making and interpretation, one can discern an increasing trend of environment-related investment disputes in which arbitral tribunals demonstrate an increased awareness of environmental issues. Viñuales argues that there has been a change in the mindset of the investment arbitration community with respect to the environment.[2] This may be a promising path that could be followed by investment disputes involving climate change. One of the premises of this article is to draw upon the experience of the recent investment disputes with environmental components and analyze its implications for climate change issues.

The increased awareness of climate change and its adverse effects among civil society and lawmakers pushes for further prioritization and legalization of the issue. States take upon themselves new international commitments concerning emission reduction and energy transition. These new obligations will inevitably impact existing investments, particularly in industry and energy. Such implications for investments may then, in turn, give rise to investment claims against the States. Cases have already started to arise due to States' moves

[1] Anja Ipp, 'Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration' (*Kluwer Arbitration Blog*, 12 January 2022) <http://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/> accessed 12 February 2022.

[2] Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles, *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019).

in this field, one of those being the 2012 suit against Germany for shutting down nuclear power plants, which eventually settled in 2021,[3] or claims against the United States concerning the Keystone XL pipeline.[4]

When using law from one field in the dispute settlement mechanism of another field, the law of the former needs to be applicable and reconcilable with the default legal rules of the latter to be enforceable. This general rule also applies when environmental laws are used in investment arbitration. Hence, the question can be raised whether and how climate change law, as a subfield of environmental law, can find application in investment disputes once they arise. To answer this question, one can draw on how international environmental law and environmental concerns have been handled and recognized in arbitration practice – rather than in the treaty frameworks – of investment law. Based on that knowledge, one can derive whether, on the one hand, this scenario could be repeated regarding climate change law and, on the other, identify the main challenges for this process.

The structure of this article is as follows. The paper continues by giving an overview of climate change law (Section 2) and investment law (Section 3), respectively, for contextualization. These sections will be followed by a description of their intersection in the event of actual and potential investment disputes arising from measures addressing climate change (Section 4). The key section of this article is a review of environment-related investment jurisprudence and an analysis thereof concerning climate change issues (Section 5). The article concludes with a forecast and recommendations on how investment arbitral tribunals will approach climate change under the current investment treaty framework (Section 6).

2. Climate Change Law as a Part of International Environmental Law

Although transboundary and global environmental challenges have always existed, international environmental law is relatively new as a field and is under constant development. This is because previously, problems relating to the environment have been described as resource disputes. The earlier perception changed in the 1970s when the first UN body dedicated to dealing with environmental issues was created, the United Nations Environment Programme.[5] Today, environmental law comprises many issues, such as biodiversity, ocean pollution, land or air pollution, ozone depletion, and many more. For the purpose of this article, the area of environmental law which is of particular interest is climate change law. Accordingly, the following paragraphs will provide an overview of international environmental law with a particular focus on its principles (2.1). They will afterward dive into the main obligations of States under international climate change law (2.2). To conclude this overview, the implementation of these main obligations will be introduced using the example of the European Union (2.3).

---

[3] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Discontinuance Order, 9 November 2021.

[4] *TransCanada Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration, 24 June 2016; *Alberta Petroleum Marketing Commission v. United States of America*, Notice of Intent , 09 February 2022.

[5] Daniel Bodansky, Jutta Brunnée and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 2 <http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199552153.001.0001/oxfordhb-9780199552153-e-1> accessed 8 March 2022.

2.1 International Environmental Law and its Principles

The many diverse problems relating to the environment are governed by a constantly increasing number of so-called multilateral environmental agreements which tackle specific environmental issues. These agreements are legally and institutionally separate from one another.[6] Apart from these treaties, there is also a growing body of non-binding instruments.[7] To navigate through such a complex legal landscape, one can refer and revert to the principles of international environmental law. A fundamental interpretation of these principles is that they are essential building blocks and constitute the foundation of environmental law as a field. The use of these principles is widespread and can be found in multilateral environmental agreements and non-binding instruments alike.[8] They exhibit a general character, which permits these principles to be applied to the constantly developing area of law. This generality is necessary since the interplay between human beings and the Earth's environment is constantly evolving. These general principles provide the possibility to unify the fragmented approach that environmental law has been taking.[9] However, this generality comes with one caveat – the exact content and duties that arise from the principles are often unclear.[10]

There are two types of principles in international environmental law – prevention and balance principles. In addition to balance principles, there are also balance concepts.[11] In the following paragraphs, an overview of the principles essential for climate change law and of interest to this article will be provided. The content of these principles is, as has been indicated above, far from clear, and so are the obligations that flow from these general principles. However, it will be seen later on within a specific legal context, such as climate change law, these principles gain a more concrete shape. Thus, with the purpose of this article in mind, the reader will only be provided with a rough summary of the respective principles.

First, prevention principles aim to avoid environmental change or damage. Well-known – and essential for climate change law – examples of prevention principles are no harm, prevention, and precaution.[12] While the broader no-harm rule crystallized into the principle of prevention, the precautionary principle has its own legal implications. The no-harm rule and, even more so, the principle of prevention essentially establish responsibility for States for their actions and the consequences that come with these actions in cases where they affect another State or areas beyond national jurisdiction. The idea of the precautionary principle is that in the event of a lack of scientific certainty concerning the effects of an activity, States should not hold back from seeking appropriate measures to prevent potential harm.[13] Apart from these substantive

[6] The Secretary General, 'Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment (A/73/419)' 4, para. 2. <https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps.pdf?sequence=3&isAllowed=y> accessed 8 March 2022.
[7] ibid 5, para. 5.
[8] ibid 6, para. 9.
[9] ibid 6, para. 10.
[10] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 67.
[11] Philippe Sands, Richard Tarasofsky and Mary Weiss, 'Principles of International Environmental Law' (1996) 90 American Journal of International Law 338, 53.
[12] See Rio Declaration on the Environment and Development 1992 (A/CONF151/26 (Vol I)) principles 2, 5; Sands, Tarasofsky and Weiss (n 11) 54.
[13] Sands, Tarasofsky and Weiss (n 11) 55–64.

prevention principles, there are procedural ones, including, for example, conducting an environmental impact assessment.[14]

Second, balance principles and concepts aim to regulate access to resources or distribute the burden of the regulation of an environmental problem.[15] An instance of one of the balance principles is the polluter pays principle.[16] This principle contains more than a duty to repair damage. It demands internalizing environmental costs. Internalizing environmental costs means that the cost of the negative externality (a negative, not compensated external impact of economic activity on third parties) should be borne by, for example, a company that causes environmental damage or consumers driving the demand for a particular product.[17] The polluter pays principle is of special relevance for climate change law since it is related to and provides, to some extent, the foundation for one of the most relevant principles, the principle of common but differentiated responsibilities. This principle divides the effort needed to manage environmental problems of a global nature. It is situated at the junction of environmental protection and development. The principle can consider the developmental needs of the global South, their reduced ability to contribute, and their lower contribution to the creation of environmental issues. This last idea, the relevance of who contributed most to the appearance of an environmental issue, is the same idea that guides the polluter pays principle. Moreover, for developed countries, this principle is a tool to ensure developing countries' participation in managing environmental problems.[18] Apart from that, there are also other important balance principles, such as intergenerational equity. This principle attempts to ensure the fair distribution between different generations of natural resources and their quality and availability.[19] This principle is very closely related to the concept of sustainable development, which will be discussed next.

An example of a balance concept would be sustainable development and the 'common' concepts like a common concern of humankind.[20] The concept of sustainable development pursues the goal of long-term stability of the economy and environment, which should be achieved through the integration of economic, social, and environmental concerns in decision-making. It is related to the idea of fairness and the balancing of interests between and within generations.[21] Climate change, with its adverse effects, is considered a common concern of humankind, as will be seen in the Preamble of the United Nations Framework Convention on Climate Change (UNFCCC), one of the conventions of the climate change regime. This concept entails a duty to cooperate to address the problem at hand.[22]

As with all subfields of international environmental law, the laws dealing with climate change also reflect these general principles. Important are, in particular, the principles of prevention and precaution, which encourage States to take action to mitigate climate change even when

[14] See Rio Declaration on the Environment and Development principle 17; Sands, Tarasofsky and Weiss (n 11) 68.
[15] Sands, Tarasofsky and Weiss (n 11) 71.
[16] see Rio Declaration on the Environment and Development principle 16.
[17] Sands, Tarasofsky and Weiss (n 11) 71, 72.
[18] Bodansky, Brunnée and Hey (n 5) 13; see Rio Declaration on the Environment and Development principle 7; Sands, Tarasofsky and Weiss (n 11) 73, 74.
[19] Sands, Tarasofsky and Weiss (n 11) 77.
[20] Bodansky, Brunnée and Hey (n 5) 9.
[21] See Rio Declaration on the Environment and Development principle 4; Sands, Tarasofsky and Weiss (n 11) 79–82, 85, 86.
[22] Sands, Tarasofsky and Weiss (n 11) 86.

there are still minor scientific uncertainties.[23] Moreover, the principle of common but differentiated responsibilities (and respective capabilities) is essential since climate change was initially caused and is primarily exacerbated by the global North, which accordingly should take the lead when tackling climate change.[24] Also, the closely related principles/concepts of intergenerational equity and sustainable development must be kept in mind when thinking about the changing climate. If States do not take action now, equity among generations and sustainable development are at risk, and future generations will have to bear the consequences.[25] Lastly, the adverse effects of climate change can be considered a common concern of humankind. This notion entails a duty of States to cooperate to protect the climate system from these adverse effects individually and as a group.[26]

These principles are referred to and incorporated into the instruments regulating climate change. When the laws concerning climate change or the climate change regime are referenced, this essentially refers to the UNFCCC, the Paris Agreement, and previously also, the Kyoto Protocol.[27] While the UNFCCC is a framework convention that establishes general principles, the Paris Agreement supplements the Convention and establishes more detailed duties.[28] Both the Convention and the Agreement are widely and almost universally ratified and together pursue the goal of tackling climate change and limiting global average temperature rise to below 2°C but preferably 1.5°C above pre-industrial levels.[29] To achieve these limits, the Paris Agreement takes a bottom-up approach as each State is supposed to set its own ambitious reduction target. These targets are the so-called Nationally Determined Contributions (NDCs).[30] Below, the most relevant obligations under the climate change regime will be introduced.

