

2023

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Naimeh Masumy

Carrie Shu Shang

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### Recommended Citation

Naimeh Masumy and Carrie Shu Shang, *Analyzing the Anatomy of Innovative Investment Treaty Drafting: The Quest to Safeguard the Right to Regulate*, 2023 J. Disp. Resol. ()

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# ANALYZING THE ANATOMY OF INNOVATIVE INVESTMENT TREATY DRAFTING: THE QUEST TO SAFEGUARD THE RIGHT TO REGULATE

*Naimeh Masumy\* and Carrie Shu Shang\*\**

## ABSTRACT:

This article engages in empirical assessments that highlight the growing trend in which recent investment agreements envision pathways to expand the regulatory space. The empirical analysis is based on 40 multilateral and bilateral investment treaties, concluded in the last ten years, which enshrine explicit references to non-commercial considerations such as sustainable development goals and environmental objectives. References to non-investment concerns are especially noteworthy as they defy the backlash that was levied against old treaties which were traditionally designed to only safeguard investor's rights. Subjecting this area to empirical scrutiny will underscore how the architect of new treaties foresee different legal techniques to integrate non-commercial objectives to reassert control over activities that are intrinsically linked with their public interest. By applying both quantitative and qualitative approaches, this article examines *how* and *why* non-commercial investment considerations are employed within the new generation of investment treaties. Thus, this article begins by exploring the factors that propelled a paradigm shift in the realm of investment treaty drafting. In the second part, the article identifies four strategic pathways employed by the drafters of investment treaties to delineate and clarify the contour of right to regulate. In the last part, the article argues that materialization of non-commercial considerations is contingent upon investment tribunals engaging more extensively in balancing exercise during their deliberation. This section makes the central argument that endorsing mainstream positivism as the only viable jurisprudential theory by investment tribunals impedes the full

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\* Naimeh Masumy serves as a research fellow at Swiss International Law School and PhD candidate at Deakin Law School. She has been advising and assisting clients on issue relating to international trade, regulatory compliance, and enforcement, as well as international arbitration under ICC and UNCITRAL rules. We are especially grateful to Professor Martins Paparinskis for his guidance and instruction throughout the writing process, as well as Dr. Rodrigo Polanco Lazo for his helpful remarks. We would also like to express our gratitude to editors at the *Journal of Dispute Resolution* for their valuable comments and diligent work on this article. All remaining errors are the authors' alone.

\*\* Carrie Shu Shang is an Assistant Professor of International Business Law and director of the Business Law minor at California State Polytechnic University, Pomona, J.D. University of Southern California School of Law (2012); B.A./B.S. (with High Honors) University of California, Berkeley (2008). She is the Co-Chair of Private International Law Interest Group of American Society of International Law (ASIL) and the Membership Committee Chair of the Silicon Valley Arbitration and Mediation Center (SVAMC). She served as a Visiting Research Scholar at UC Berkeley Center for the Study of Law and Society, and a Perkins Coie Public Interests Law Fellow.

realization of the scope of application of non-commercial considerations. It concludes that explicit references to non-commercial interests will provide incentives for investment tribunals to acknowledge their consequences in investment arbitration; however, it remains to be seen whether the new treaty drafting can balance investment and non-investment concerns and ensure cross-regime consistency.

#### INTRODUCTION:

There has been a discernable trend in incorporating right to regulate principles in a new generation of international investment agreements (IIAs). Particularly, this trend is more pronounced with respect to issues pertinent to sustainable development and environmental protection. This is accompanied by the paradigm shift in traditional investment treaties that solely focus on protection of foreign investor rights, to investment treaties that facilitate sustainable development goals.<sup>1</sup> Among key stakeholders, there emerged a recognition that investment law and sustainable development increasingly intersect.<sup>2</sup> In addition, the growing numbers of investor state arbitration has prompted several states to reform and revise their investment treaties, ensuring that investors do not rely on expansive investment protection standards to hinder the ability of states to set out progressive regulations designed to bolster environmental and social agendas.<sup>3</sup>

Sustainable development integrates social, environment, economic and governance policies to form a coherent paradigm, as enshrined in international law. The recent iteration of right to regulate demonstrates that drafters of investment and foreign trade treaties demand greater discretion to enact legislations that promote and foster Sustainable Development Goals (“SDGs”) and better address environmental and natural resource concerns.<sup>4</sup> Scientific developments and shifts in public opinions coupled with improved understanding of environmental impacts propelled a shift in which states assumed greater responsibility to adhere to their environmental and sustainability agendas.<sup>5</sup> The shift was also reinforced by the growing popularity of the notion of sustainable development and its appropriation in the field of international investment law.<sup>6</sup> This is further accompanied by growing post-pandemic concerns regarding the negative impacts of international trade and investment on

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1. Federico Ortino, *The Social Dimension of International Investment Agreements: Drafting a new BIT/MIT Model?*, IINT’L. L.F. DE DROIT INT’L. 243, 243–50 (2005).

2. Nathalie Bernasconi-Osterwalder et al., *Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers*, INT’L INST. SUSTAINABLE DEV. 1–50 (2012), [https://www.iisd.org/system/files/publications/investment\\_treaties\\_why\\_they\\_matter\\_sd.pdf](https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf).

3. Audio tape: Virtual conference on the future of investment treaties’ background note on potential avenues for future policies, held by OECD (Mar. 29, 2021), <https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf>.

4. Suzane A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT’L ECON. L. 1037, 1043–48 (2010).

5. Christina Behary & Melinda Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT’L L. REV. 384, 394 (2015).

6. Perry E. Wallace, *International Investment Law and Arbitration, Sustainable Development, and Rio+20: Improving Corporate Institutional and State Governance*, 12 SUSTAINABLE DEV. POL’Y, 21, 22–28 (2012).

loss of local jobs, the rising distaste of globalization and the waning of liberalized economic principles.<sup>7</sup>

### METHODOLOGY

This article revisits the issue of right to regulate in the context of innovative treaty drafting of the new generation of sustainable investment treaties. It argues that setting out a clear definition of right to regulate may serve as a potent interpretive tool for arbitrators, helping them balance the conflicting objectives. Our study adopts a dual empirical research methodology involving both quantitative content and factor analysis of 40 international investment agreements that came into force in the last five years. The second portion of this research was conducted using quantitative context analysis aimed at identifying the prevalence of the provisions that embody explicit languages containing non-commercial interests. To this end, our research specifically singles out those provisions that contain important host state public policies including environmental protections, labor rights, and sustainable development goals. We identify three trends in this article: First, more precise language has been adopted in the preambles in which issues such as sustainable development and environmental protections were all emphasized. Second, some of the new IIAs have intentionally made a discernable and laudable endeavor to move away from traditional approaches to right to regulate by including a provision dedicating to nuances of the right to regulate. Finally, the research denotes that states attempted to delineate the scope of investment protection standards by inserting exclusion provisions within the archetype of investment protection standards, limiting their scope of application.

### I. THE REGULATORY POWER OF STATES

The right to regulate serves as a valuable gatekeeper to safeguard a State's right to implement advanced legislative attempts to introduce regulations boosting SDGs.<sup>8</sup> This right reinforces "the idea that host state[s] can, under certain conditions, exercise police powers to adopt legitimate regulatory measures affecting foreign investors."<sup>9</sup> The emergence of a new generation of investment treaties was prompted by the need of the host states to preserve their right to regulate; this need has to be balanced against the necessity to protect the host states' sovereignty which is undermined and infringed by far-reaching protections provided to investors in classical investment treaties.<sup>10</sup>

Historically, states emphasized economic development to the detriment of environmental protections.<sup>11</sup> Traditional investment treaties provided little scope for

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7. Kate Miles, *Sustainable Development, National Treatment and Like Circumstance in Sustainable development in Word Investment Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 265, 278–92 (Marie-Claire Cordonier Segger et al. eds., 2011).

8. Howard Mann, *Reconceptualizing International Investment Law: It's Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 523–34 (2013).

9. Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration*, 50 INT'L L. 529, 547 (2017).

10. Markus Wagner, *Regulatory Space in International Investment Law and International Trade Law*, 36 U. PA. J. INT'L L. 1, 13 (2014).

11. Mann, *supra* note 8, at 543.

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the right to regulate, in turn affording more protections to investors. As such, arbitral tribunals resisted using balancing tests to limit investor rights, due to expansive provisions for investors which were also coupled with the narrowly construed provisions relating to right to regulate. This led to tribunals interpreting investment protection standards very broadly, and sometimes, to the detriment of government's legitimate regulatory power, tilting the balance in favor of investors.<sup>12</sup> Therefore, widespread concerns arose concerning the aptitude of investment arbitration in creating an equal opportunities for all the stakeholders.<sup>13</sup> To remedy this, the new generation of investment treaties started to envision a more robust right to regulate, providing a legal framework in which arbitrators can draw a clear balance between investor rights against the state need for "regulatory space".<sup>14</sup> Such efforts reflect the growing desire of states to serve their citizens without fear of retaliation from investors whose economic interest may be vastly infringed upon by such regulation.<sup>15</sup> It also signals to investors that investment protection provisions are not a widespread and unrestricted commitment from government without subject to subsequent change.

To this end, the changing paradigm in the new wave of investment treaties switched from investment protection based treaties to treaties that better balance sustainable development protections.<sup>16</sup> These efforts were inspired by the new mantra that important policy objectives will not be held subordinate to investment protection standards.<sup>17</sup> This paradigm shift of investment treaties also transforms the purposes of traditional investment law.<sup>18</sup> Specifically, drafters made a conscious decision to provide sufficient clarity as to the regulatory space for investor-state arbitral tribunals to draw a clear distinction between legitimate public policy regulations and the lawful expropriatory actions.<sup>19</sup> These attempts were in line with a growing demand in developing clear understandings of the role of right to regulate and its contextualization through the prism of investment treaties with terminological and textual peculiarities.<sup>20</sup> Nonetheless, the contour of state regulatory power has remained contested, notably in light of its clash with indirect expropriation concept.<sup>21</sup>

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12. Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can be Reformed*, 29 ICSID REV. – FOREIGN INV. L.J. 372, 372–418 (2000).

13. *Id.* at 399–414.

14. Gus Van Harten, *The European Union's Emerging Approach to ISDS: a Review of the Canada – Europe CETA, European-Singapore FTA, AND European-Vietnam FTA*, 1 U. BOLOGNA L. REV. 138, 161–62 (2016).

15. *Id.* at 163.

16. Wolfgang Alschner & Elisabeth Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW 217, 221 (Freya Baetens ed., 2013).

17. European Commission Press Release, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016).

18. Slobodan Djajic, *Searching for Purpose: Critical Assessment of Theological Interpretation of Treaties in Investment Arbitration*, 4 INT'L L. REV. 1, 23–24 (2016).

19. *Id.* at 28.

20. Fabio Morosini, *Reconceptualizing International Investment Law from the Global South: An Introduction*, in RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 1, 41 (Fabio Morosini & Michelle Ratton eds., 2018).

21. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs*, 50 VAND. J. TRANSACTIONAL L. 355, 358–79 (2016).

## II. THE UNDER THEORIZATION OF RIGHT TO REGULATE

Right to regulate is the power of a sovereign state to adopt and maintain government measures for public welfare objectives.<sup>22</sup> This definition has remained imprecise because the notion of public welfare objectives and maintaining those objectives are devoid of a common definition from different treaties.<sup>23</sup> This definition has therefore yielded nonlinear interpretations and constructions of the “public interest,” “right to regulate” and “environmental considerations” norms in both the dispute settlement process and the law-making process. It is undeniable that all international treaties, by their very nature, reduce the scope of sovereignty for all parties to the treaty. Generally, investment treaties include clauses that define and narrow the types of domestic administrative regulation to which foreign investors must subject themselves.<sup>24</sup>

To this end, for a long time, there was an evident antagonism and ongoing tension between the notions of public interest such as environmental concerns and sustainable developments, and the protection of property and commercial interests of foreign investors.<sup>25</sup> Investment agreements have not yet engaged successfully with the social dimension of the international investment regime. In turn, those agreements failed to provide both host states and foreign investors with a uniform and coherent guideline in treaty interpretation.<sup>26</sup> Such failure is attributable to the long-lasting theory that investment law was conceived to protect foreign investors while promoting investment flow – and the protection of the public interest therefore was not a goal of international investment law. IIAs are not construed as corrective tools to compensate for the absence of a binding conventional framework regulating cross-border activities by MNEs and their impact on various environments.<sup>27</sup> More importantly, IIAs are not by themselves legal instruments promoting environmental concerns. As Mascio and Pauwelyn summed up, investment law is concerned with “fairness grounded in customary rules on treatment of aliens, not efficiency.” Specially, “[i]t is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.”<sup>28</sup>

On the other hand, environmental concerns and concepts of sustainable developments were traditionally thinly incorporated into investment treaties, and consequently, Investor-State Dispute Settlement mechanism, which is the adjudicating body of investment-related disputes, jurisprudence still struggles for full consistency with such obligations. Investment treaty texts do not necessarily possess

22. “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law* (OECD, Working Paper No. 2004/4, 2004).

23. Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT’L ECON. L. 223, 223–55 (2012).

24. Thomas Walde & Abba Kolo, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 INT’L COMPAR. L.Q. 811, 811–27 (2001).

25. *Bridging the Gap between International Investment Law and the Environment*, 30 UTRECHT J. INT’L EUR. L. 145, 145–60 (2014).

26. Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World* (OECD, Working Paper No. 2015/02, 2015).

27. Howard Mann et al., *IISD Model International Agreement on Investment for Sustainable Development: Negotiator’s Handbook*, INT’L INST. SUSTAINABLE DEV. (2d ed. 2006), [https://www.iisd.org/system/files/publications/investment\\_model\\_int\\_handbook.pdf](https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf).

28. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin*, 102 AM. J. INT’L L., 48, 48–57 (2008).

the same linguistic elasticity as that found in trade treaties.<sup>29</sup> Crucially, investment law does not contain the veritable and venerable public policy toolbox for solving the “legitimacy crisis”.<sup>30</sup> The public policy dialogue in investment law is still unsettled and more than often the current quest for “policy space” across constellations of thousands of regional investment treaties has not reached a level of coherency.<sup>31</sup>

It follows that there is much discussion regarding the ability of sovereign states to regulate with the interference with international trade and investment law. The right to regulate, as a defense, can be used to justify a host state’s measure or a change of the legal framework. Although the pure exercise of the sovereign powers of a host state cannot as such justify a breach of an international obligation. Formal recognition of the right to regulate has largely been considered a positive development in terms of making IIAs more balanced and giving arbitral tribunals clear interpretive guidance against restricting the state’s regulatory space.<sup>32</sup> That notwithstanding, the right to regulate in international investment law remains somewhat under-theorized.<sup>33</sup>

#### *A. A Shifting Paradigm and the Emerging Importance of Non-Commercial Interest*

As discussed, nations have historically realized economic development and investment to the detriment of environmental protections.<sup>34</sup> Most investment provisions remained symbolic in nature and their contents remained generally vague and broad, devoid of clear specifications of obligations and rights of each party. Such opacity in language led to tribunals unjustifiably restricting state sovereignty in favor of investment protection.<sup>35</sup>

This coincided with the growing recognition that countries should not only perceive investment treaty as a mere tool for investment protection or attracting foreign capital but should also be regarded as a means towards realizing national development strategies. Therefore, the traditional paradigm of the protection of investors has had to contend with views that favor balancing public policy matters against the need for investors to be protected against governmental intrusion.<sup>36</sup> Recently there has been an incremental rise of new investment treaty provisions carving out state

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29. Diane Desierto, *Necessity and Supplementary Means of Interpretation of Non-Precluded Measures in Bilateral Investment Treaties*, 32 U. PA. J. INT’L L. 827, 882–94 (2010).

30. D.A Collins, *A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period*, 25 CONN. J. INT’L L. 1, 23 (2010).

31. Spears, *supra* note 4, at 1037, 1045.

32. Claudia Salgado Levy, *Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective*, 3 GRONINGEN J. INT’L L. 59, 59 (2015).

33. Charalampos Giannakopoulos, *The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach*, in PERMUTATION OF RESPONSIBILITY IN INTERNATIONAL LAW 148 (Photini Pazartzis & Panos Merkouris eds., 2019).

34. Peter Muchlinski, *Negotiating New Generation International Investment Agreements*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCE, LESS ISOLATED, INCREASINGLY DIVERSE 41 (Steffen Hindelang & Markus Krajewski eds., 2016).

35. Roland Kläger, *Revising Treatment Standards--Fair and Equitable Treatment in Light of Sustainable Development*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang & Markus Krajewski eds., 2016); Pauwelyn, *supra* note 12, at 67.

36. Spears, *supra* note 4, at 1040.

regulatory freedom to recognize public interest, sustainable development goals and environmental considerations as overarching objectives of treaties.<sup>37</sup>

One of the important proposals of the U.N. Conference on Trade and Development (UNCTAD), entitled “Investment Policy Framework for Sustainable Development,” puts forward various policy options and recommendations for host states to design various elements in their international investment agreements that would contribute to the achievement of development objectives.<sup>38</sup> Nonetheless, Interpretation of public policy exceptions and the provisions relating to right to regulate in IIAs (as well as in ISDS) jurisprudence still struggle for full consistency with public policy considerations. Clearly, the jury may still be out on whether investment law has indeed succeeded in facilitating public policy compliance in post-Doha era.<sup>39</sup>

### *B. Treaties and the Emergence of Non-Commercial Considerations*

The right to regulate is often seen as a state response to expansive interpretations of IIA provisions by arbitral tribunals and an ever-growing number of investor claims filed even against traditionally capital exporting states. Sovereign states take regulatory measures for various reasons; there may be instances when immediate action must be taken, such as in a time of crisis or emergency.<sup>40</sup> However, some scholars have noted that the state’s margin of regulation will be wider, but may end up being more restricted again when the state of emergency has passed.<sup>41</sup> In recent years, states tend to regulate more heavily in particular areas, such as the protection of public health, the environment, competition, human rights, and social values.<sup>42</sup>

Commentators stated that this trend has assisted the adjudicative authority to regard and accommodate state defenses anchored on competing obligations under different international instruments, including International Covenant on Economic, Social, and Cultural Rights.<sup>43</sup>

An Organization for Economic Cooperation and Development survey published in 2014 reveals that about ninety-two percent of existing international investment agreements did not contain any provisions concerning sustainable developments and environmental concerns.<sup>44</sup> Language enshrined in investment treaties until that time did not create clear conceptual systems which in turn established distinct semantic domains of legal terms concerning right to regulate, including environmental and sustainable development protections. Since then, international

37. Charalampos, *supra* note 33, at 156.

38. *Investment Policy Framework for Sustainable Development*, UNITED NATIONS CONF. ON TRADE & DEV. 1, 6 (2015) [https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

39. *See generally* G.A. Res. 70/1 (Sept. 25, 2015).

40. Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); Nathalie Bernasconi-Osterwalder et al., *Investment Treaties and Why They Matter to Sustainable Development: Questions & Answers*, INT’L INST. SUSTAINABLE DEV. 1, 7 (2011) [www.iisd.org/pdf/2011/investment\\_treaties\\_why\\_they\\_matter\\_sd.pdf](http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf).

41. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions* 73 *FORDHAM L. REV.* 1521, 1527 (2005); Michael Wai-bel et al., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 5 (2010).

42. *See Rep. of the Human Rights Council on its thirtieth session*, U.N. Doc. A/HRC/30/44 (2015).

43. Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest- the Concept of Proportionality*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (Stephan W. Schill ed., 2010).

44. Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* (OECD, Working Paper No. 2014/01, 2014).



investment law has undergone significant change as the importance of private law considerations and investor interest diminished in favor of greater environmental and sustainable development concerns.<sup>45</sup> The new formulation of investment treaties tried to embody a manner consistent with environmental protection and conservation to safeguard the public welfare, promote sustainable development, and strengthen the development and enforcement of environmental laws and regulations.

The same OECD survey shows that the overall number of IIAs containing environmental references is expanding.<sup>46</sup> The proportion of newly concluded IIAs with a reference to environmental matters also increased significantly, contrasting the previous investment agreements or treaties that were structurally skewed in favor of investors.<sup>47</sup>

### *C. the Ambiguity Surrounding the Existing Jurisprudence*

Host States have proactively raised the issue of state regulatory freedom to pursue public interests or human rights concerns as a defense in numerous investment treaty arbitrations involving alleged breaches of different treaty standards. These defenses have been raised to counter allegations against the breach of equitable treatment standards or an indirect expropriation. However, the success or failure of these defenses turned on the ways in which arbitral tribunals interpret the investment protection standards enshrined in IIAs.<sup>48</sup> The case jurisprudence on the other hand, fails to provide any reasonable and compelling guidance. *Parkerings v Lithuania* ideally summarizes two contrasting positions as a statement of general principle: “It is each state’s undeniable right and privilege to exercise its sovereign legislative power.”<sup>49</sup> A state has the right to enact, modify or cancel a law at its own discretion. Nevertheless, what is prohibited is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power. Seeking to flesh out a similar principled position, the tribunal in *El Paso v Argentina* took the view that measures do not exceed the normal regulatory powers of a State, and therefore do not violate the legitimate expectations of the investor when they fall within an “acceptable margin of change.”<sup>50</sup>

Overall, the existing criteria to draw a distinction between legitimate regulatory measures and expropriatory actions include: 1) Whether the measure is discriminatory; 2) The extent to which governments interfere with property rights; 3) The purpose of the measure; 4) Whether the measure is proportional regarding the impact on the investor and the public policy that is being pursued; and (5) to what extent the measure is contrary to legitimate investor expectations. However, as discussed above, the case law has failed to establish bright-line rules.

45. See Kingsbury, *supra* note 43, at 89 n.49.

46. Gordon & Pohl, *supra* note 26, at 12.

47. Gordon & Pohl, *supra* note 26, at 12.

48. Flavien Jadeau & Fabien Gelin, *CETA’s Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation*, in *The Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA)*, TRANSNAT’L DISP. MANAGEMENT (SPECIAL ISSUE) (2016).

49. *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007).

50. *El Paso Energy International Company v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, ¶ 402 (Oct. 31, 2011).

The following section provides an overview of different techniques used by states to enhance and strengthen the regulatory space enshrined in their recent treaties.

### III. INNOVATIVE DRAFTING IN RECENT IIAS: MOVING TOWARDS PROTECTION OF APPROPRIATE POLICY SPACE

This Section will demonstrate that a progressive march of investment treaty texts provides tangible evidence of the ideological shifts that accompanied the evolving global economy from granting unequivocal protection to capital exporting states, to the recent rise of emerging market players and the need for rebalancing sustainable development aspirations.<sup>51</sup> This shows that the ‘new’ generation of bilateral investment treaties (concluded from 2015 onward) acknowledges “the need for ‘rebalancing’ [of] the private and public interests involved in foreign investments . . . clarifying the state’s rights and duties to regulate and protect public interests.”<sup>52</sup> In actuality, IIAs substantive and procedural investment protections hinder governments’ willingness and abilities to implement and enforce policies to ensure that “covered investments” generate benefit, not harms, to state parties.<sup>53</sup> Whether foreign direct investment can contribute to sustainable development agendas depends on the ability of state governments to adopt and enforce public interest regulations. For that reason, it is important that states evaluate the effects of IIAs on their ability to regulate in the public interest, which is preserved under the “right to regulate” language. Government needs policy space to be able to enact, implement, revise, and refine policies, in order to achieve any sustainable development objectives, while international law, to some degree, inherently constraints such regulatory space.<sup>54</sup>

Given the tremendous diversity of IIA texts, it would be impossible to identify all the treaty provisions that trigger the issue of a state’s regulatory freedom to pursue public interest or environmental concerns.<sup>55</sup> The following instances denote that these provisions appear more detailed (and are worded in a more expansive and self-judging manner) than other IIAs that only recognize states’ rights to equitably exercise sovereign powers. These are: the inclusion of notions such as sustainable development and environmental considerations in the treaty Preamble; explicit environmental obligations; specific right to regulate chapter; and existence of exclusionary measure (in relation to expropriation clause). These trends are summarized into Table 1.