2.2 Main Obligations under International Climate Change Law upon States

On 25 September 2015, the General Assembly, in its resolution A/RES/70/1, confirmed what has already been outlined previously: '…the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.'[31] This acknowledgment can be found at several places in the resolution and, most importantly, as a footnote to Sustainable Development Goal number 13. The sustainable development goal declares that States should '[t]ake urgent action to combat climate change…'.

Accordingly, when investigating the role of climate change law and its principles for international investment arbitration, one first and foremost needs to take a look and understand the climate change regime and, in particular, the UNFCCC and the Paris Agreement. State obligations can be found in these instruments, which are based on and guided by the environmental law principles mentioned above. Within the climate change instruments, these

[23] See United Nations Convention on Climate Change 1992 (1771 UNTS 107) art. 3.3.
[24] Bodansky, Brunnée and Hey (n 5) 13; see Paris Agreement 2015 (UNTS vol 3156) art. 2.2; see UNFCCC art. 3.1.
[25] Bodansky, Brunnée and Hey (n 5) 14; see Paris Agreement arts 2.2, 4.1; see UNFCCC arts 3.1, 3.4, 3.5.
[26] Bodansky, Brunnée and Hey (n 5) 9; Paris Agreement preamble; UNFCCC preamble.
[27] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (2303 UNTS 3); Paris Agreement; UNFCCC.
[28] The Secretary General (n 6) 14, 15.
[29] Paris Agreement art. 2a.
[30] ibid art. 3.
[31] United Nations General Assembly, 'A/RES/70/1 Transforming Our World: The 2030 Agenda for Sustainable Development' 8, 14, para 31.

environmental law principles take a specific form consistent with the goals and terms of the climate change regime.[32] In the following paragraphs, State's obligations under the UNFCCC will be examined first before discussing obligations under the Paris Agreement.

The UNFCCC was adopted in 1992, came into force in 1994, and has 197 parties.[33] As its name says, the UNFCCC is a 'Framework Convention', which means that it has a broad scope. The idea behind a framework convention is to reach an agreement on a particular objective and establish a foundation with basic principles and a platform for discussion. Later on, this foundation is supposed to be converted into a series of more concrete obligations.[34] The UNFCCC was previously supplemented by the Kyoto Protocol, while nowadays, precise obligations can be found in the Paris Agreement. Thus, the Convention is a snapshot of what parties could agree on at the time, which was to start the process of quantifying and reporting emissions of greenhouse gases per State and develop measures.[35] Hence, as will be seen in the following paragraph, the UNFCCC, along with an institutional architecture, provides an objective for the entire climate change regime and some basic principles and obligations.

Since one of the guiding principles of the UNFCCC and the entire climate change regime is the common but differentiated responsibilities and respective capabilities principle, the UNFCCC is divided into different country groups by the attached annexes of the Convention.[36] Thus, this differentiation favors developing countries. The division is as follows: Annex I includes industrialized countries (OECD members in 1992) and economies in transition, while Annex II includes only the OECD members of Annex I. Then there are Non-Annex I countries which are essentially the developing country parties.[37] Obligations are set following this classification.

The essential articles of the UNFCCC for the purpose of this paper are articles 2, 3, and 4 UNFCCC and, to some extent, the Convention's Preamble, as the Preamble declares climate change and its adverse effects to be a common concern of humankind which demands cooperation.[38]

Hence, Article 2 is particularly important since it describes the 'ultimate objective' for the entire climate change regime, which is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[39] The article also provides a time frame in which this objective should be achieved, namely in sufficient time 'to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.'[40] According to Article 2 UNFCCC, this ultimate goal applies to the Convention and any related instrument, including the Paris Agreement and, previously, the Kyoto Protocol. It should be noted that this goal is not a prohibition of the emission of greenhouse gases but the stabilization of these gases. It also immediately draws attention to one of the principles of environmental law, namely sustainable development. Focus is placed on the principle by making economic development in a sustainable manner part of the time

[32] Daniel A Farber and Cinnamon Piñon Carlarne, *Climate Change Law* (Foundation Press 2018) ch. 3.II.
[33] UNFCCC.
[34] Farber and Carlarne (n 32) ch. 3.I.A.
[35] ibid.
[36] UNFCCC art. 3.1, 3.2, annexes I, II.
[37] ibid Annexes I, II.
[38] See ibid Preamble.
[39] ibid art. 2.
[40] ibid.

frame. This goes hand in hand with the principle of sustainable development as it dictates as part of its widely accepted understanding that environmental considerations, economic, and social development are interdependent and mutually reinforcing.[41] As expected from a framework convention, the ultimate objective is more of a broader goal and does not create specific obligations or guidelines. The intention is only to set up a framework that directs discussions and needs to be ascertained further in future agreements.

Nevertheless, some principles are supposed to guide parties when pursuing this ultimate objective, and they can be found in Article 3 UNFCCC. As indicated, these principles are based on the principles of international environmental law, only that they are made more specific to match the needs of the issue at hand, climate change. However, it should be kept in mind that the list provided by the article does not claim to be exhaustive despite providing a framework. In the following paragraphs, a few of the principles mentioned beforehand and their placement in the article will be pointed out briefly.

First, Article 3.1 UNFCCC names 'present and future generations' as beneficiaries of protective action regarding the climate system. This consideration of present and future generations forms part of the sustainable development concept and its related principle, intergenerational equity.[42] Other references to either sustainable development directly or to 'sustainable economic growth' and the like can also be found in Articles 3.4 and 3.5 UNFCCC. Despite the exact obligations that flow from this being unclear, it becomes clear that equity and fairness considerations, along with the integration of environmental, economic, and social concerns, are crucial and should be kept in mind through deliberations with regard to climate change.[43]

In the same vein, Articles 3.1 and 3.2 UNFCCC mention the principle of common but differentiated responsibilities and respective capabilities. This principle underpins the entire structure of the climate change regime, as seen by the country division in the Annexes to the UNFCCC, and provides a more precise obligation. As '[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'[44] This expectation can be traced back to the fact that opposed to developing parties, the developed country parties are not just the ones who contribute the most to climate change, but they also have the means to reduce it. It will be seen in the discussion concerning Article 4 UNFCCC what obligation or, more precisely, commitments this includes.

Lastly, the principle of precaution is mentioned in Article 3.3 of the UNFCCC. The article clarifies that the parties should take precautionary measures to 'anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects.'[45] In addition, if there is a threat of severe or irreversible damage, 'lack of full scientific certainty should not be used as a reason for postponing such measures.'[46] Thus, even though climate change does come with a recognizable amount of scientific uncertainty and State parties cannot completely prevent climate change anymore, they should initiate mitigation measures.

[41] Rio Declaration on the Environment and Development principle 4; 'Report of the World Summit on Sustainable Development: Johannesburg, South Africa, 26 August-4 September 2002, A/CONF.199/20' (United Nations 2002) A/CONF.199/20 ch I, item 1 Political Declaration, para. 5.
[42] Sands, Tarasofsky and Weiss (n 11) 77, 80.
[43] See Farber and Carlarne (n 32) ch. 3.II.
[44] UNFCCC art. 3.1.
[45] ibid art. 3.3.
[46] ibid.

All of these principles are central to the climate change regime and should guide the parties in their actions and further discussions. Some of these principles are directly reflected in the 'commitments' under the Framework Convention, which can be found in Article 4 UNFCCC, such as prevention/precaution or the common but differentiated responsibilities principle. Following the Convention's setup and principles, as described above, there are different commitments for different country groups.

The obligations for all country parties can be found in Article 4.1 UNFCCC. These are, for example, to update, publish and make available national inventories of anthropogenic emissions by sources (a), measures in relation to adaptation (b, e), or the integration of climate change policies (f). Before explaining the obligations of Annex I Parties, it should be noted that there is an implementation conditionality to the commitments of developing country parties in Article 4.7 UNFCCC. This conditionality reads:

> *[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention…*[47]

This, again, shows the importance of the overarching ideas of equity and fairness and, in particular, the application of the common but differentiated responsibilities (and respective capabilities) principle to climate change regulation. It becomes apparent that the roles of developing and developed country parties differ.

The commitments for all parties are followed by the commitments of Annex I Parties only. These commitments can be found in Article 4.2 UNFCCC. Especially interesting is Article 4.2.a UNFCCC. This is because subparagraph (a) declares that Annex I Parties shall adopt national mitigation policies and measures to return – individually or jointly – to their 1990 level by 2000. Moreover, such policies and measures, in accordance with the objective of the Convention, show that developed country parties are taking the lead as part of the principle of common but differentiated responsibilities and respective capabilities.[48]

The UNFCCC sets the scene for future discussions and obligations concerning climate change. It underlines that both mitigation and, to some extent, adaptation are necessary to minimize climate change and that measures should be taken with the ideas of equity and fairness in mind, especially considering the different situations of States. The following paragraphs will show how the Paris Agreement has implemented, concretized, and partially relativized this Framework. In the meantime, between the UNFCCC and the Paris Agreement, the Kyoto Protocol imposed enforceable obligations on the developed country Parties. These Parties had to abide by the Protocol's greenhouse gas limitation and reduction targets.[49]

The Paris Agreement is an international treaty with 193 parties (including the EU) that entered into force on 4 November 2016.[50] Particularly interesting about the Agreement is that it takes

[47] ibid art. 4.7.
[48] ibid art. 4.2.a.
[49] Petra Minnerop-Röben, 'Climate Protection Agreements', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2018) para. 9 <http://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e2207> accessed 24 March 2022.
[50] Paris Agreement.

a very different approach than the Kyoto Protocol, as its obligations are bottom-up instead of top-down.[51]

The Paris Agreement is following the objective of the UNFCCC pursuant to its Article 2.1. However, it concretizes the broad objective of the UNFCCC and, most importantly, sets a temperature goal for all Parties and not just developed country Parties. This temperature goal can be found in the Agreements' Article 2.1.a. It explains that to pursue the objective, States need to hold 'temperature increase to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.