51. André von Walter, *Balancing Investors’ and Host States’ Rights – What Alternatives for Treaty-makers?*, in INTERNATIONAL INVESTMENT LAW AND EU LAW 141, 143 (Marc Bungenberg et al. eds., 2010).

52. See generally Camille Martini, *Balancing Investor’s Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 INT’L L. 529, 534–55 (2017).

53. See generally Fabio Morosini, *Reconceptualizing the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian experiences* (July 13, 2018) (unpublished manuscript) (on file with the Getulio Vargas Foundation library).

54. See generally HEGE ELISABETH KJOS, *APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW* (2013).

55. Christoph Schreuer, *Fair and Equitable Treatment*, in PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION: DIVERSITY AND HARMONIZATION 125, 131 (Anne K. Hoffmann ed., 2010).

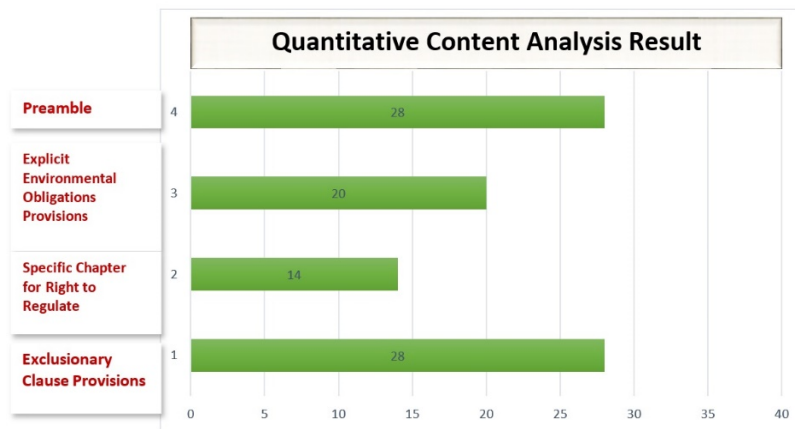


Table 1. Right to Regulate Provisions in Recently Concluded IIAs

Concluded from the Table 1, most major treaties formulated in the last ten years have made references to the right to regulate issue in investment treaties. It has been common for countries to include right to regulate in the treaty Preamble (31 out of 40 treaties, or 70% of the studied treaties in the current chapter), although specific right to regulate chapters and chapters detailing environmental obligations are also common. Specific references to preserve regulatory space are also found in expropriation related provisions.<sup>56</sup> These exclusionary clauses often specifically stipulate that non-discriminatory regulatory actions that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, and the environment, do not constitute indirect expropriation.

#### A. *Reference in Preambles*

Although the principle of sustainable development has found expressions in a catalogue of investment treaties and international instruments, its first articulation was found in the Treaty of Lisbon. The inclusion of sustainable development in the Treaty of Lisbon provided a normative backdrop for the broader recognition of this principle, and therefore, as an objective for investment-related agreements in the EU, as exemplified in the Treaty of Amsterdam. The inclusion of sustainable development in the Treaty of Lisbon provided a normative backdrop for the broader recognition of this principle, and therefore, as an objective for investment-related agreements in the EU, as exemplified in the Treaty of Amsterdam. Its inclusion in the Treaty of Lisbon has subsequently led to the broader adoption of this principle as an objective for investment agreements formed under the overarching paradigm of the EU. Its reference in the Amsterdam Treaty solidified its status as a main overarching objective of many investment-related treaties. The principle of sustainable development has found expressions in a plethora of investment treaties and

56. Investment treaties tend to envision regulatory space for States based on which they possess a large degree of regulatory autonomy to implement regulations that safeguard non-economic values of a society such as human health, safety, the environment or social mobility.

international instruments. It has become a fundamental objective with treaty of Lisbon, gaining currency as an overarching objective of EU with its addition to the Treaty such as Amsterdam.<sup>57</sup>

Sustainable development is a unique concept that integrates social, environment, economic and governance policies to form a coherent paradigm.<sup>58</sup> Central to its underpinning is the ability to balance three important pillars; the right to environmental protection, the right to economic development, and the right to social enhancement.<sup>59</sup> These components are interconnected and cannot be interpreted in isolation. The International Court of Justice examined this principle in the case concerning *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) noting that economic development and environmental protections are interwoven and ought to be jointly interpreted.<sup>60</sup>

Another inherent feature of the principle of sustainable development is its evolutive nature. This principle has been largely perceived as encompassing a duty to employ best efforts, or otherwise known as the obligation of method. In other words, it does not set out specific, clear criteria for evaluating whether that threshold has been achieved.<sup>61</sup> The principle does not purport any particular outcomes.<sup>62</sup> As articulated by Lowe, the content of a rule system for sustainable development is evasive and flexible,<sup>63</sup> purporting that the range of standards and principles that need to be observed depends on contextual specificities such as time, place and the characteristics of the states concerned.<sup>64</sup>

Nonetheless, such elasticity in its normative framework should not render this principle empty of substance or devoid of any effective role. Rather, it will allow a margin of appreciation to an adjudicator to gauge the legitimacy of the underlying regulations based on emerging norms and standards in recent scientific development. This understanding of the principle of sustainable development was echoed in the reasoning of International Court of Justice (“ICJ”) in the case of *Hungary* in which the Court noted that “To evaluate the environmental risks, current standards must be taken into consideration”.<sup>65</sup> Irrespective of the terms construed in the underlying treaties, the Court placed significant importance on newly developed standards of environmental protection to evaluate if a breach has occurred. In addition, the Court has clarified that individual treaties are not supposed to be interpreted in isolation but rather in the context of evolving international law. The Court has also underlined that “the treaty is not static, and is open to adapt to emerging

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57. DAVID R. BOYD, *UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY* (2003).

58. See U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, at 3–5, U.N. Doc. A/CONF.48/14/Rev.1 (June 5–16, 1972).

59. See generally Ben Purvis et al., *Three pillars of sustainability: in search of conceptual origins*, 14 *SUSTAINABILITY SCI.* 681, 681–95 (2019).

60. See Stephen Stec, *Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case*, 29 *GOLDEN GATE U.L. REV.* 317, 317–54 (1999); *Gabčikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25).

61. Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 *EUR. J. INT’L L. REV.* 377, 377–400 (2012).

62. *Id.*

63. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 19 (Alan Boyle & David Freestone eds., 1999).

64. *Id.*

65. *Gabčikovo -Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 74 (Sept. 25).

norms of international law”.<sup>66</sup> Such an evolutive pattern of interpretation was followed in the *Iron Rhine* Arbitration, where it was stated that “an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the international rule.”<sup>67</sup> In this case, the Tribunal also affirmed that integrating competing objectives is an expression of the principle of sustainable development.<sup>68</sup> The same understanding was echoed in *Pulp Mills*, in which ICJ reaffirms that the balance between economic development and environmental protection is the essence of sustainable development.<sup>69</sup>

That these holdings imply that international adjudicative bodies and tribunals regard the environmental aspect of sustainable development as an inherently evolutive and contextual standards. Thus, its standards of obligation will vary overtime which has a direct bearing on how the appropriate standard of review and the interpretation of its scope of application of this notion changes accordingly.

It must be noted that references to other courts and tribunals jurisprudence will be instructive as it may help investment tribunals draw inspiration from the case law of other courts and can inform tribunal’s analysis when trying to reconcile environmental considerations with other competing obligations.

The inherent flexibility of these agreements will allow tribunals to exercise balancing and rebalancing of both parties’ interests to justify the legitimacy of adopted regulations.<sup>70</sup> Therefore, as nation’s struggle to adapt to a new climate, such fluidity in the concept of sustainable development will allow tribunals to take into account new rising interests and circumstances.

The scope of application of sustainable development is ultimately at the arbitrator’s discretion.<sup>71</sup> When interpreting the notion of sustainable development, tribunals may rely upon article 31-3 of the Vienna Conventions on the Law of Treaties and International Investment Law, which sets out a unique “evolutionary interpretation,” suggesting that the meaning of treaty provisions may mature and develop over time.<sup>72</sup> Such an approach provides tribunals with a level of flexibility and realism to appreciate and realize the transitory framework of sustainable development. As discussed, central to the principle of sustainable development is its transitory underpinning which requires constant evolution in order to accommodate new emerging norms and recent standards based on innovative scientific methods. The normative framework of the principle of sustainable development and environmental standards will change over time due to an increase of climate consciousness and the public backlashes in the context of a changing crisis.<sup>73</sup> However, the obligations and standards of protection concerning might change based on a new circumstances or newly introduced standards. Following this vein, a state may pragmatically and rationally implement its regulatory discretion to adapt to new circumstances. Thus, exercising such power should not be viewed as an arbitrary exercise of the power.

66. *Id.* at ¶ 112.

67. *Iron Rhine Railway* (Belg. v. Neth.), 27 R.I.A.A. 35, 73 (Perm. Ct. Arb. 2005).

68. *Id.* at ¶ 87.

69. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgement, 2008 I.C.J. 3, ¶ 204 (July 22).

70. See Barral, *supra* note 61, at 387–89.

71. Kirsten Mikadze, *Uninvited guests: NGOs, amicus curiae briefs, and the environment in the international investment regime*, 12 J. INT’L L. & INT’L L. REV. 35, 59 (2016).

72. Hervé Ascensio, *Article 31 on the Vienna Conventions on the Law of Treaties and International Investment Law*, 31 ICSID REV. 366, 371 (2016).

73. Barral, *supra* note 61, at 394–95.

In view of the above analysis, it is of growing importance for tribunals to retain a significant margin of appreciation to fine-tune their decisions based on a whole host of criteria. In this regard, tribunals have assumed the key role of investigating underlying facts to determine what “circumstances” would be understood as meeting state’s legitimate public interest. This can be achieved through assessing various considerations ranging from financial capabilities of the host states, the objective and purpose of the convention, the available scientific data, and the demands of the time and designated context.<sup>74</sup>

The practices of other international courts and tribunals such as ICJ may inform tribunals looking at such agreements how to reconcile the growing tension between the principle of sustainable development and investment protection standards, as well as how to more broadly interpret the notion of right to regulate.<sup>75</sup>

The below examples show the frequency of the use of sustainable development in the preamble of treaties that have been signed in the last ten years, which has been visualized in Figure 2.

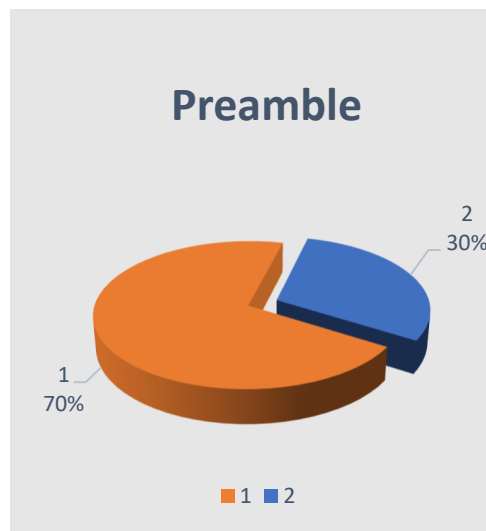


Figure 2. Percentage of Treaties Referring to Non-Commercial Interests in Preambles in IIAs.

### B. The Role of Preambles

This Section focuses on the role of preambles in defining parameters of right to regulate principles, as well as general benefits yielded from incorporation of sustainable development goals and environmental considerations within the context of

74. Barral, *supra* note 61, at 386.

75. Henning Grosse Ruse-Khan, *The Concept of Sustainable Development in International IP Law—New Approaches from EU Economic Partnership Agreements?* 10 MAX PLANCK INST. INTELL. PROP. 1, 34 (2010).