In terms of obligations, the Paris Agreement considers, apart from mitigation, also adaptation (for example, Article 7.10) and loss and damage/compensation (Article 8.2). However, for the purpose of this article, the most interesting are the obligations with regard to mitigation. These obligations aim to achieve and help to abide by the temperature goal.

To mitigate climate change, '[e]ach party shall prepare, communicate, and maintain successive nationally determined contributions that it intends to achieve.'[52] These nationally determined contributions (NDCs) shall represent a progression over time and reflect the highest possible ambition in accordance with Article 4.3 Paris Agreement. However, still taking the different circumstances of the State into consideration as the NDCs should reflect '(…) its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'[53] This could be understood in the way that a party's level of progression and ambition should be evaluated based on its respective situation.

Despite this differentiation in the assessment of parties' NDCs, it can be said that the Paris Agreement has changed the dynamics between developed and developing country parties. Opposed to the overarching idea of the UNFCCC and the obligations under the Kyoto Protocol, now all States have obligations. Even though the principle of common but differentiated responsibilities and respective capabilities is still in place, pursuant to Article 4.4 Paris Agreement:

> *[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.*

Thus, it can be seen that the Paris Agreement, compared to the UNFCCC, sets a more precise goal. However, State parties still have a lot of flexibility to decide exactly how to achieve this goal. Their actions only have to show progression and ambition over time. It is important to note that all country parties have obligations that will align over time. Thus, the dynamics have changed since the UNFCCC as developing country parties will have to take up more climate change-related commitments in the future.

In conclusion, despite being vague, the principles of international environmental law obtain a more specific meaning when put into a certain context. In the case of the climate change regime, some of these principles and concepts guide the entire structure of the regime. The UNFCCC

[51] Minnerop-Röben (n 49) para. 10.
[52] Paris Agreement art. 4.2.
[53] ibid art. 4.3.

and, even more so, the Paris Agreement set obligations that directly flow from these principles, particularly the principles of prevention/precaution, common but differentiated responsibilities, and the concept of sustainable development.

In the remainder of this section, the European Union will be used as an example to show how States implement the obligations described above.

2.3 State Actions to Fulfil Climate Obligations

There are a variety of different obligations under the climate change regime that States are supposed to abide by. The regime gives States the chance to fulfill these commitments either individually or jointly.[54] An interesting example demonstrating how States are trying to implement measures and abide by their obligations under the climate change regime is the European Union (EU). In the case of the EU, States are approaching these commitments jointly.

Since climate change became a salient issue in international politics in the 1990s, the EU has aspired to be a leader in the international playing field.[55] The EU's ambition has gone as far as trying to become the first climate-neutral continent by 2050.[56] This ambition is supposed to align with the obligations under the climate change regime, namely, the UNFCCC and the Paris Agreement, as well as previously the Kyoto Protocol.[57] This goal also forms part of the Commission's pursuit towards implementing the Sustainable Development Goals.[58] The program created to achieve these targets is the European Green Deal. The Deal was approved in 2020, and the name describes a set of initiatives by the European Commission.[59] Part of the ambitious program are climate strategies and targets for the years 2030 (the 2030 Climate & Energy Framework) and 2050 (2050 Long-Term Strategy).[60] The EU plans for the year 2030 to reduce greenhouse gas (GHG) emissions by 55% from the level in 1990, produce 32% of energy from renewables, and increase energy efficiency by 32.5%.[61] Energy is partly key to becoming climate neutral since a large portion of the energy produced today is still provided by hydrocarbon or fossil fuels, particularly coal, petroleum, and natural gas.[62] As noted above, the EU plans to become climate neutral by 2050.[63] Hence, the European Green Deal aims to transition the European economy in a way that decouples growth from resource use.[64] The Commission proposed the European Climate Law to enable a clear and transparent transition

---

[54] see UNFCCC art.4.2.a.

[55] Sebastian Oberthür and Claire Dupont, 'The European Union's International Climate Leadership: Towards a Grand Climate Strategy?' (2021) 28 Journal of European Public Policy 1095, 1095.

[56] European Commission, 'European Green Deal' <https://ec.europa.eu/clima/eu-action/european-green-deal_en> accessed 30 March 2022.

[57] Commission, Communication from the Commission to the European Parliament, the European Council, The Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal 2019 pt 2.1.1.

[58] ibid 1.

[59] Commission Communication from the Commission to the European Parliament, the European Council, The Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal (n 56); European Commission, 'European Green Deal' (n 56).

[60] European Commission, 'Climate Strategies & Targets' <https://ec.europa.eu/clima/eu-action/climate-strategies-targets_en> accessed 26 March 2022; Oberthür and Dupont (n 55) 1105.

[61] European Commission, '2030 Climate & Energy Framework' <https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2030-climate-energy-framework_en> accessed 26 March 2022.

[62] Commission Communication (n 57) 2.1.2.

[63] European Commission, '2050 Long-Term Strategy' <https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy_en> accessed 26 March 2022.

[64] Commission Communication (n 57) pt 1.

that cannot be reversed. The law embeds the 2050 net zero goal and climate neutrality in legislation and thus creates a legally binding target. The law entered into force on 29 July 2021.[65]

Having described the international legal framework on climate change, which imposes certain obligations to act upon States, let us turn to the coexisting legal framework on investment protection which may create obligations to abstain from certain actions. As will be demonstrated further, due to significant differences in the nature, structure, and objectives of these two frameworks, they might be irreconcilable in certain circumstances.

3. Investment Law and Arbitration

Compared to other public international law fields, international investment law – a body of rules regulating commercial activities by foreign investors in another State and their treatment by said State[66] – is a particular field in several aspects.

Investment law is developing and legalizing through international treaties at a quite an unprecedented pace.[67] Another particularity is that, within the realm of international economic law, it predominantly concerns not inter-State dealings but relations between States and private persons, i.e., foreign investors.[68] Nevertheless, the goals and ideological underpinnings of investment law are shared with other fields of international economic law, particularly international trade law. These goals ensure free movement of capital and foster economic development through trade and investment.[69] It is assumed that foreign investment fuels development and, as such, should be encouraged and legally protected.[70]

International investment law is made up of a variety of sources: a dense network of more than 2,200 bilateral investment treaties (BITs) in force,[71] approximately 330 investment chapters in free trade agreements (FTAs) in force[72] (both supplemented by applicable rules of general international law), domestic foreign investment laws, investment contracts[73] and lastly,

[65] ibid 2.1.1.; European Commission, 'European Climate Law' <https://ec.europa.eu/clima/eu-action/european-green-deal/european-climate-law_en> accessed 26 March 2022.
[66] David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2017) 1.
[67] Anne van Aaken, 'The International Investment Protection Regime through the Lens of Economic Theory' in Michael Waibel and others (eds), *The backlash against investment arbitration: perceptions and reality* (Wolters Kluwer Law & Business 2010).
[68] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45, 58–74.
[69] Kenneth J Vandevelde, 'The Liberal Vision of the International Law on Foreign Investment' in Chin Leng Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge University Press 2016).
[70] Jason W Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2011) 51 Virginia Journal of International Law 397; Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73; Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 8–9.
[71] UNCTAD Investment Policy Hub - International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 3 March 2022.
[72] Ibid.
[73] Lorenzo Cotula, 'Investment Contracts and International Law: Charting a Research Agenda' (2020) 31 European Journal of International Law 353.

investment risk insurance policies.[74] One could witness a very rapid legal development from the late 1950s, despite – or perhaps because of – ideological struggles on economic sovereignty, foreign property, and the role of foreign investment in domestic economy.[75]

Finally, the substantive rules included in most of these sources, particularly investment treaties and contracts, are often effectively invoked and enforced by investors against the States in international arbitration. This main mechanism of ISDS appears to be the key characteristic and the cause of the success of investment law, often even referred to as 'investment law *and* arbitration'.[76]

This section provides a short overview of investment law as a specific field of public international law (often called the 'investment *treaty* law'), focusing on its main particularities delineated above to contextualize potential overlaps and tensions with climate change law.

Investment law is created and applied in a triangle of actors. The first corner of the triangle is an investor, i.e., a natural or legal person possessing capital or other assets already invested abroad. The second corner is the host, or 'capital-importing', State where the investor makes their investments. When investing abroad, an investor may try to purchase a political risk insurance or have a contract with the host State to ensure and protect its legal rights and mitigate potential risks. The third and last corner is the State of nationality of the investor – home, or 'capital-exporting', State. The home State can make arrangements with the host State to ensure the protection of its respective investors by concluding an IIA, be it a BIT or an FTA with an investment chapter. Each of these actors has their own interests, costs, and benefits arising from the legal framework for investment protection they create.[77]

Despite the variety of sources and actors of investment law, it appears that this whole legal framework has been built on the same goals and assumptions. As is explicitly indicated in the titles of numerous BITs, the regime's main objective is investment promotion and protection. Although the idea of IIAs is to encourage investment and, thereby, ensure economic development of the host State and inter-State trade relations, this developmental goal is often just implicit.[78] It is assumed that the more protection foreign investments get, the more foreign investment will flow into the host State and thus will contribute to its economic development. The norms' whole structure, including substantive and procedural rights, is then shaped mainly by foreign investors' interests, with little consideration to the interests of host States themselves

[74] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business 2009) 1–2; Borzu Sabahi, Ian A Laird and Giovanna E Gismondi, 'International Investment Law and Arbitration: History, Modern Practice, and Future Prospects' (2017) 1 International Investment Law and Arbitration 1.

[75] Thomas Waelde, *Requiem for the 'New International Economic Order': Rise and Fall of Paradigms in International Economic Law* (Centre for Petroleum and Mineral Law and Policy 1994); Newcombe and Paradell (n 74) 47–48, 50; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 41–48.

[76] Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers 2004); Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); van Aaken (n 67) 537–538; V Vadi and L Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal' (2013) 16 Journal of International Economic Law 613; G Matteo Vaccaro-Incisa, *China's Treaty Policy and Practice in International Investment Law and Arbitration: A Comparative and Analytical Study* (Koninklijke Brill NV 2021).

[77] Bonnitcha, Poulsen and Waibel (n 70) 155–179; Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 52–57.

[78] Yackee (n 70); Bonnitcha, Poulsen and Waibel (n 70) 8–9.

or other potentially relevant stakeholders within the host States, including domestic investors, indigenous groups, and local communities. The investors' interests are predominantly the protection of property rights (over a wide variety of assets), mainly against expropriation, stabilized legal framework, and prohibition of discrimination or other unfair treatment.

Contrary to climate change law, there is no distinction between developed and developing States. All the parties to an IIA promise each other and their respective investors the same guarantees unless explicitly stated otherwise. The traditional equality of the parties and the mutuality of obligations is only theoretical. In practice, most host States receiving investment and thus compelled to fulfill obligations under a given treaty are usually less developed than their more affluent home State counterparts, which export capital through foreign investment.[79] This is particularly visible in the nationality of the parties in investment disputes where most investors are nationals of developed States. In contrast, the majority of respondent States are middle-income or developing countries.

The goals and assumptions of investment law traditionally translate into broad and general rights in treaty or contract clauses. The reason for the 'internationalization' of investment law is twofold. First, there is a perceived insufficiency of domestic legal protection. Second, leaving foreign investors' claims under the host State's national jurisdiction would arguably disadvantage the investors.[80] This explains the turn to international treaties and internationalized investor-State contracts, both usually providing for ISDS as an international, neutral forum. Despite the sheer number of IIAs in force and various treaty models adopted, most of these are almost identical, at least with respect to the main investors' rights they provide.

The key investors' right is the prohibition of expropriation without compensation. In the early days of investment treaties, in the face of massive expropriations in Communist and post-colonial States in the 20th century, this prohibition appeared to be the priority for foreign investors and their home States. This prohibition applies to both direct takings and indirect State measures, which might, e.g., decrease the value of an investment or prevent an investor from managing or otherwise enjoying its investment, any of which would amount to having a similar effect as expropriation.[81] The legal basis and the purpose of a measure are usually irrelevant – even if the expropriation took place for public purposes or in full compliance with the domestic laws of the host State, it should always be adequately compensated.

Another crucial investor protection is fair and equitable treatment (FET) or minimum standard of treatment (MST), which the host State shall accord to foreign investors.[82] The scope and meaning of FET/MST and their relationship with customary international standards of treating foreigners and their property have been the subject of a multi-faceted debate in scholarship and

[79] While in the past investment treaties have been concluded and applied in the developed-developing dynamic, this trend has significantly shifted recently. For example, the largest capital importer globally are the United States while the largest capital exporter (and a party to the largest number of IIAs) is China. Vaccaro-Incisa (n 76) 12–15.
[80] Salacuse (n 77) 56–57.
[81] Newcombe and Paradell (n 75) 13–15; Kate Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes' (2010) 1 Climate Law 63, 71–75.
[82] Miles (n 81) 75–76; Freya Baetens, 'Combating Climate Change through the Promotion of Green Investment: From Kyoto to Paris without Regime-Specific Dispute Settlement' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019) 116–123.

investment arbitration case law.[83] Recent years have brought a trend to make FET/MST treaty clauses more specific by, e.g., providing a list of exemplary violations or otherwise delineating their scope. The key features of FET/MST are equal treatment to other investors in the same circumstances, prohibition of discrimination, not violating 'legitimate expectations' of investors, i.e., keeping the host State's promises made in particular to an investor, and providing regulatory stability.[84] Usually, aggravated investors bring claims against the host States due to violation of treatment standards and/or expropriation (direct or indirect). The tribunals have considered the question of treatment standards in all investment disputes involving climate change matters.[85]

In addition, investors can usually also count on other rights (like freedom of transfers or admission of investment-related personnel to the host State) or treatment standards (national treatment, most-favored-nation (MFN) treatment, full protection, and security) under IIAs, investment contracts or domestic laws. Generally, they only have a subsidiary role to expropriation and FET/MST clauses as both these pillars of investor protection are sufficiently broad in their application. Nevertheless, in case of any breach of an investor's right, they may claim compensation for damages suffered due to that breach. Even though often the applicable law is not clear about the compensation standard and calculation, investment treaties and jurisprudence tend to put effect to the 'Hull formula' of 'prompt, adequate, and effective compensation,' comprising full compensation for losses suffered and lost profits.[86]

However, it is vital to remember that the investors' rights would not be effectively protected without a proper dispute settlement mechanism. Arguably, the most significant innovation of investment law was providing a forum through which individual investors can directly sue the host State without having to seek recourse through diplomatic protection under customary international law of their home State.[87] This has been developed in parallel to international human rights law. These two areas of law have not only some common historical roots but also substantive (in particular, the respect for individual property) and procedural (suing a State in international adjudication) rights.[88] Generally, an aggravated investor may bring a legal claim against the host State to an arbitral tribunal set up *ad hoc* or under the applicable rules as indicated in the legal basis for jurisdiction to hear the claim (an IIA, a contract, or a domestic law provision) for any violation of its rights stipulated therein.[89] The ISDS started to be used quite late on a larger scale after its first implementation in the late 1950s. The 'explosion' of disputes began first with disputes under the North American Free Trade Agreement (NAFTA)

---

[83] FET is used in 'European-style' IIAs while MST is used in 'American-style' IIAs, i.e. of the United States and Canada. Todd Weiler, 'An Historical Analysis Of The Function Of The Minimum Standard Of Treatment In International Investment Law' in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law* (Brill | Nijhoff 2011).

[84] José E Alvarez, *The Public International Law Regime Governing International Investment* (AP All-Pocket 2011) 177–226.

[85] Baetens (n 82) 121.

[86] Irmgard Marboe, 'Compensation and Damages in International Law' (2006) 7 The Journal of World Investment & Trade 723.

[87] Mārtiņš Paparinskis, 'Barcelona Traction: A Friend of Investment Protection Law' (2008) 8 Baltic Yearbook of International Law 105, 111–112; Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015) 85–87.

[88] Alvarez (n 84) 63.

[89] With respect to some countries, like China, arbitration clauses had limited scope, e.g. only with regard to the amount of compensation and not the breach itself; see G Matteo Vaccaro-Incisa, 'Arbitration Clauses Limited to Compensation Due to Expropriation: Relevant Case Law, Interpretive Trends, and the Case of China's Treaty Policy and Practice' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Singapore 2021).

in the late 1990s and then with a wave of claims against Argentina in the early 2000s. The jurisprudence of the field has been developing quickly, asserting effectiveness of the regime by enforcing its rules.[90] This effectiveness – exceptional among fields of public international law, particularly when compared to environmental law or human rights law – is perhaps one of the reasons for dissatisfaction with the regime by its opponents.[91]

The critique of investment law and arbitration arises from its effective assertion of investors' rights at the expense of other stakeholders, particularly the host States and their domestic actors. Due to their underlying goals and assumptions delineated above, IIAs are focused primarily on investors' rights and give much less attention to host States' rights like the right to regulate or their obligations under other sources of international law.[92] That may result in tensions and collisions between investment law and other public international law regimes, particularly human rights and environmental law. These, in turn, fuel the legitimacy crisis of investment law and arbitration.

Recent trends in investment treaty-making show attempts to address fragmentation concerns by importing different values, objectives, or even explicit references to 'sustainable development' obligations arising from, e.g., other treaties between the respective State parties in the IIAs, but the process is slow, piecemeal and hampered by politics.[93] With some exceptions, investment arbitration jurisprudence tends to consider (perhaps rightly) investment treaties as *leges speciales* and either downplay or ignore considerations of other potentially relevant norms of international law.[94] The structure of the rules and the perceived bias of ISDS in favor of investors raise a multi-faceted critique of the regime, the reform of which is subject to debate at the UNCITRAL.[95]

In summary, international investment law has come a long way in a short time with its particular goals, assumptions, and sources. It has grown into a fully-fledged international legal regime with effective dispute settlement. It faces some perils of its apparent success, which arise from its traits, in particular substantial isolation from other international legal regimes, at least in the opinion of its opponents.