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preambles. There is no universal standardized treatment towards preambles, and thus difficulties arise when considering the *actual* legal power of a preamble from its *potential* power.<sup>76</sup> Tribunals do not view the rules of interpretation agnostically and they attempt to adhere to interpretive rules mandated by the Vienna Convention to construe the new terms in the treaty.<sup>77</sup>

The Vienna Convention on the law of treaties (VCLT)<sup>78</sup> provides a normative backdrop and methodology based on which arbitral tribunals can interpret a treaty provision. This Convention provides consolidated guidelines for investment tribunals on how to interpret and apply the provisions enshrined in investment treaties, influencing their decisions on the best analyses to apply in appropriate circumstances.<sup>79</sup>

The Vienna Convention sets out three dominate approaches to treaty interpretation. The first approach is characterized as textual approach, which suggests that the underlying treaty should be interpreted according to their language. The second approach is coined as the subjective approach which encourages the adjudicators to consider the intentions of the state parties that signed them when conducting treaty interpretation. The final approach found upon the theory that treaties should be interpreted according to their objective and purpose.<sup>80</sup> In fact, scholars have pointed out that treaty interpretation is the key ideological battle in Investor-State Dispute Settlement regime.<sup>81</sup> Newcombe and Paradell have argued that a key challenge for future arbitral tribunals, in the context of a treaty containing an exception clause combined with preamble language which includes an explicit reference to the notion of sustainable development will be to reach a satisfactory outcome regarding both the protection of foreign investors and the promotion of states' policies fostering sustainable development.<sup>82</sup>

Such challenges are partly due to the fact that the VCLT has not substantially clarified the crucial role of preambles in treaty interpretation, providing considerable leeway for interpreters to exert legal influence.<sup>83</sup>

At first glance, it appears that “the text-and-context analysis” is the most prominent approach towards treaty interpretations, which is set out by articles 31 and 32 of the VCLT.<sup>84</sup> According to this approach, an ordinary meaning should be attributed to the terms of the treaty. The emphasis on text is particularly important in the context of preambles because the VCLT characterizes preambles as part of the text. Therefore, based on this analysis, treaty preambles are afforded relatively important legal weight under this approach.<sup>85</sup> In fact, The VCLT appears to reserve

76. Max Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1296 (2016).

77. *Id.*

78. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

79. Martins Paporinkis, *Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks*, in INVESTMENT TREATY LAW AND ARBITRATION 65–96 (Chester Brown & Kate Miles eds., 2011).

80. Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L L. & COMPAR. L.Q. 318, 319–20 (1969).

81. Anthea Roberts, *Power and Persuasion in Investment Treaty International: the Dual Role of States*, 104 AM. J. INT'L L. 179, 179–225 (2010).

82. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES, STANDARDS OF TREATMENT 1387 (2009).

83. Hulme, *supra* note 76, at 1302.

84. Vienna Convention on the Law of Treaties, art. 31.1–3, May 23, 1969, 1155 U.N.T.S. 331.

85. Hulme, *supra* note 76, at 1297.

for preambles a relatively high position on the hierarchy of interpretative means.<sup>86</sup> After all, the text is the “presumptive object of interpretation” under the VCLT’s general approach.<sup>87</sup>

However, the existing practices of international tribunals and courts suggests that preambles are most often being invoked under object-and-purpose analysis, contrasting to the text and approach proposed by article 31. When drawing up Vienna provisions to interpret the treaties, the arbitrators usually aim to identify the meaning of the contested terms in a way that squarely “gives effect to the parties’ intention.”<sup>88</sup> Most often, tribunals relied on the text in the governing preambles to determine the overall objective of the treaty. Although, it has been stated that tribunals attribute the same weight to the immediate context or plain reading of the non-preambles terms to determine the overall objectives, preambles are often cited as a basis or evidence of a treaty’s “object and purpose.”<sup>89</sup> The association of preambles with statements of object and purpose is largely reflected in the practice of international courts and tribunals. A prime example in this regard is the *Shrimp/Turtle* case, which is largely regarded as one of the most polarizing cases confronted by the World Trade Organization (WTO) in the trade/environment debate. This case brought into focus whether trade restrictions to protect the environment are permissible under the law of the GATT/WTO system. The Preamble of the WTO recognizes that trade is not an end in of itself, but rather the sustainable economic growth must be pursued within the broader context of sustainable development and protection of the environment.<sup>90</sup> In applying VCLT provisions, the Appellate Body of WTO noted that the object and purpose of treaty must initially be sought in the text and context of the disputes provisions, and when the text is inconclusive, and the tribunals seek to confirm its interpretation, they should do so in light of the object and purpose of the treaty.<sup>91</sup> Further, parties coming before such tribunals also frequently cited preamble text to argue that the object and purpose favor their cause.<sup>92</sup>

Thus, a reasonable explanation for including preambles in investment treaties is how it can serve as a chief vehicle to explicitly set out the object and purpose of the treaty. To this end, when a preamble conforms to this convention by including such explicit statements, the objectives and goals that are enshrined in the preamble will serve as a first point of reference for any adjudicators seeking to interpret a given treaty under the recognized rules of treaty interpretations.

It is therefore important to recognize that incorporating references to principles such as right to regulate and sustainable development in investment treaties will have significant impacts on the interpretation of investment protection standards included therein. In other words, by incorporating this and similar language into

86. Hulme, *supra* note 76, at 1299.

87. Julian Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?* 107 AM. J. INT’L L. 780, 785 (2013).

88. *Id.* at 787.

89. Khan, *supra* note 76, at 1300.

90. Marrakesh Agreement Establishing the World Trade Organization, Preamble, Dec. 15, 1993, 33 I.L.M. 15.

91. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (“A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought.”). The *Iron Rhine* court also took this as its starting point, *see Iron Rhine Railway* (Belg. v. Neth.), 27 R.I.A.A. 35, 63 (Perm. Ct. Arb. 2005).

92. Hulme, *supra* note 76, at 1300.



preambles of IIAs, states indicate that they have multiple goals in mind when signing those agreements. It also sends a clear message to arbitral tribunals that investment protection is not the sole, or even the primary goal of the treaty, but rather that investment policy objectives ought to be achieved in a manner that is compatible with other public policy objectives.<sup>93</sup>

As our statistics denote, a growing number of treaties explicitly use the language of sustainable development in their preambles. Such clear, strong use of this language should provide explicit incentives for tribunals to strike a balance between the competing objectives.

As discussed, many IIAs still contain substantive clauses and do not have a single ordinary meaning which means that tribunals are often confronted with a set of provisions that are vaguely worded with and broad in scope of application. Thus, in the face of ambiguity, tribunals often exercise their discretion to interpret the text using Vienna's balancing frameworks. However, traditionally Tribunals have proven reluctant to apply Vienna as a balancing tool, frequently giving greater significance and weight to investment protection standards. This is because of the prevailing theory that international investment law was primarily conceived to protect foreign investors while promoting investment flow.<sup>94</sup> As leading scholar Pauwelyn noted, investment law is fundamentally concerned with "fairness grounded in customary rules on treatment of aliens, not efficiency."<sup>95</sup>

This note therefore argues that the increasing precision of these provisions could help ensure that tribunals properly balance these concerns and set out a clear policy space that is consistent with the pillars of sustainable developments.<sup>96</sup> Where there is a clear and precise reference to issues such as environmental, social and economic dimensions in a preamble, tribunals may be more inclined to delineate the parameters of public interest more broadly. In fact, in delineating the contour of the notion of right to regulate, using explicit terms such as environmental protections against biodiversity threats and hazards, economic development by allowing participation of local communities and social growth by increasing labor standards of the region may provide a clear and coherent benchmark for tribunals, based on which they can assess if the underlying investments have been sustainably aligned.<sup>97</sup>

#### IV. THE ROLE OF SUBSTANTIVE INVESTOR PROTECTION STANDARDS: CLARITY WITH REGARD TO RIGHT TO REGULATE

There have been a growing number of cases where foreign investors have challenged progressive legislative and administrative measures due to the expansive nature of investment protection standards, thereby significantly impacting the sovereign power of states to implement important international obligations.

93. Djajic, *supra* note 18, at 3–6.

94. *Fair and Equitable Treatment Standard in International Investment Law* (OECD, Working Paper No. 2004/03, 2004).

95. Nicholas Di Mascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?* 102 AM. J. INT'L L. 48, 56 (2008).

96. J. ROMESH WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* 671–82 (2d ed. 2012).

97. Catharine Titi, *The Right to Regulate in International Investment Law*, 10 STUD. INT'L INV. L. 19, 23–29 (2014).

To clearly design the scope of regulatory power, recent treaties employed a spectrum of novel as well as previously tested safeguards including: (1) inclusion of specific provisions addressing right to regulate; (2) inclusion of exception clauses; (3) provisions for self-standing non-economic interests such as environmental obligations; and (4) explicit affirmation of the state's right to regulate within investment protection standards. The following section will provide a brief account of these safeguard measures.

#### *A. Inclusion of express right to regulate*

In addition to Preambles, more IIAs have also started to include substantive provisions on right to regulate, often in separate chapters.<sup>98</sup> These provisions are aimed at preserving a certain amount of policy space for states, and to set up a space in which a state can freely exercise its regulatory power without compromising the purpose of a treaty. The state's right to regulate in the public interest has been memorialized in various investment arbitrations. A cogent example in this area is the case of *Marvin Feldman v Mexico*, in which the Tribunal observed that “[G]overnment must be free to act in the broader public interest through protection of the environment, new or modified tax regime [...] [and] reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation”.<sup>99</sup>

However, the inclusion of these provisions has proven problematic, as they often clash with other provisions designed to protect the investor. The scope of application of right to regulate is often constrained by provisions such as Fair and Equitable Treatment (FET), and the provisions regarding indirect expropriation.<sup>100</sup> On some occasions, tribunals have acknowledged that the application of FET is based on the evolution of surrounding facts and cannot be done solely on the subjective expectations of the investor. A cogent example in this regard is the *El Paso* case, in which the tribunal had attempted to provide a more through methodological contribution to the debate concerning the scope of application of the notion of legitimate expectations and its invocation (use) within the investment treaty context. In this regard, the tribunal in *El Paso* noted, “the legitimate expectations of the investor [...] can be deduced from the circumstances and with due regard to the rights of the state”.<sup>101</sup> In a similar vein, in *Philip Morris v. Uruguay*, the tribunal held that the challenged measures did not constitute an indirect expropriation because “[T]he measures were a non-discriminatory and proportionate exercise of police powers for the *bona fide* purpose of protecting public welfare, and were thus not expropriation”.<sup>102</sup> The Tribunal also asserted that “protecting public health has long since been recognized as an essential manifestation of the State's police power”.<sup>103</sup>

98. See Agreement Between Canada and Moldova on the Promotion and Protection of Investments art. 15, Can.-Mold., June 12, 2018 C.E.T.S. 2019/16; Agreement Between Canada and Moldova on the Promotion and Protection of Investment art. 15, Can.-H.K., Sept. 6, 2016 C.E.T.S.

99. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, ¶ 103 (May 27, 1999).

100. *Martini*, *supra* note 9, at 579.

101. *El Paso Energy Company v. Argentina*, ICSID Case No. ARB/03/15, Award, ¶ 348 (Oct. 31, 2011).

102. *Philip Morris Brands, Sarl, S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 305 (July 8, 2016).

103. *Id.* at ¶ 291.

These awards clearly illustrate that Tribunals do recognize the “police powers” doctrine which provides that a state possesses an inherent right to regulate in protection of the public interest and a loss of property resulting from police powers does not constitute an indirect expropriation.<sup>104</sup> Thus, the recognition of police powers provides substantial leeway for states to implement regulations that promote and bolster their non-commercial agenda. According to the “police powers” doctrine, no compensation is due whenever the regulatory measures are taken in good faith, in a non-discriminatory manner, and for a public purpose.<sup>105</sup> However, a number of scholars have opined that the principle of police powers does not have a strong foothold in customary international law. Therefore, an explicit inclusion of right to regulate for public interest is considered a significant step towards establishing a positive right for states to preserve and safeguard their sovereign regulatory power.