4. Climate Change and Investment Law – Clashes and Challenges

It has been argued that pursuing objectives under the UNFCCC, the Paris Agreement, and the European Green Deal may lead to investment disputes due to various legal issues.[96] We have already seen the first claims arising from measures designed to combat climate change. Claims

[90] van Aaken (n 67).
[91] ibid 554.
[92] Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013) 133; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 81, 131.
[93] Ipp (n 2).
[94] Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57 International and Comparative Law Quarterly 361; Newcombe and Paradell (n 74) 91–92; Alvarez (n 84) 196–200; Jorge E Viñuales, 'Customary Law in Investment Regulation' (2014) 23 The Italian Yearbook of International Law Online 23.
[95] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission On International Trade Law' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 4 March 2022.
[96] Miles (n 81) 64; Baetens (n 82) 108, 113–114.

arose and are expected to rise further from, among others, emission trading schemes, measures limiting carbon emissions, taxation measures, coastal planning, and environmental permits.[97]

No instrument under the UNFCCC framework provides for enforcement or sets up a dispute settlement mechanism comparable to ISDS.[98] Thus, disputes concerning, for example, trading Emission Reduction Units can be and are frequently directed to investment arbitration. In addition, increasingly more ambitious State actions to achieve the temperature goal and, more specifically, the NDCs set by States under the Paris Agreement may hamper foreign investors' activity. This, in turn, will give rise to compensation claims due to violations of investors' rights provided for in IIAs. It is likely that if States abide by their obligations under the Paris Agreement, the overall number of investment disputes will increase as States' climate commitments, including those of developing countries, become more ambitious.

When investment disputes with climate change components arise, the parties, particularly the respondent States, may use climate change considerations to bolster their legal argumentation in two ways. First, respondent States may invoke the international climate change regime as a context or justification for their domestic regulations or other measures. Against this factual background, tribunals may assess how far such regulations or measures were indeed aimed at the objectives set by the regime, whether they were necessary, proportionate, or foreseeable by a diligent investor. Second, States may invoke the climate change regime as a part of international law applicable to the dispute, especially if both the home State and host State are parties to relevant treaties. In addition, they might argue that environmental or climate change law principles, like the precautionary principle or sustainable development, apply regardless of the treaty. In such a situation, one may see a conflict of norms that has to be resolved by the tribunal. Thus, climate change concerns may appear as factual or legal issues in an investment dispute.

Several challenges appear with respect to the emergence of legal considerations from another field of international law which is usually foreign to investment arbitration practitioners due to its respective novelty and conceptual differences. First, the parties may have recourse to only a selective use of climate change law argumentation, picking and choosing only particular norms or principles without the broader normative context in which they exist. That may result in only fragmentary (if any) application of climate change law which might be difficult to remedy due to the second challenge – the inexperience of arbitrators with climate change law. While often both parties and tribunals in investment disputes readily use environmental experts to assess the facts of the case (e.g., environmental damage), they never do the same concerning environmental law (while they do so with respect to investment law itself). In the face of usually missing clear conflict of law rules, a substantial disproportion in understanding between one field of law and another may impact the outcome of legal reasoning. That does make any potential interaction between the legal fields difficult and might only exacerbate allegations of systemic isolation of investment law, which may lead to ignorance towards non-investment considerations. The third challenge is the unclear content of the 'proportionality test', which is yet to be established in investment arbitration jurisprudence and could guide the balancing of inherent and foreign values to investment law. Besides other jurisprudential inconsistencies of investment disputes, the fourth challenge concerns counting compensation awarded for IIA violations. Should an investor be fully compensated if their investment caused environmental damage or contributed significantly to climate change and, because of that, was closed by the

[97] Miles (n 81) 64, 86–91.
[98] Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48 Vanderbilt Journal of Transnational Law 1285, 1316; Baetens (n 82) 108.

host State? Or should there be some mitigation? Could the host State sue such an investor in investment arbitration?

The best way to receive an answer and a forecast about potential outcomes of investment disputes arising from measures aimed at combating climate change appears to be a review of the up-to-date investment jurisprudence involving various environmental considerations, including climate change.

5. Current Trends in Investment Disputes with Environmental Components

Viñuales[99] provides a broad but, at the same time, detailed picture of developments in investment law, including environmental components in the broadest sense. He draws attention to three aspects: (1) involvement of private investment in environmental transformation, (2) trends in IIAs, and (3) in particular to ISDS jurisprudence. Viñuales presents 'trends that have moved from forecasts to reality.' His main research question is, 'how environmental protection is gaining ground in the international law of foreign investment and in the mindset of those whose profession is to clarify and apply it.' As will be seen, it is difficult to say how far environmental protection or widely understood environmental concerns are gaining ground *in law* besides placing relevant clauses in the most recent IIAs, which constitute a small fraction of the existing investment treaty framework. The environment is increasingly present in parties' arguments and tribunals' considerations, which Viñuales calls a 'mindset change'. This section will first describe Viñuales' main findings (5.1) and then proceed to show how far this mindset change has occurred in recent investment jurisprudence and what its effect is on the outcomes of investment disputes, with environmental components, is (5.2).

5.1 1970-2015/2017: Jorge Viñuales' Overview of Investment Disputes and the 'Change of Mindset'

Viñuales briefly describes the framework for harnessing investment to promote sustainable development and 'green growth'.[100] The key act of this framework is the 2030 Agenda for Sustainable Development, providing Sustainable Development Goals (Goal 13 being combatting climate change).[101] Therein, public and private investment are addressed, focusing on investment promotion in developing countries to solve their problems and emphasizing the need to respect public policy space for every State to address sustainable development challenges. In general, the global institutional framework of the United Nations and the World Bank, in particular, seek to create and promote 'possible synergies between foreign investment and sustainable development, including environmental protection. '[102]

Then, Viñuales turns to an increasing trend of introducing environmental considerations – mainly as exceptions – into IIAs.[103] The inspiration for this may be found in international trade law; the NAFTA, for instance, already in 1994, addressed its relationship with obligations

[99] Viñuales (n 2).
[100] ibid 13.
[101] ibid 14.
[102] ibid 16.
[103] ibid 17–19; see also David W Rivkin, Sophie J Lamb and Nicola K Leslie, 'The Future of Investor-State Dispute Settlement in the Energy Sector: Engaging with Climate Change, Human Rights and the Rule of Law' (2015) 8 The Journal of World Energy Law & Business 130, 148–150.

under selected environmental treaties.[104] Such a tendency is strong and continuing, particularly in FTAs but to a certain extent also in some BITs. The EU, for example, puts a strong emphasis on mainstreaming environmental issues in its trade and investment agreements. However, these preambular considerations and 'GATT-like' exceptions appear not to be effective tools to weigh environmental (legal or not) considerations into the works of investment tribunals. First, many investment disputes are based on first-generation IIAs, which lack environmental considerations. A vast majority of IIAs in force do not include such clauses, and it is unlikely that this can be remedied through respective amendments and renegotiations of most of them. Second, even if a treaty includes environmental references (like the Energy Charter Treaty (ECT), for example), these can rarely be successfully invoked by a State party to preclude its liability, as will be seen below. This is caused by several factors, including the 'hard', straightforward character of States' obligations towards investors, compared to more vague environmental objectives or the emphasis put on investor protection above all other objectives of the regime. Apparently, economic liberalization remains the primary political objective of IIAs, leaving sustainable development objectives secondary.

The final and key aspect of the intensified interplay of investment law and the environment is 'the surge of investment disputes with environmental components.' These disputes are the spheres in which investment law is put into practice and may clash with environmental considerations. Viñuales gathered a set of 117 cases commenced from 1970 until October 2015.

Viñuales defines investment disputes with environmental components as 'disputes that arise from the operations of investors: (a) in environmental markets (for example, landfilling, waste treatment, garbage collection, pesticides/chemicals, energy efficiency, renewable energy, emissions reduction, biodiversity compensation, and so on) and/or (b) in other activities where their impact on the environment or certain minorities is part of the dispute (for example, tourism, extractive industries, pesticides/chemicals, water extraction or distribution) and/or (c) in disputes where the application of domestic or international environmental law is at stake.'[105] Only investor-State disputes solved in investment arbitration under investment treaties are considered (i.e., no domestic court cases or mediations are in the dataset).

The proposed definition is quite broad and flexible. However, it allows review of a wide array of investment disputes in which any consideration of the natural environment (even a very marginal one) appears. It must be kept in mind that even though investment arbitration is generally less confidential than other fields of international arbitration, not all disputes or dispute documents are publicly accessible. At times, one can rely only on the short summaries of the dispute or redacted versions of documents which may limit insight into how far environmental considerations were part of the dispute. Thus, despite numerous databases and other sources, the number of cases selected may vary due to differences in the interpretation of the proposed definition and data access.[106]

[104] The trend of introducing treaty carve-outs, exceptions, exemptions or at least interpretive guidelines is particularly strong in Canadian and US model IIAs. Miles (n 81) 80–81.
[105] Viñuales (n 2) 20.
[106] For example, our data search conducted in March 2022 returned with 25 investment disputes initiated in 2015 when Viñuales indicates only 17 of them; that difference most probably arose from broader interpretation of the part (b) of Viñuales' definition of 'environmental component' of a dispute and from the updated data; these differences in numbers do not preclude, however, the general observation that there has been an increased number of environmental investment disputes commenced in the recent years.

Among these 117 initiated cases, 65 were concluded by October 2017, while the remainder was pending. More than half of these were filed after 2012, showing a 'steep increase' of investment disputes with environmental components. These components vary – most often, these are energy transition policies, particularly tariff schemes for renewables introduced and then reversed in Spain and other countries (36%). That category is of particular importance as comprising cases related to climate change. The second category of components is the issues relating to environmental permitting (20%). After these, in similar proportions appear issues like environmental damage/remediation, conservation, waste, water, other, and trade.[107]

Viñuales aptly forecasted that the trends described above would increase as the existing legal framework pushes for such a substantial transformation in numerous policy areas, which can hardly be 'smooth and painless' for private investors. These investors, in turn, may have recourse to protections provided by investment law to 'resist of recover the costs of environmental regulatory change.'[108] In practice, that would mean that investors recover damage incurred due to unfavorable State measures, even if these serve environmental purposes. At the same time, States are financially punished for introducing these measures. The tensions between sustainable development commitments, including those concerning climate change, and investment law are thus inevitable. As demonstrated below, the updated overview of investment disputes with environmental components confirms the steep increase of such disputes in recent years, particularly those concerning energy transition.

A review of the cases allowed Viñuales to note a change in the way the arbitral tribunals approach environmental issues in investment disputes. He aimed to 'assess how the relevant international norms and instruments had previously been applied.' As a benchmark, he indicates the previously prevailing 'traditional approach' according to which environmental measures adopted by States were always suspicious to tribunals and subordinated to investment law. All the potential conflicts between investment and environmental law have been perceived as legitimacy conflicts, and all environmental concerns raised by respondent States as a post-factual defensive strategy rather than genuine considerations. In general, tribunals distrusted environmental argumentation adopted (if any) by States. Opposite to the 'traditional approach' would be a progressive one, seeing conflicts as normative rather than those of legitimacy. The progressive approach considers environmental and investment regulation on equal footing, seeing the former, even if only domestic, as required or justified by international environmental obligations. In practice, Viñuales notes, 'a number of decisions' suggests that investment tribunals take a 'middle way', which he called an upgraded 'traditional approach'. The conflict between investment and environment is still considered one of legitimacy. Environmental law issues remain 'essentially domestic', but environmental considerations enter the process of interpretation of applicable investment law. These considerations are being introduced through legal concepts like the police powers doctrine,[109] the level of reasonableness and due diligence required from investors,[110] or the use of relevant clauses either exempting from liability or otherwise affecting the interpretation of investors' rights due to environmental

[107] Viñuales (n 2) 26.
[108] ibid 25.
[109] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, para. 266. It is important to note that the police powers doctrine applies also to public goods other than environment, like human rights, public order, safety, health etc. Catharine Titi, 'Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill | Nijhoff 2018); Noam Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) 14 Manchester Journal of International Economic Law 21.
[110] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 218-222.

considerations.[111] The environment in itself became a value still not prioritized over investors' rights but at least recognized as a legitimate policy objective.[112]

Viñuales briefly discusses several cases demonstrating this new stance taken by investment tribunals, arguing that environmental considerations appear in the 'increasingly clear and open form,' even if eventually respondent States are found to be in breach. For Viñuales, that shows the 'mainstreaming' or 'normality' of environmental reasoning in investment jurisprudence.[113] That jurisprudence arguably shows 'footprints' of a 'mindset change' of investment arbitrators. His examples show that while tribunals openly address environmental considerations, they usually do not absolve respondent States from their liability under investment agreements and, thus, eventually punish their efforts to protect the environment. In both *CDSE v. Costa Rica* and *Unglaube v. Costa Rica*, while different approaches by the tribunals to compensation standards for environmentally motivated expropriation are discernible, Costa Rica has been found liable and had to pay the investor. Similarly, in *Clayton and Bilcon v. Canada*, in which indeed much emphasis was put on environmental considerations, the majority found the respondent State liable mainly due to violations of domestic law which is quite unusual for NAFTA jurisprudence.[114]

In *Berkowitz (Spence) v. Costa Rica*, in turn, the tribunal found to have only limited jurisdiction with regard to claims concerning treatment standards, and environmental legal considerations were discussed mainly by the non-disputing parties (El Salvador and the United States, respectively).[115] The key factual finding – that the claimants should have been aware of the location of certain land properties within the boundaries of a national park – was far more decisive than it was an explicit regulation relating to the environment in the Dominican Republic-Central America FTA (CAFTA-DR), the applicable treaty.[116] Nevertheless, the tribunal considered an assumption (or interpretive guidance) from paragraph 4(b) of Annex 10-C CAFTA-DR, that non-discriminatory measures to protect *inter alia* the environment do not constitute indirect expropriation.[117]

Of the cases discussed by Viñuales, the only one in which environmental considerations were discussed thoroughly and treaty norms (similar to those of the CAFTA-DR) were applied to absolve the respondent from liability was the *Al Tamimi v. Oman* case. The tribunal used the guidance of Annex 10-B and Chapter 17 (on environment) of the US-Oman FTA explicitly to refuse to find indirect expropriation[118] or a violation of the minimum treatment standard.[119] That case, however, alone, is the most significant evidence of the 'mindset change' described by Viñuales and demonstrates a far-reaching use of environmental regulations in an investment treaty by the tribunal. However, it is essential to emphasize that the treaty, being a US-modelled FTA, is not the most popular treaty model. Still, a vast majority of IIAs are lacking equivalent environmental clauses. Even if they existed, as in the CAFTA-DR, they do not play such a

[111] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015, para. 389.
[112] Viñuales (n 2) 25–27.
[113] ibid 29.
[114] ibid 31–33.
[115] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, paras 157, 161.
[116] ibid paras 178-182.
[117] ibid para. 271.
[118] *Al Tamimi v. Oman* (n 111) para. 368.
[119] ibid paras 389-390.

decisive role as demonstrated in *Spence* and other CAFTA-DR-based investment cases. It is not improbable, though, as will be demonstrated below.

An interesting case, also mentioned by Viñuales, is *Allard v. Barbados,* in which it was the investor who alleged environmental damage on the part of the host State and demanded compensation for damaged property. In addition, the claimant relied on environmental treaties previously concluded by the respondent State as heightening the standards of its due diligence obligations.[120] However, the tribunal did not follow that direction. Nevertheless, it accepted that 'consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances.'[121] Similar attempts have been made by investors in renewable energy who relied on the environmental objectives mentioned in the ECT preamble to emphasize the respondent's obligation to maintain environmental-friendly regulations, which were abolished due to the financial crisis.[122] Although that argument in itself did not prove convincing, it shows that international environmental obligations may also be used *against* respondent States in investment disputes.

In two closely related cases, *Burlington v. Ecuador* and *Perenco v. Ecuador*, respondent, for the first time, managed not only to convince the tribunal to find jurisdiction over counterclaims against investors but also to win on these. Ecuador's right to counterclaim was found both under domestic and international environmental law. That development in itself might support Viñuales' claims of the change of mindset. Also, the tribunal expressly recognized that 'a State has a wide latitude under international law to prescribe and adjust its environmental laws, standards, and policies in response to changing views and a deeper understanding of the risks posed by various activities.' It further declared itself 'mindful of the fundamental imperatives of the protection of the environment in Ecuador.' Nevertheless, Ecuador also lost with respect to several claims by the investors, and the compensation it had to pay significantly exceeded the compensation awarded for its counterclaim. As a result, the claimants, even though found liable for environmental damage after a diligent, expert-led assessment, were just to be paid less by the respondent after a set-off.

To sum up, in virtually none of the discussed cases (except for *Al Tamimi*) could the respondent State prevail due to the environmental nature of the measure. It has either lost, received a 'pat on the back' by the tribunal, or other non-environmental reasons were put forward to explain the claimants' loss. Environmental defenses may stall the advances of the investor. However, they rarely shield the respondent States from liability, while at times, they can be used as a sword by claimants (although never successfully as of now). It might as well seem that the expressions regarding the deference of environmental concerns, like in *Clayton* or *Unglaube,* were merely a lip service.

It should be taken into account that investment arbitration is for at least a decade under the scrutiny of not only practitioners and academics but also civil society which is rather critical of the field. Since investment awards are usually publicly available, a wide audience is

[120] *Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, paras 178, 230.
[121] ibid para. 244.
[122] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, paras 393, 408; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 432; *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para. 273; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, paras 861-862.

interested in the outcomes and the way these are justified. A total disregard for environmental concerns would further increase respondent States' and civil society's dissatisfaction with the ISDS. Thus, arbitrators may feel compelled to at least express understanding and demonstrate an apparent 'mindset change' even if usually that is not genuine or effective. That is not to say that some arbitrators do not really understand environmental concerns or do not treat them seriously. They have, however, limited legal possibilities to take them on board when conducting their legal reasoning, and even if such an avenue exists, it is rarely taken to the end.

5.2 2015/2017 – Today: Most Recent Developments

Following Viñuales' definition and typology of investment cases with environmental components, we have reviewed the up-to-date investment disputes, which partly confirm his argument on the change of mindset. However, at the same time, they validate some of the pessimism expressed above. Reviewing the updated pool of investment disputes also brings some new observations that might be relevant to assess the current trends and notice the new ones.

As shown in figure 1 below, the substantive increase in investment disputes with environmental components is confirmed. Only in the years 2016-2020, 99 new disputes were initiated. Thus, taking together fragmentary data for 2021 and early 2022, the number of environmental investment disputes almost doubled (compared to 117 disputes commenced before October 2015).[123] While a bulk of these disputes are energy transition disputes under the ECT (particularly against Spain) or the NAFTA/USMCA (particularly against Canada), they also present a variety of (mainly) factual and legal environmental issues at stake. Importantly, this wave is not fully correlated with the overall number of initiated cases. In recent years, environmental disputes constituted between 25% to 33% of all investment disputes initiated yearly, with the exception of 2018 (which has seen the most investment disputes generally and the least environmental investment disputes commenced).[124] In the face of incoming regulatory measures aimed at climate change with respect to, among others, energy transition, this trend will most probably continue as forecasted by Viñuales.

[123] The dataset has been created with the use of publicly available information mainly from the UNCTAD Investment Dispute Settlement Navigator (https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search) and the Investor-State Law Guide (https://new.investorstatelawguide.com/), supplemented with documents available at italaw (https://www.italaw.com/) as of March 2022; the sources are limited with respect to the years 2021-2022 (data on UNCTAD is as of 31 December 2021); the case selection was based on Viñuales' definition of investment disputes with environmental components, guided by the literature on the topic and done through the analysis case descriptions and case documents (when available); the keywords used to facilitate the search were 'environment(al)', 'sustainable development', 'sustainability', 'Kyoto Protocol', 'Paris Agreement', 'Convention on Biological Diversity', 'Ramsar Convention'.