Our empirical assessment shows a significant number of investment treaties adopting an express affirmation of right to regulate. The drafters of these treaties intended to include right to regulate as a central feature of the analysis of any investor claims. Expanding the contour of regulatory space was due to the persistent backlash against Investor-State Dispute Settlement mechanisms being biased towards foreign investors, while penalizing policy regulations that governments were adopted to advance legitimate purposes.<sup>106</sup> This was in line with these states’ intentions to freely serve their citizens without the fear of retaliation from investors whose economic interests may be negatively impacted by such regulations. The language used in some of the provisions underscore the notion that parties assertively retain the right to regulate. These provisions have gone as far as using language that precludes the right to compensation to investors, providing adequate signals to tribunals to attribute due consideration to the right to regulate measured against investment protection standards. For instance, the provisions have used “language that attempted to clarify the difference between the right to regulate and the need to compensate.”<sup>107</sup> For example, a provision in the North American Free Trade Agreement spelled out that: “[a] Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement.”<sup>108</sup>

Echoing this development, Sands states that “those charged with interpreting and applying treaties on the protection of foreign investment need to take into account the values that are reflected in norms that have arisen outside the context of the investment treaty which they are applying.”<sup>109</sup> This is partly relevant because in the past tribunals have resisted using balancing tests to limit investor rights, and such clear language will encourage the use of balancing tests and will help ensure

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104. Catherine Titi, *Police Powers Doctrine and International Investment Law*, GEN. PRINCIPAL L. & INT’L INV. ARB. 323, 323–43 (2018).

105. Martini, *supra* note 9, at 580.

106. Rodrigo Polanco, *The Rise of and Backlash Against Investor-State Arbitration*, in THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTE 29 (2019).

107. Wagner, *supra* note 10, at 41.

108. Negotiating Group on the Multilateral Agreement on Investment (MAI), OECD art. 3, 5 (May 4, 1998), <https://www.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>.

109. Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENV’T L.J. 198, 198–202 (2002).

that the right to regulate will be explicitly invoked against all investor rights and protections.<sup>110</sup>

The regulatory power of a state can also be framed by dedicating a chapter to the right to regulate, enumerating policies that are legitimate and will not be infringing upon by those standards designed to protect investors. These provisions will usually confer a wider latitude to states, enabling them to determine their own level of environmental, social and labor protection.<sup>111</sup> A robust right to regulate in the public interest determines what regulatory measures governments may take without compromising the overall objective of the investment treaty. Our quantitative analysis show that exactly half of the studied treaties incorporated an explicit provision affirming the right to regulate (Figure 2).



Figure 3. This pie chart illustrates that half of the treaties that were subject of our empirical assessment include a specific chapter dedicated to the scope of application of the right to regulate and its interactions with other investment protection standards.

### B. Explicit Environmental Exception Clauses

In addition to these provisions explicitly affirming the right to regulate, another way to frame and preserve the regulatory power of a state is through incorporating exceptions clauses designed to protect and safeguard environmental measures. The aim of general exception clauses is to reconcile competing public and private interests by ensuring that IIAs do not hamper host state policies that are being put in a place to promote environmental and public policy considerations.<sup>112</sup> Commentators have stated that the general exceptions clauses concerning environment interests

110. Van Harten, *supra* note 14, at 161–62.

111. *Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape*, PROSPECTS INT'L INV. L. & POL'Y 26 (Roberto Echandi & Pierre Sauve, eds., 2013). See also UNCTAD, WORLD INVESTMENT REPORT 2010 (2010).

112. Andrew Newcombe, *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty*, in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 267, 267–83 (2013).

offer a holistic and innovative solution to concerns regarding the scope of foreign investor's rights under IIAs.<sup>113</sup> Additionally, such language helps establish the state's overarching objective to protect the environment.

Enhancing linguistic changes like this would have significant impacts on how these provisions will be viewed by future tribunals. Such changes will help inform a tribunal's analysis, as well as developing persuasive jurisprudence. Where environmental exceptions are not inserted, there is a risk that arbitral tribunals will find a violation of a treaty obligation if the state adopts a measure intended to protect the environment. This was the case in *Santa Elena v. Costa Rica*, in which the Tribunal still found that environmental protection measures could still amount to expropriation. The Tribunal held the state is liable to pay compensation: "Expropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies[...] even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".<sup>114</sup>

This reasoning confirms that even though international law has long recognized in some form or another the state's legal power to expropriate private property for reasons of environmental obligations,<sup>115</sup> such obligations are not recognized as a stand-alone standard. Thus, there exists a need to incorporate explicit provisions for environmental obligations.<sup>116</sup> Some commentators have contended that this type of provision might have the potential to protect a state's right to regulate, as they may deny an arbitral tribunal jurisdiction over the dispute altogether. However, these provisions are still subject to interpretation, as tribunals will use their discretion to determine whether the respective measures will fall within the purview of the exclusionary clause, or if the underlying administrative measures breach investor protection provisions. Therefore, it should be stressed that including such provisions does not serve as promoting the development of rules that would grant "self-judging discretion" to deviate from their obligations to investors.<sup>117</sup> When arbitral tribunals are confronted with policy measures that are taken to advance critical environmental goals, they will use their discretion to analyze the existence of a rational policy, the reasonableness of the act in relation to policy and whether the designated policy was adopted under the guise of environmental protection undertones (or undercurrent). Therefore, the mere existence of explicit provisions of environmental protections will not take away investor's recourse to additional protection.<sup>118</sup>

Crucially, general exceptions clauses are treaty mechanisms that IIA parties endorse to address concerns that an IIA provides an appropriate balance between public and private rights. These clauses exclude the application of the entire treaty with respect to the excepted policy.<sup>119</sup> The inclusion of these provisions will exempt a state party from the treaty obligations in specified circumstances, in which compliance would be incompatible with the key environmental policy objectives

113. Andrew Newcombe, *General Exceptions in International Investment Agreements*, in SUSTAINABLE DEVELOPMENTS IN WORLD INVESTMENT LAW 351, 351–70 (2011).

114. *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, ¶ 72 (May 15, 1995).

115. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 503, 534 (5th ed. 1998).

116. Martini, *supra* note 9, at 546.

117. Martini, *supra* note 9, at 560–78.

118. Martini, *supra* note 9, at 540–78.

119. Laurence Boisson de Chazournes, *Standards and Guidelines: Some Interface with Private Investments*, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 103 (2013).

explicitly identified in the agreement. In *Clayton v. Canada*, the Tribunal states that NAFTA countries are free to adopt laws “that are as demanding as they choose in exercising their sovereign authority”; however, “the mere fact that environmental regulation is involved does not make investor protection inapplicable.”<sup>120</sup> This serves as a paradigmatic example that envisioning environmental clauses in a treaty does not *per se* render a measure taken under the guise of environmental protection as legitimate and lawful.

As Figure 4 clearly illustrates, a growing number of IIAs have included general exceptions that allow a wide range of regulations concerning environmental protections. These clauses explicitly provide express and general exemptions of environmental regulatory measures that would have otherwise amounted to clear breach of provisions stipulated in investment.<sup>121</sup> In these instances, an arbitral tribunal would determine whether a given breach is excused on the basis of the general exception clause, or would fall within the purview of general exception clause rather than weighing whether the state’s actions in pursuance of societal and environmental protections amount to a violation of the treaty. The percentage of studied treaties incorporating environmental obligation has been summarized into Figure 3.

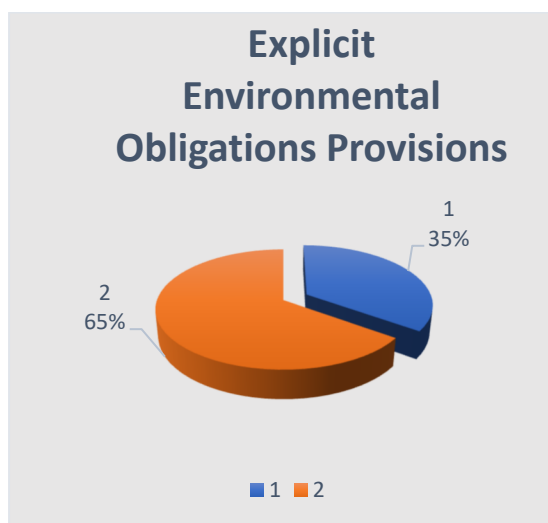


Figure 4. Percentage of Studied Treaties Incorporating Explicit Environmental Obligations

### C. General Exclusion Clause and Exception of Expropriation

International investment law has developed substantive standards which offer far-reaching international protections to investors.<sup>122</sup> One of the core features of most investment treaties is that they confer a direct right on investors to bring claim

120. *Clayton v. Canada*, PCA Case Repository Case No. 2009-4, Award on Jurisdiction and Liability, ¶ 597–98 (Mar. 17, 2015).

121. NEWCOMBE & PARADELL, *supra* note 82, at 267.

122. Newcombe, *supra* note 113, at 354.

against a host state, challenging measures that impacted their investments.<sup>123</sup> Investment treaties provide substantive standards, granting investors a cause of action for the investor in order to challenge the host state's conduct that directly and indirectly conflict with their investment, and allow for relief against an alleged breach.<sup>124</sup>

There is no universal notion of substantive standards of protection for investors within the sphere of international investment law, thereby their interpretation can vary based on the wording of the designated provisions. Nonetheless, in most treaties substantive standards contain the same or similar wording. A cogent example in this regard would be the principle of the fair and equitable treatment (FET) which has been frequently adjudicated and often found to be breached.<sup>125</sup> Other less-invoked standards are expropriation, umbrella clauses and most favored nation clauses.<sup>126</sup> In particular, expropriation, the minimum standard of treatment clauses provide investors with the possibility of recovery for a broad range of host state actions that detrimentally affect an investment.<sup>127</sup> These standards are often formulated as broad obligations on the part of the host state toward the investor and are presented and put together in the context of large-scale investments to evaluate to what extent an investor can be based on a putative breach of these standards which have attained customary international law status.<sup>128</sup> These investment law principles recognize and crystalize a minimum set of standards derived from one particular norm of general international law, namely that aliens are entitled to treatment that ought to be free from any intervention. These four standards were traditionally conceptualized by the Law of Nations and subsequently consolidated as customary norms.<sup>129</sup>

States have started refining investor protections in a narrower way by introducing general exception clauses, which are either framed as a general exception clauses or introduced as a sub-provisions to expropriation that limit the scope of indirect expropriation. These exclusion clauses frequently appear with some variations. For instance, some were formulated to list what environmental measures may not amount to expropriatory conducts. In addition, a new formulation has emerged to explicitly clarify what policy-oriented measures could fall within the ambit of non-discriminatory environmental regulation, and therefore, cannot be invoked as a ground for indirect expropriation. These attempts for providing clearer elucidation of such clauses may guarantee states to implement and enforce public policy-related regulations without breaching any investment protection standards.

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123. Valentina Vadi, *PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION I* (2018).

124. Newcombe, *supra* note 113, 359.

125. NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 896 (6<sup>th</sup> ed. 2015).

126. Spears, *supra* note 4, at 1048.

127. Charalampos, *supra* note 33, at 18.

128. RICHARD GARDINER, *PART II INTERPRETATION APPLYING THE VIENNA CONVENTION ON THE LAW OF TREATIES, A THE GENERAL RULE, 5 THE GENERAL RULE: (1) THE TREATY, ITS TERMS, AND THEIR ORDINARY MEANING* (2nd ed. 2015).

129. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 *AM. J. INT'L L.* 1, 11 (2018).