[124] Similar proportions appear also in the earlier ICSID jurisprudence concerning mining sector, see Rivkin, Lamb and Leslie (n 103) 131.

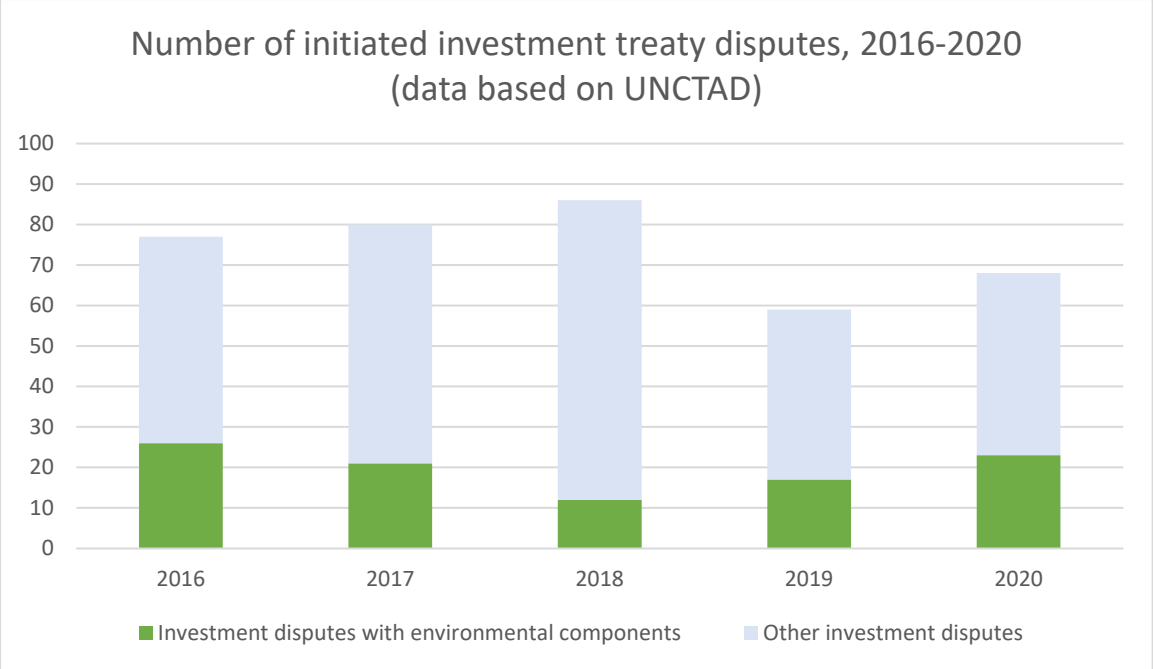

Figure 1 Initiated invested treaty disputes 2016-2020

From October 2017, after the *Wirtgen v. Czech Republic* award, until March 2022, 53 investment disputes with environmental components have been resolved (i.e., finally decided, settled, or discontinued), and 9 more decided as to the merits of the case (i.e., only a decision on compensation is pending). Among these, 38 (61%) were concerned with energy transition, 11 (17%) environmental permitting, and 6 (9%) environmental damage/remediation. Thus, within less than 5 years, the number of concluded environmental investment disputes again almost doubled (compared to 65 disputes concluded from 1970 until October 2017). The proportional increase in energy transition disputes, most of these conducted under the ECT, is notable. That should have substantially increased the pool of arbitral decisions to analyze jurisprudential trends in addressing environmental considerations. However, there is not much progress in the general approach taken by the tribunals.

First, the win-loss ratio of environmental investment disputes is much more favorable to claimants. While overall, claimants prevailed in 213 out of 748 (28%) concluded investment disputes (and a further 148 have been settled),[125] in the recently concluded disputes with an environmental component, claimants have been awarded compensation in 23 out of 53 cases (43%). The disproportion is even more prominent when taking into account all the wins on the merits by claimants (when compensation has not been awarded yet or not at all): 39 out of 62 cases (63%). Of course, the outcome of every case heavily depends on the applicable law and factual circumstances, and the numbers do not indicate that, in general, claimants have it easier to prevail in environmental investment disputes. Nevertheless, it is visible that the presence of environmental considerations, which should be helpful for the respondent's case, does not correlate with the respondent's success rate. It is important to note, however, that a significant part of these cases is the 'Spanish Saga' claims (under the ECT), where in fact, Spain has backtracked from the environmentally friendly policy of ensuring feed-in-tariffs for

[125] UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement (data as of 31 December 2020), accessed 29 March 2022.

investments in solar power plants.[126] The respondent avoided liability in only three out of the 28 'Spanish Saga' cases in the assessed pool.[127]

Second, respondents not only tend to lose but they are ordered to pay substantial amounts of compensation. Setting aside the *Tethyan Copper* award as an outlier in which the tribunal has awarded a staggering amount of more than USD 4 billion,[128] in 23 other cases in which compensation has been awarded, the overall amount of aggregate compensation exceeds USD 1.177 million (interest and costs excluded). Even if tribunals expressed 'considerable deference to the regulatory power and margin of discretion of the host State,' they awarded significant amounts of compensation against it.[129] Otherwise, as done by the *Unglaube* tribunal, the environmental considerations play no role in assessing the amount of the compensation.

Most importantly, environmental issues, including environmental law, tend to appear in investment disputes, both implicitly and explicitly, merely as a part of the factual background. While treaties like the Kyoto Protocol, Paris Agreement, Convention on Biological Diversity (CBD), or Ramsar Convention are sometimes mentioned, they are invoked to provide context for domestic law introduced by the host State.[130] Moreover, as mentioned above, the claimants are often the ones who refer to these international instruments trying to establish additional obligations upon respondent States. Never has an international environmental treaty or any rule or principle of environmental law been invoked by the respondent State as justification for a regulatory measure in itself. It can be observed that generally, when assessing legitimate expectations of investors, public interests like the environment have 'little or no' relevance.[131]

Environmental law is frequently considered a domestic law of the host State and, thus, a part of the factual background. Against this background, tribunals analyze whether a breach of an investment treaty has occurred. If the applicable treaty provides certain environmental stipulations, there seems to be room for legal considerations, but that rarely occurs. While *Spence* has been decided only on jurisdiction for now, and it seems that any environmental law concern raised by the non-disputing parties will not be decisive, *Al-Tamimi* appears to be the only investment claim discussed by Viñuales in which treaty clauses on environment played any role in deciding the case. From the updated pool, despite a significant increase in cases, only very few share this trait, namely *David Aven v. Costa Rica* and *Philip Morris v. Uruguay*.

---

[126] Vadi (n 98) 1323–1325.

[127] Additionally, *Eiser* case has been annulled in full: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Respondent Application for Annulment, 11 June 2020.

[128] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019. The compensation awarded in this dispute is the largest known amount awarded by an investment tribunal.

[129] E.g., *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, para. 688-697, 860. Quote after Baetens (n 82) 121.

[130] E.g., *Athena Investments A/S (formerly Greentech Energy Systems A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V(2015/095), Final Award, 23 December 2018, para. 105; *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para. 97; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, paras 85, 460, 598 and 766.

[131] Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?' in Charles Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D. Caron* (Oxford University Press 2022).

The *David Aven* case is particularly interesting because it was another expropriation dispute against Costa Rica under CAFTA-DR, this time successful for the respondent. It involved alleged environmental damage done by the investor in their land property comprising wetlands protected under domestic environmental law. Respondent defended its environmental measures and laws by relying on Chapter 17 CAFTA-DR on environment, overriding Chapter 10 on investment protection. The tribunal did not follow that argument, but it closely assessed the international legal obligations of Costa Rica under environmental treaties, namely the CBD and the Ramsar Convention, before assessing its domestic regulations. It concluded that Costa Rica 'has both adopted international conventions and has enacted internal legislation in environmental matters consistent with most international conventions but at the forefront of most jurisdictions'.[132]

The *Philip Morris v. Uruguay* case on tobacco packaging regulations concerns more health than strictly environmental issues. However, it is relevant to the present analysis for two reasons. Firstly, environmental concerns have been explicitly mentioned in both international (Framework Convention on Tobacco Control – FCTC) and domestic legal frameworks, which the tribunal thoroughly analyzed.[133] Secondly, the tribunal, building on the previous jurisprudence, particularly *Chemtura v. Canada*, and other investment treaties, recognized the police powers doctrine as 'general international law' despite its absence in the investment treaty applicable to the dispute.[134] Additionally, the tribunal stated that States have a certain 'margin of appreciation' in regulating such values as public health.[135] Although the tribunal concluded before that the claimant will not succeed on expropriation claims for other reasons, its analysis is undoubtedly more than *obiter dicta*. It demonstrates a significant leap in recognition of the police powers doctrine as a part of customary international law. In previous cases, such an argumentation was raised by the respondent but neither addressed nor shared by the tribunal but only expressed as *obiter dicta*. Although the analysis primarily concerned public health as a legitimate value to be protected by police powers, nothing suggests it would not apply the same way to environmental protection.