*i. General Exception Clauses*

General exceptions are particularly appealing to drafters of IIAs as they set out protected regulatory space for the state to implement a wide range of measures which will help address unforeseeable future harms to the public welfare.<sup>130</sup> In particular, these exception provisions carve out space for host states to regulate in areas such as public health, safety, or the protection of the environment.<sup>131</sup> In addition, they affirm the right of members to pursue objectives identified in the paragraphs of these provisions so much so that even pursuing the said goals might circumvent the obligations set out in provisions pertaining to investment protections. This suggests the force of general exception clauses, which attribute primacy to regulatory measures that directly impinge upon the parameters of protection standards set for investors.<sup>132</sup>

It can be argued that the uncertainty regarding the scope and application of broadly worded investment obligations and standards, such as fair and equitable treatment or legitimate expectations, may be resolved by using general exceptions. To this end, general exceptions can draw interpreters, and potentially arbitrators, attention to the necessity of striking a balance between investment promotions and public policy considerations. As the 2011 Organization for Economic Co-operation and Development study stated, these clauses are appropriate barometer of the extent to which state treaty practice has specifically addressed the balance between investment protection standards and public policy considerations, in particular environmental regulations, labor, and sustainable development.<sup>133</sup>

Such provisions ensure that tribunals refrain from acting as “run-away” tribunals and making overarching and unwarranted interpretation of IIA obligations.<sup>134</sup> As remarked by Newcombe, “Since investor-state arbitration awards can only be reviewed on very limited grounds (not including a mere error of law), the inclusion of general exceptions might be viewed as serving as an important check against a tribunal interpreting an investment obligation in an unexpected and expansive manner.”<sup>135</sup> In fact, a tribunal faced with an express general exception must interpret it in accordance with the rules of treaty interpretation enshrined in the VCIL to ensure adherence to the basic rule of law. The VCIL is aimed to maintaining a degree of harmony in the interpretation and application of international law pertaining to investment treaties. The strict adherence to the rules and principles contained in the VCIL will harmonize the standard of review being conducted in investment arbitration and prevent this transnational system of justice from further scrutiny. Hence, general exceptions may reflect a cautionary approach, mitigating the risk of overly broad interpretations of IIA obligations in awards that are not subject to appellate review.<sup>136</sup> In addition, the majority of these exception concern specific obligations including promotion of sustainable development, public order, environmental

130. Newcombe, *supra* note 112, at 279–80.

131. Alec Stone & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 73, 142–43 (2008).

132. *Id.* at 155–56.

133. Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* 1, 7 (OECD Working Paper No. 2011/1, 2011).

134. NEWCOMBE & PARADELL, *supra* note 82, at 359–61.

135. Newcombe, *supra* note 113, at 278.

136. Céline Lévesque, *Influences on the Canadian FIPA Model and US Model BIT: NAFTA Chapter 11 and Beyond*, 44 CAN. Y.B. INT’L L. 249, 271–77 (2006).



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regulation, labor and essential security. Typical language introducing general exceptions are below.

*ii. Expropriation*

As discussed previously, expropriation is commonly known as the unlawful taking of property belonging to a foreign investor by the state, which will trigger the obligation that is born by states towards the investors. Direct expropriation is also characterized as a measure wherein a state obstructs the investor's legal title to the investment through an action that is designed to confer benefits to the general public.<sup>137</sup> Expropriation provisions are often viewed as guarantees put in place for the benefit of the investor.<sup>138</sup> These provisions typically protect investors from undue state interference by providing that private property may not be subject to expropriation or to measures tantamount to an expropriation, unless such measures are taken by the state for the public interest, under due process of law, and are accompanied by the payment of compensation.<sup>139</sup> Even though this is a relatively accurate understanding of expropriation provisions, it should not detract from the fact that, in their current form, provisions protecting investors from expropriation are also indicative of the host state's right to regulate.<sup>140</sup>

The factors used by tribunals when evaluating whether indirect expropriation has occurred are traditionally vague, open-ended, and non-exhaustive. Some of the words such as "manifest arbitrariness" and "manifestly excessive" have been incorporated to ascertain the level of commitment which still fails to provide a bright-line distinction between the contour of investment protection standards and right to regulate public interest.<sup>141</sup>

The application of exception clauses in relation to expropriation lead to certain interpretive complications. For instance, some commentators contend that a general exception can be interpreted as permitting expropriation without compensation, if they are taken in pursuit of the policy objectives specified in the clause.<sup>142</sup> Commentators consider that such an interpretation goes a little too far in protecting the state's regulatory space to the detriment of the foreign investor's protection. In addition, some commentators have opined that the public interest provision being within the construct of expropriation clause precludes the investors from receiving international protection, the application of this clause thus should be analogous to that of the reasoning advanced by the award in *Hesham v. Indonesia*. In this case, the Tribunal applied the "unclean hands" doctrine, which does not allow the investor to be protected in eventual breaches suffered under the investment treaty, if their misconducts contribute to the breach of an underlying treaty. In fact, the Tribunal asserted that the proposed public interest sub-provisions should be viewed as

137. "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law* (OECD Working Papers No. 2004/4, 2004).

138. "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law* (OECD Working Papers No. 2004/4, 2004).

139. *Id.*

140. Tarcisio Gazzini, *Authentic (or Authoritative) Interpretation of Investment treaties by the Treaty Parties*, EJIL: TALK! BLOG EUR. J. INT'L L. (Aug. 17, 2020), <https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/>.

141. See "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law*, *supra* note 137.

142. Schreuer, *supra* note 138, at 7–8.

imposing obligations upon investors.<sup>143</sup> Nonetheless, by limiting the scope of application of expropriation clauses, tribunals will have narrower discretion when evaluating the parties' investment protection obligations.

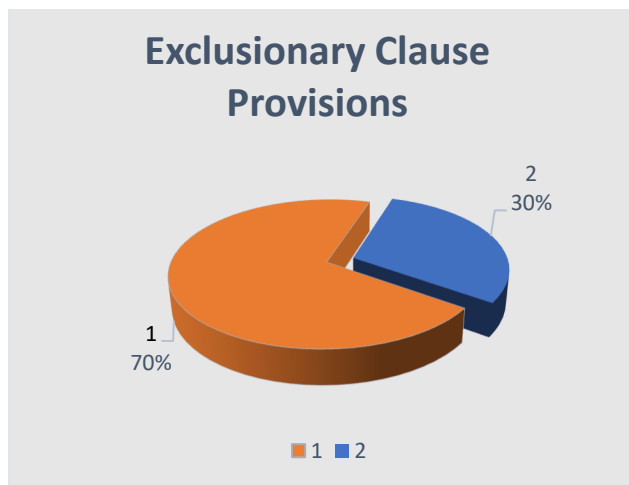


Figure 5. Shows the Percentage of Studies Treaties Incorporating Exclusionary Clauses in Expropriation Provisions.

#### V. THE TRAJECTORY OF SUSTAINABLE DEVELOPMENT AS AN EVOLVING INTERNATIONAL NORM

As discussed in previous sections, sustainable development has become a widely accepted policy objective within the new paradigm of investment treaties. The integration of sustainable development was intended to reconcile the principles of economic growth with the need for fostering meaningful sustainable rhetoric in the contemporary investment treaties discourse. Its development was a direct result of the growing need to place global environmental goals at the center of any narratives that require meaningful focal points for coordination and a legitimate constraint on state and private entities' harmful behaviors.<sup>144</sup>

However, the widespread acceptance of this principle as an overarching paradigm of the foreign direct investment has produced lackluster performance in the field of investment arbitration. Seeking to explain why Investor-State Dispute Settlement ("ISDS") fails to endorse this principle, this section will examine: (a) the normative foundation of the sustainable development principle within the broader framework of legal positivism; (b) the normative coherency of the constitutive elements of this principle as a viable legal order; and (c) why ISDS tribunals shy away

143. Andrew Newcombe et al., *Warrag v. Republic of Indonesia: Imposing International Obligations on Foreign Investors*, 30 ICSID REVIEW 525, 525–32 (Sept. 29, 2015).

144. KATHERINA BERNER, RECONCILING INVESTMENT PROTECTION AND SUSTAINABLE DEVELOPMENT: A PLEA FOR AND INTERPRETATIVE U-TURN, IN SHIFTING PARADIGM IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 177–203 (Steffen Hinfelang & Markus Krajewski eds., 2016).

from incorporating this principle in their final reasoning, and in turn, fail to promote and uphold the tenet of this paradigm in the sphere of international law. Finally, this section will offer a pathway that helps tribunals to avail themselves to sustainable development standards.

#### *A. The Normative incoherency of sustainable development*

Sustainable development integrates social, environment, economic and governance policies to form a coherent paradigm,<sup>145</sup> and it is anchored around the concept of inter-generational equity as one of its intrinsic component.<sup>146</sup> The concept of inter-generational equity is founded upon the theory of the fairness amongst all generations in the use and conservation of the environment and its natural resources.<sup>147</sup> Therefore, it is a unique concept that combines three distinct dimensions that are interdependent, yet interlinked—environmental, economic, and social.<sup>148</sup> This progressive norm was launched through so-called “soft law,” following the foundation of the UN, which has its roots in various pre-war institutions.<sup>149</sup> Like many other United Nations declarations and guidelines, the emergence of the notion of sustainable development within the international law sphere did not have any legally binding force and was primarily characterized as a soft law instrument. It was mostly viewed as a normatively worded legal instrument to govern the relations between States, international organizations, and individuals. However, for the evolution of the concept of sustainable development, Earth Summit (1992) was a watershed moment that essentially consolidated and codified the normative contour of this principle, making it the chief vehicle for the expression of its legal requirements.<sup>150</sup> The Earth Summit which is otherwise known as “Rio Declaration on Environment and Development,” clarified the scope of application of sustainable development by introducing twenty seven principles that were designed to guide countries to reach sustainable development. This Declaration was signed by 127 countries, suggesting the growing consensus concerning the desire to achieve these set of objectives. The inclusion of the notion of sustainable development in other non-binding legal mandates further clarified and developed its scope of application, allowing for its underlying meaning to emerge.

Therefore, the conception, articulation and dissemination of sustainable development and its constituent components such as good governance are the result of 20-30 years of intense UN-led activity, which, in international law terms, is a relatively short time.<sup>151</sup>

Scholars such as Stoddart define sustainable development as an efficient and equitable distribution of recourses intra-generationality and inter-generationality

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145. WIL HOUT, *THE POLITICS OF AID SELECTIVITY: GOOD GOVERNANCE CRITERIA IN WORLD BANK, US AND DUTCH DEVELOPMENT ASSISTANCE* 11 (2007).

146. Thomas N. Gladwin et al., *Shifting Paradigms For Sustainable Development: Implications For Management Theory and Research*, 20 *ACAD. MGMT. REV.* 874, 886–87 (1995).

147. Edith Brown Weiss, *Intergenerational Equity*, *MAX PLANK ENCYC. INT’L L.* (2021).

148. Jale Tosun & Julia Leininger, *Governing the Interlinkags Between the Sustainable Development Goals: Approaches to Attain Policy Integration*, 1 *GLOB. CHALLENGES* 23, 23–45 (2017).

149. See U.N. Conference on the Human Environment, *supra* note 58.

150. See Report of the U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26 (Vol. I) (June 3–14, 1992).

151. Marie-Claire Cordonier Segger, *Significant Developments in Sustainable Development Law and Governance: A Proposal*, *NAT. RES. F.* 28, 61–74 (2004).

with the operation of socio-economic activities within the confines of a finite ecosystem.<sup>152</sup> In a similar vein, Ben-Eli identified the notion of sustainability as a dynamic equilibrium in the process of interaction between the population and the carrying capacity of the environment such that the population develop its full resources without producing irreversible impacts on the carrying capacity of the environment which we rely upon.<sup>153</sup> Scholar Richard O'Brien identifies this concept as the capacity of the government to effectively formulate and implement sound policies, to ensure appropriate equilibrium and alignment among, society, economy and the environment in terms of the regenerative capacity of the planet's life supporting ecosystem.<sup>154</sup> The common denominator shared by all definitions that are associated with sustainable development is its premise in safeguarding human activities and their ability to satisfy human needs without depleting and exhausting productive resources at their disposal. Therefore, the chief characteristic of this principle is to offer a core concept of sustainability within global governance to address human challenges toward environmental impacts in a manner that will be beneficial to several generations.

Nevertheless, the varied and different definitions and interpretations associated with sustainable development do not lend themselves to a coherent and robust definition with a clear scope of application. Sustainable development as it is typically understood places a duty on state authorities to "do something" requiring states and non-state entities to take the necessary measures to achieve a set of interrelated objectives.<sup>155</sup> In particular, the duty to provide meaningful interactions between these three dimensions, without damaging resource for the future.<sup>156</sup> In essence, the existing formulation of this principle is designed to inform the decision-makers, and serve as a blueprint for state and private sectors on the process of making and implementing decisions concerning future development.