The *Philip Morris* decision corroborates Viñuales' findings on the change of mindset perhaps most powerfully of all the recent cases. Two caveats must be voiced, however. First, it is still a particular case that concerns the highly regulated issue of tobacco control. The FCTC and its implementing instruments create a different international framework than the UNFCCC and its related agreements. Moreover, just like *Chemtura v. Canada* before, from which it borrowed passages on police powers and margin of appreciation, it stands alone against numerous other cases in which the tribunals did not even consider such reasoning. Second, the dissenting opinion by Gary Born to this award shows how limited the change of mindset might be. Arbitrator Born, though recognizing general Uruguay's right to regulate tobacco packaging,[136] had an issue with, among others, Uruguay being the only country to introduce a certain measure. While such reasoning has a certain value, if shared by the majority in this or another investment dispute, it might have severe consequences for any unprecedented regulatory measures. It appears that the States are expected to introduce several unprecedented regulations to mitigate climate change. In the face of binding investment treaties and doubts of well-

[132] *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 439.
[133] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras 86-95.
[134] *Philip Morris v. Uruguay* (n 133) paras 287-307.
[135] ibid paras 397-400.
[136] ibid paras 1-3.

established arbitrators like Gary Born, the host States might be afraid to be the first to introduce such measures and thus cause another 'regulatory chill' which arguably humankind cannot afford right now. Nevertheless, since the mindset change is not as widespread as one could expect, States still have to bear their existing investment treaty frameworks and obligations in mind when introducing any regulatory measure combatting climate change which could encroach on some rights of foreign investors. More detailed suggestions will be presented below.

A decision supporting a more pessimist look at the usefulness of environmental exception treaty clauses is *Eco Oro v. Colombia*.[137] In this case, concerned with changes in domestic environmental and mining laws depriving the investor of a right to apply for environmental permits, Colombia relied heavily on the police powers doctrine recognized explicitly in the treaty as well as an exception provided in Article 2201(3) for non-arbitrary and justified measures necessary to protect 'human, animal or plant life and health.'[138] Firstly, the tribunal magnanimously stated that 'neither environmental protection nor investment protection is subservient to the other; they must coexist in a mutually beneficial manner' and found the invoked clause 'permissive'.[139] It found, however, that 'whilst a State may adopt or enforce a measure… without finding itself in breach of the FTA, this does not prevent an investor claiming… that such a measure entitles it to the payment of compensation'.[140] Thus, even if environmental measures are 'permissible' under a given treaty, they may still result in the obligation to compensate an aggravated investor. While the expropriation claim has been dismissed under the police powers doctrine recognized in the treaty (and with reference to the *Philip Morris* case),[141] Colombia has been found liable to pay compensation for a breach of the minimum standard of treatment.[142] The decision on the amount of compensation in *Eco Oro* is pending.

A similar reasoning to *Eco Oro* was adopted previously by the *Infinito Gold* tribunal.[143] Interestingly, the tribunal has found the respondent State liable but awarded no compensation. Apart from the practical use of treaty clauses on the environment, this is a potentially curious trend to look at. While in none of the analyzed cases, such a decision was dictated directly by environmental concerns, the tribunals have not been convinced of the cause-and-effect relationship between the violation and 'quantifiable harm'.[144] At times, it was considered that the investment would not have succeeded even in the absence of the found violation.[145] This suggests that if the investment is frustrated at an early stage to the extent that applicable investment protections are violated, the damage may be too distant to be quantified into compensation. However, tribunals firmly held that neither exemptions included in the treaty nor the police powers doctrine always preclude liability of the host State if found in breach.[146]

---

[137] *Eco Oro v. Colombia* (n 130).
[138] ibid paras 361-366.
[139] ibid paras 828-829.
[140] ibid para. 830.
[141] ibid paras 623-699.
[142] ibid paras 806-821, 837.
[143] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, paras 770-781.
[144] ibid para. 712*; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa*, ICSID Case No. ARB/07/26, Award, 8 December 2016, paras 845-847; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, paras 728-741.
[145] *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, paras 649-651.
[146] ibid para. 650; *Infinito Gold v. Costa Rica* (n 143), paras 770-781.

Thus, even if respondent States can avoid paying high compensation, their capacity to rely on treaty exemptions or the police powers doctrine is limited.

To conclude the analysis of environmental investment jurisprudence, despite the continuing increase of both filed and concluded cases, the change of mindset argued by Viñuales is, at best, limited. In most disputes with environmental components, these components belong only to the factual background, and tribunals, although relying on external experts, are still suspicious of respondents' claims about environmental motivations of measures.[147] Investment tribunals rarely consider international environmental obligations seriously, and these obligations are often used against respondent States in (so far failed) attempts to heighten the standards of their respective obligations. While in some cases, the police powers doctrine is also applied with respect to the environment, and tribunals engage with environmental clauses as exceptions, exemptions, or at least interpretive guidelines, these are still a minority. At the same time, certain jurisprudential inconsistencies in investment arbitration and the inexperience of arbitrators with international environmental law persist.[148] Due to the ephemeral, *ad hoc* nature of investment arbitral tribunals and no established rules on recourse to precedent in investment arbitration, it is uncertain how far findings in *Al-Tamimi, David Aven,* or *Philip Morris v. Uruguay* can spread and develop into *jurisprudence constante*. If one were to summarize the general mindset of investment jurisprudence towards environmental concerns in one phrase, this phrase would start as follows: 'Environment is very important *but*…'.

6. Climate Change Investment Disputes – Forecast and Recommendations

The main issue remains that most IIAs lack clauses solving potential normative conflicts between investment and environmental obligations.[149] While virtually all the newly concluded IIAs address the matter, many disputes are based on treaties silent on environmental concerns (e.g., until recently, the ECT).[150] Even among these few cases in which relevant treaty clauses can be invoked, their usage is limited by a narrow interpretation of tribunals and even State parties.

In the absence of treaty clauses able to help manage conflicting norms under different treaties, suggestions are made to rely on the rules of treaty interpretation found in the 1969 Vienna Convention on the Law of Treaties (VCLT), particularly the principle of systemic integration enshrined in Article 31(3)(c) VCLT.[151] Here, however, the nature of international environmental obligations, particularly those of climate change treaties, poses a difficulty. On the one hand, an adjudicator sees straightforward obligations, including prohibitions and commands of a host State towards investors. While on the other hand, imprecise, bottom-up

[147] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, paras 414, 432.
[148] Vadi (n 98) 1333.
[149] ibid 1344–1345.
[150] While indeed the ECT mentions environmental objectives in its preamble, they have never been used as interpretive guideline in favor of respondent States. Thus, their function in future climate change investment disputes will be rather limited. The ongoing attempts reform to ECT directly concern also the climate change: European Commission, 'Commission Presents EU Proposal for Modernising Energy Charter Treaty' (*Trade - European Commission*) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148> accessed 30 March 2022.
[151] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279; Baetens (n 82) 126–128; Ipp (n 1); Anja Ipp, Annette Magnusson and Andrina Kjellgren, 'European Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence' (Climate Change Counsel) 36–40.

commitments following general principles can be found on the side of the environmental and particularly climate change law. Thus, even though these principles of international environmental and climate law could potentially be valuable for the interpretation of investment treaties, their overarching role is, unfortunately, more limited than it should be – from the point of view of those preoccupied with climate change.

There is no equivalent dispute settlement system for climate change law that could press upon States to effectively pursue environmental objectives, while investment arbitration remains an effective way to reward aggravated investors with substantial compensation. The calls to introduce an arbitration mechanism for climate change obligations have not been answered.[152] The proposal to turn the Kyoto Protocol into an ECT-like multilateral investment protection treaty for low-carbon investments was not feasible.[153] In the current situation, States may feel like their hands are tied by the existing investment treaty frameworks and under pressure from investment litigation. No wonder they plan short-term and abstain from ambitious regulatory measures aimed at climate change, wary of potential risks they may face if they breach investors' rights and of insufficient legal defenses.

That is not to say that respondent States should always be shielded from liability for any measure just because it is allegedly introduced to protect the environment or combat climate change. However, arguably they should have some degree of discretion and deference from investment tribunals, especially when these are explicitly recognized in IIAs governing the disputes. Rhetorical pats on the back accompanied by finding the host State liable and awarding staggering compensation will not encourage States to take an active stance in combatting climate change.

Even when taking a rather pessimist look at the current approach to environmental considerations by investment tribunals, it cannot be denied that at least some decisions are giving glimpses of hope for encouraging environmental protection irrespectively of binding obligations towards investors. Nevertheless, some general cautions can be given to the host States.[154] First, they should be wary when introducing relevant regulatory measures, especially if they are novel, sweeping, and unexpected. Second, the existing investment treaty framework and promised investors' protection has to be assessed as a whole, mainly due to the existence of MFN clauses. Third, retroactive measures should be avoided at all costs, especially those requiring investors to pay back previously obtained financial support. Fourth, the measures should be non-discriminatory and aimed at whole sectors as far as possible. Fifth, policy and regulatory changes should be discussed publicly, both with respect to general directions and particular solutions, to avoid accusations of frustrating legitimate expectations by 'surprising' investors with legislation. Sixth, a recourse to judicial remedy or another appeal procedure should be available to aggravated investors. Seventh and last, if making counterclaims against an investor, make them early and well-evidenced. The question remains open whether States can afford to constantly look over their backs and follow these guidelines when the need to combat climate change through sweeping measures becomes increasingly dire.

The recent modernization of the ECT, although a long-awaited step forward, has yet to prove its sufficiency and effectiveness. Despite some positive indications that investment law and

[152] Risteard de Paor, 'Climate Change and Arbitration: Annex Time before There Won't Be A Next Time' (2017) 8 Journal of International Dispute Settlement 179.
[153] Anatole Boute, 'Combating Climate Change Through Investment Arbitration' (2012) 35 Fordham International Law Journal 613, 653–659.
[154] On particular suggestions with respect to treaty and contract drafting see Baetens (n 82) 125–126.

arbitration are more receptive to environmental considerations, they still appear to hamper somewhat more than encourage combating climate change.[155] Unless a significant part of the existing investment treaty framework includes proper clauses solving normative conflicts and tribunals will use them on a larger scale, the allegations of 'regulatory chill', systemic ignorance, and legitimacy gaps of investment law and arbitration are likely to persist.

[155] European Commission, 'Agreement in Principle Reached on Modernised Energy Charter Treaty' <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> accessed 19 September 2022.