In sum, sustainable development has been largely characterized as a means to promote different normative ends.<sup>157</sup> Depending on specific designated processes, the capacity of each institution, and the relevant social dynamic, this principle introduces a different set of standards of performance to host states and those private entities whose actions may have direct bearing on the promotion and protection of sustainable development agenda. Critically, the commitment imposed by

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152. A POCKET GUIDE TO SUSTAINABLE DEVELOPMENT GOVERNANCE, COMMONWEALTH SECRETARIAT (Emlyn W. Cruickshank et al. eds, 2nd ed. 2012).

153. Nico J. Schrijver, *The Evolution of Sustainable Development in International Law*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 173-207, 217-412 (2008). See also Michael Ben-Eli, *Sustainability: Definition and Five Core Principles*, SUSTAINABILITY LAB'Y (2015), <http://www.sustainabilitylabs.org/assets/img/SL5CorePrinciples.pdf>.

154. Richard O'Brien, *Drivers of change for the UN's future role*, in POST-2015 UN DEVELOPMENT: MAKING CHANGE HAPPEN? 56 (Stephen Browne & Thomas G. Weiss eds., 2014).

155. Onismo Maibeki et al., *Corporate Governance and the Quality of Service Delivery in Local Authorities: Case of Masvingo Municipality*, 6 Int'l J. Rsch. & Innovation Soc. Sci. 482, 485 ("[G]overnance issues pertain to the ability of government to develop an efficient, effective, and accountable public management process that is open to citizen participation and that strengthens rather than weakens a democratic system of government.").

156. Onismo Maibeki et al., *Corporate Governance and the Quality of Service Delivery in Local Authorities: Case of Masvingo Municipality*, 6 Int'l J. Rsch. & Innovation Soc. Sci. 482, 485 ("[G]overnance issues pertain to the ability of government to develop an efficient, effective, and accountable public management process that is open to citizen participation and that strengthens rather than weakens a democratic system of government.").

157. Yu Keping, *Governance and Good Governance: A New Framework for Political Analysis*, 11 FUDAN J. HUM. SOC. SCI. 1, 1-8 (2018).

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sustainable development may vary based on the countries, the key objectives, and the desired outcome. Thus, the intrinsic feature of this concept does not lay out negative obligations, rather, it sets out an incentive to employ best efforts to exercise authority and discharge functions that have multi-pronged impacts in a sound and effective fashion. Thus, this principle places relative obligations, not obsolete ones, and should be most likely interpreted based on its forward-looking element, with an emphasis on striving to design, formulate, and implement policies in an effective and accountable way.

The elucidation of this concept can be understood as serving an aspirational idea, which is often difficult to achieve in its entirety.<sup>158</sup> This is also partly due to the fact that there are no concrete and fixed indicators to monitor and evaluate the commitment posed either by organizations or private entities. To this end, the lack of intelligibility and articulacy of this definition reinforces the programmatic and aspirational nature of this principle.

In light of the above analysis, the following sections argue that the lack of lucid formation of this principle prevents it from achieving rule of law status, resulting in the lack of full integration of this principle within the archetype of investment arbitration.

### *B. Sustainable development as a viable legal order: The rigidity of legal positivism*

Sustainable development, in its current normative format, does not fit neatly into a well-established principle of law. For non-state normative schemes, in order to attain the requirement of legality and basic rule of law, they must conform with the basic criteria of justice which is anchored in the legal theory presented by famous legal philosopher, Lon Fuller. Fuller theory of rule of law recognizes that rules made by the sovereign deserve the label of law irrespective of any other considerations. By the same token, a normative scheme that is developed outside the realm of sovereignty does not deserve such label until it conforms with the principle of legality. The Fuller theory is widely recognized as a positive law theory which has occupied the center stage in the application and interpretation of transnational norms by international adjudicative bodies.<sup>159</sup> In other words, the basis for legality in the international sphere is guided and interpreted through the prism of the classical conception of legal positivism, which only identifies law within the command of a sovereign.<sup>160</sup> According to the theory of legal positivism, there is no law outside of state law, thus there is no clear recognition of a normative order that falls outside of state law, unless it conforms to the positive law.<sup>161</sup> Duguit and Kleison, proponents of classic positivism, have noted that the only means to satisfy their aspirations for justice and equity is the resigned confidence that there is no other justice than the ones to be found in the positive law.<sup>162</sup> Fuller's theory of legality outlines an array of requirements that could qualify a normative scheme as deserving the

158. O'Brien, *supra* note 154.

159. O'Brien, *supra* note 154.

160. Guilherme Vasconcelos Vilaça, *Why a Theory of International Arbitration and Transnational Legality?*, 36 CAN. J.L. & JURIS. 495, 498 (2016).

161. *Id.*

162. Leon Duguit & Hans Kelsen, *Foreword*, 1 REVUE INTERNATIONALE DE LA THEORIE DU DROIT 1, 3 (1926-27).

label of “law.”<sup>163</sup> The theory purports that any normative order ought to: 1) formulate in lucid language and be reasonably clear; 2) the rules must be easily ascertainable; and 3) the normative orders can be easily followed and not changed with the disorientating frequency.<sup>164</sup>

The following analysis illustrate that when measured against the requirement advanced by the Fullerian theory, sustainable development fails to conform and thus its status as a viable legal order, and by extension, its ability to be endorsed by investment tribunals, remains questionable. Then, the final section offers a pathway that helps tribunals to avail themselves to the sustainable development standards.

### *i. Ascertainability*

The evolutive and contextual nature of sustainable development bars this concept from forming a general rule of law as it does not satisfy the requirement of ascertainability. The normative framework of sustainable development is inherently evolutive: it is prone to social, environmental, or scientific evolution.<sup>165</sup> Such a nature underlines its main component; intergeneration equity. This component implies that everyone shares a common yet differentiated responsibility in the pursuit of sustainable development, the details of which depend on the characteristics of the state concerned. More specifically, this suggests that one cannot expect that same level of commitment from developing states as one can from developed states. It is difficult to imagine that developing states, faced with organizational and financial constraints, would be obligated to abide by the same principles set for economic growth and structural transparency. In other words, the range of standards and principles that need to be observed depends on contextual specifics such as time, process, place, and the characteristics of the state concerned. A cogent example in this regard is achieving social dimension of sustainable development. This social pillar of this principle operates with a degree of abstraction, as its intrinsic features are premised on the designated flows, relevant cycles, and progresses that are not easily observable. Another notable example is the *Shrimp- Turtle* case which confirms that such notions ought to be interpreted in light of contemporary concerns and modern scientific criteria, which reinforces relative obligations posed by this principle.<sup>166</sup> As noted by Benaim, The dynamics and changes within the social paradigm are highly intangible and cannot be easily modelled.<sup>167</sup> This differentiated responsibility, which is an implicit requirement of sustainable development, underscores the duality of norms present in such a system, rendering its scope and application relativistic. As such, it does not purport a clear standard of conduct which would render it difficult for tribunals to determine whether obligations have been breached, because analyzing any such threshold would be highly relative.<sup>168</sup> Looking through the prism of legal positivism, if a rule system’s norms are not typically

163. LON L. FULLER, *THE MORALITY OF LAW* 33–41 (Yale Univ. Press rev. ed. 1964).

164. *Id.* at 38.

165. Duncan A. French, *International Environmental Law and the Achievement of Intragenerational Equity*, 31 ENV’T L. REP. 10469, 10470 (2001).

166. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶127-131, WTO Doc. WT/DS58/AV/R (adopted Oct. 12, 1998).

167. Benaim, *supra* note 156.

168. Marie-Claire Cordonier Segger et al., *Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation*, 12 REV. EUR. COMPAR. & INT’L ENV. L., 54–68 (2003).

ascertainable by their addresses, and cannot remain stagnant over a period of time, such a system ought not to be considered law due to constant discrepancies of the intrinsic features of the norm. Therefore, sustainable development's transitory nature leads to its failure to meet or satisfy this requirement.

ii. *Perspicuity and coherence:*

Another important principle of a normative framework that ought to deserve the label of "law," is the principle of perspicuity. This principle provides that the formulation of any mandate must be in lucid language and written explicitly so that it lends itself to an objectionable yardstick, based on which the general public may infer the general foreseeable rules. This principle suggests that mandates are required to be written in coherent and lucid language, allowing to draw from common patterns of expression to truly demonstrate the underlying obligations that they infer.

Following this vein, there is no overarching coherent definition that coordinates the intrinsic feature of this definition to provide normative clarity. There have been laudable efforts in streamlining the intrinsic features of this principle through various legal instruments, including the UNDP definition.<sup>169</sup> Nonetheless, there is no unified definition of sustainability that would provide a convenient device for organizing the literature. With varying degrees of language contained in non-binding legal mandates, sustainable development is proceeding at a relatively high degree of abstraction. The formulation of provisions in many BITs are too flexible and varied. The wordings are imprecise, and sometimes some of the definitions are characterized by the use of the conditional. For instance, a recent iteration of UN Sustainable Development Agenda suggests that the implementation and success of this agenda will rely on countries' own sustainable development plans, policies and programs.<sup>170</sup> These mandates are indeed formulated in a way to set out an incentive rather than a clear, identifiable concept, allowing an adjudicator to gauge if the underlying obligation has been fulfilled, or if a breach has occurred. According to Low's analysis, the content of a rule system for sustainable development is evasive and flexible.<sup>171</sup> Other notable commentators have speculated that sustainable development can be declaratory in nature. This analysis suggests that the specific details of a system will necessarily vary according to the subject matter it concerns, who is using it, and what needs to be done to achieve the end. Such abstract and imprecise definitions require case-by-case assessment, which implies that the declaratory nature of this principle bars sustainable development to have the force to achieve generality. Thus, when addresses are unable to infer when a rule is applicable, it is difficult for them to apprise themselves of the award. Therefore, the lack of lucid and textual specificity of this principle prevents it from achieving rule of law status.

169. Rachel Emas, *The Concept of Sustainable Development: Definition and Defining Principles*, U.N. DEPT. ECON. & SOCIAL AFFAIRS (2015), [https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf).

170. UN Sustainable Development Goals, *FAQ: How Will the Sustainable Development Goals be Implemented* (last visited Oct. 21, 2022) <https://www.un.org/sustainabledevelopment/development-agenda/#:~:text=Implementation%20and%20success%20will%20rely,plans%20with%20their%20global%20commitments>.

171. See Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 19, 29 (Alan Boyle & David Freestone eds., 1999).

iii. *Temporal Steadiness:*

In his 1964 book *The Morality of Law*, Fuller argued that stability (temporal steadiness) is an indispensable feature of the principle of legality.<sup>172</sup> This feature reflects the nature of the rule of law presence in society. It envisages law operating as a relatively stable set of norms available as public knowledge. It requires that laws be stable enough to guide ordinary citizens as to what requirements they ought to comply with and to gain insights about the sanctions they might face in the event of non-compliance. It is therefore an important part of the rule of law that the rule remains steady so that the general public has a reliable sense of what the law at any given time requires. The temporal steadiness calls for limits in the pace and scale of transformation of a rule of law. If there was no limit to frequent changes within the framework of law, the general public would have difficulty managing their affairs effectively.<sup>173</sup> Essentially, if the rules are to be completely absorbed in the one practical reasoning, it requires generating a set of authoritative characters, which would be immune from transitory events in its normative landscape.<sup>174</sup>

What is perceived as sustainable development will change over time according to scientific, social, environmental and economic specificities. This is due the fact that this concept (the notion of sustainable development has been characterized as principle, standards, and goals in different legal instruments thus far. The various characterizations of this notion has made it exceedingly difficult to attribute this notion with the identification of principle—this entire section actually argues that lack of hegemony with respect to its legal classification prevents tribunals from endorsing this notion more frequently) presents an evolutive proposition and objective that witnesses constant changes, thus by its very nature it remains transitory. For instance, as suggested by leading scholar Weiss, the list of principles and standards associated with the concept of sustainable development cannot be exhaustive.<sup>175</sup> This is evidenced by the 2009 OECD iteration of good governance, one of the main sub-components of sustainable development, which put forth seven different standards as encompassing good governance. In contrast, another definition of good governance provided by UNDP (1997-23) listed seventeen standards for the same concept.<sup>176</sup> Many other organizations, including the Inter-American Development Bank, the European Bank for Reconstruction and Development and the World Bank, used this notion widely and provided some definitions to achieve their underlying objectives. These definitions have one common ground. They broadly define sustainable development as the processes, actions, policies that seeks to improve areas such as natural resources overexploitation, manufacturing operations, the linear consumptions of products, the direction of investments, citizen lifestyle, technological developments or business and general institutional changes. In essence, all these definitions conceptualize sustainable development as an approach

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172. Fuller, *supra* note 163, at 39.

173. MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW 102 (2007).

174. POST-2015 UN DEVELOPMENT: MAKING CHANGE HAPPEN? (Thomas Weiss & Stephen Browne & Thomas G. Weiss eds., 2014).

175. *Id.* at 89.

176. Rachel M. Gisselquist, *Good Governance as a Concept, and Why This Matters for Development Policy*, (U.N. Univ. World Inst. for Dev. Econ. Rsch. Working Paper No. 2012/30, 2012), <https://www.wider.unu.edu/publication/good-governance-concept-and-why-matters-development-policy>.



to development that looks to balance different needs with an awareness of the environmental, social, and economic limitations we face as a society. It considers appropriate measures and policies that could be beneficial for the present and the future generations. Therefore, the diverse definitions of this notion, which also subject to constant changes, confirms its transitory underpinning. This transitory nature is warranted however, as the definitions of sustainable development standards such as precautionary principles, right to participation, and good governance, are meant to be interpreted in light of contemporary concerns and modern scientific knowledge strike the needed balance between social and environmental considerations. The normative constancy through time will, therefore, shift and change. Critically, new formulations and standards will be added to the idea of what constitutes sustainable development based on social, environmental, and scientific changes, rendering it an inherently unstable concept. Thus, the transitory nature of this concept does not allow ordinary citizens to truly “predict and plan”, which is part of the bedrock of legal principles. In other words, the lack of predictability of this concept will make it impossible for the general public to infer its pattern of expression.

Simultaneously, it is important to note that contextualizing sustainable development through a traditional legal form largely fails to acknowledge the normative framework of sustainable development, which bars the hegemonic application of sustainable development.<sup>177</sup> In addition, the narrow interpretation of sustainable development is not aligned with the true spirit and conceptualization of sustainable development of its underlying goals which were formulated to introduce a different set of standards and obligations based on changing circumstances in social, economic, and environmental spheres of each state. Thus, the imposition of a static definition to the principle of sustainable development will bar the policy rationales behind it. This transitory nature is warranted, however, as the definitions are meant to be interpreted in light of contemporary environmental concerns and modern scientific knowledge. The strength of this concept means that it must evolve in order to exert proper influence as its process-oriented nature and its malleability allow to serve as a modifying norm that can exert informative influence as an interpretive tool in the hands of adjudicators. It does not set out a clear standard of conduct by which states could discharge responsible and the underlying objectives and the required steps are not clearly discerned by the adjudicators. The flexible characteristics of sustainable development make it a particularly potent interpretive tool, granting the adjudicators a wide margin of appreciation to gain interpretive proficiency, which helps adjudicators gauge the strength of any given arguments.

Nevertheless, the lack of benchmarks and clear standards of obligations will make it difficult to determine when or if the breach occurs because such a breach can only be identified when the results of the promised efforts have not been fully materialized. Therefore, the current formulation of sustainable development does not conform with the definition of legality. As a consequence, the incorporation of sustainable development into final reasoning investment arbitration has been partial, incoherent, and significantly contested.

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177. See Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467, 467–87 (1997) (UK).

*C. Resistance towards sustainable development:*

The applicability and contribution of sustainable development in arbitral proceedings largely depends on how sustainable development is characterized and whether it even deserves the label of “law.” By and large, investment tribunals do not take an agnostic approach towards non-state normative framework and consider their legality through the lens of legal positivism. This means that if a normative scheme does not conform with the understandings of the rule of law that is largely construed through the prism of legal positivism, then it would not be considered to carry the weight of the rule of law. While an understanding of legal positivism has largely been abandoned outside the realm of international commerce and arbitration, legal positivism is still highly regarded in this field and continues to imbue the understanding of arbitrators towards non-state normative schemes.<sup>178</sup> Subscribing to the classical conception of legal positivism has lent itself to investment tribunals treating those normative schemes that have been conceptualized outside the boundaries of domestic law and sovereignty (e.g., norms created by international conventions and declarations such as precautionary principles and good governance) as an applicable legal order only if those norms fulfill the principle of legality. This means if transnational norms do not conform to such principle, arbitral tribunals will shy away from endorsing them as a ground to justify a state’s measures, as relying on these notions may be seen as clashing with the application of equity, justice and, fairness. Pursuant to Article 42 (3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which mirrors article 38(2) of the Statute of the International Court of Justice (ICJ), equity requires the specific consent of the disputing parties<sup>179</sup> Therefore, when the principle of sustainable development is confronted by investment tribunals, it does not meet a fertile ground to thrive. In addition, as detailed in the previous discussions, the lack of identifiable metrics and criteria concerning the threshold of sustainability standards leave tribunals with no objectionable standards based on which they can identify if the underlying obligations has been fully materialized.

In light of this analysis, a cursory look at the existing practice of ISDS reveals that tribunals exhibit a tendency to not fully engage with the sustainability standards, and in this regard, they have adopted three discernable approaches when faced with sustainable development defenses. The first cluster of tribunals have openly dismissed the status of sustainable development as a norm capable of constraining states conduct. For instance, *Vattengall v. Germany*, in which an arbitral tribunal observed that sustainable development did not create a “legally enforceable right.”<sup>180</sup>

The second category of tribunals have found themselves grappling with the economic component of sustainable development, in particular as one of the main prongs of the notion of investment. It appears that these tribunals cannot provide clear assessments on what constitutes economic contribution in the context of investment. In this regard, the *Ad hoc* annulment committee in *Patrick Mitchell* alluded to the perceived difficulty in ascertaining the economic development scope

178. Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequence*, 2:1 J. INT’L DISP. SETTLEMENT, 60–63 (2011).

179. Statute of the International Court of Justice art. 38(II), June 26, 1945, 59 Stat. 1055, 1060.

180. *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, ¶ 63–78 (2009).

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of application and noted that “[...] it suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event *extremely broad* and variable depending on the case.”<sup>181</sup>

Similarly, the tribunal in *Astaldi, S.p.A. v. People’s democratic Republic of Algeria* regarded the criteria of sustainable development to be impossible to assess.<sup>182</sup> In determining whether economic development is an intrinsic element of investment, other tribunals looked into the underlying treaties and did not take this principle as an overarching paradigm governing the objective of the investment, but rather examined the provisions of ICSID Convention to determine if the requisite of economic development is fully inferred from the ICSID Convention.

The third category of tribunals have referred to one of the sub-components of sustainable development (good governance) in their initial analysis to determine if a host state has breached the fair and equitable (FET) standards but did not endorse this principle as a ground to decide if the FET has been violated or not. In both cases of *Maffezini v Spain* and *World Duty Free v Kenya* the tribunals alluded to the notion of good governance in assessing the illegality of the acquisition of investments, including payment of bribes by an investor which rendered the dispute inadmissible.<sup>183</sup> However, in making the final determination concerning the illegality of investment, the tribunals did not inquire into the nuances of what good governance entails, and rested their decisions on factual evidence.

In a similar vein, the case of *Burlington v. Ecuador* gives much insight into the attitudes of investment tribunals when confronted with the environmental aspect of sustainable development. This case concerned with the production of oil and gas in areas that were prone to long-term environmental risks, including vulnerability to oil spill, sediment water, and contamination due to drilling wastes, erosion in surface hydrology, and emulsions.<sup>184</sup> There were numerous claims raised by Ecuador that the abandonment of the refinery facilities by Burlington were going to cause widespread environmental impacts for generations to come. Ecuador relied on the precautionary principle as one of the widely recognized components of sustainable development to advance its arguments. However, tribunals did not recognize this argument was strong enough to absolve Ecuador from any responsibility concerning expropriation.

The above cases illustrate the complexity of integrating principles of sustainable development within existing legal regimes. It further points to deficiencies concerning the role sustainable development standards in the context of investment arbitration. Critically, the current jurisprudence of investment arbitration clearly denotes that arbitral tribunals continue to grapple with the application and interpretation of norms such as sustainable development, despite the growing recognition of this concept in the recent generation of investment treaties. Therefore, until the tribunal adopts a different and more sophisticated standard of review and abandon its

181. *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Application for Annulment of the Award, ¶ 33 (2006).

182. *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, ¶ 72 (July 12, 2006); *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 454 (Feb. 8, 2013).

183. *See World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

184. *See Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).

traditional approach towards positivistic account of rule of law, these concepts will still be of little legal utility and would not be able to constrain the investor's conducts. In view of this, the next section highlights the responsibility born by arbitral tribunals to take a proactive stance towards the recognition and implementation of this concept in the final reasoning of investment awards.

#### VI. ESTABLISHING A CLEAR TEXTUAL GUIDANCE REGARDING SUBSTANTIVE PROVISIONS

The above section illustrates that when assessed by investment tribunals, sustainable development provisions do not encounter fertile ground for environmental and sustainable-oriented policies to thrive. When ISDS mechanisms crossed paths with sustainable development, there was no material effect on the final award. The growing resistance of ISDS mechanisms to endorse sustainable development will reinforce the impression that sustainable development remains a noble aim, which fits nicely into political sound bites, but is ultimately unsubstantiated by legislative norms.

As discussed previously, lack of direct and concrete guidance will make it difficult for state to implement and regulate policies that foster and promote sustainable agendas. Some IIAs simply provide that such factors as the economic effect of the state's measures on the investment, the investor's expectations, the character of the state's action (e.g. whether it is non-discriminatory), or its objective<sup>185</sup> shall be relevant considerations for the tribunal to take into account in balancing the competing values at issue. The opacity concerning the language used in investment treaties may stifle regulations when states are unsure if the designated policies are "legitimate."

Nevertheless, the earlier sections denote that in the recent IIAs, states have sought to offer arbitral tribunal's relevant interpretive guidance for this type of situation. Conversely, other IIAs have been more explicit in clarifying that, as a matter of principle, non-discriminatory measures taken by the state in good faith and for a legitimate public welfare objective cannot constitute an indirect expropriation. Language clarification provisions in IIAs certainly provide policymakers with more certainty. These clarifying provisions help balance the public interest objectives with investor interests. Without the qualifying language, the tribunal is forced to engage in something like a good-faith inquiry.<sup>186</sup> In that case, the burden falls on the state to prove good faith.<sup>187</sup> Therefore, these provisions help to ascertain tribunals to understand what parties intended, as opposed to a strict textual interpretation of the treaties. Such mechanisms will provide arbitrators with a necessary analytical tool to engage more vigorously in balancing exercise, and in doing so attribute due consideration to issues such as environmental obligations, labor considerations, safety and health measures, and sustainable developments that have been implemented in good faith. The case of *Methanex v. U.S.* is an exemplary decision that recognizes tribunals' attempts in striking a proper balance between competing

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185. *E.g.*, these objectives could span from safeguarding public welfare, safety, public health to the environment.

186. Martini, *supra* note 9, at 576.

187. Rosalien Diepeveen et al., *Bridging the Gap between International Investment Law and the Environment*, 30 *UTRECHT J. INT'L & EUR. L. REV.* 145, 149 (2014) (Neth.).

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objectives.<sup>188</sup> This interpretive guidance has principally taken the form of a strong reaffirmation of the state's power to regulate, though, again, this has taken various forms in practice. Several benefits of clearer textual guidance are summarized below:

- The non-economic values will be explicitly invoked against all investor's rights;
- Investors will no longer be litigious, striving to protect their investment by using a broad claim basis to prevent the State's from effectively wielding its sovereign power to protect the changing interest of its citizens;
- Imposing actionable responsibilities on investors would reverse the burden of proof;
- When evaluating investment protection standards, Tribunals will no longer rely on open-ended non-exhaustive treaty provisions, they will have more guidance and control by attribute due considerations to non-investment values as well;
- Such narrow way of interpreting investment protection standards effectively expand the reach of parties to exercise their right to regulate and will help tribunal in confidently apply and interpret the cases before them;<sup>189</sup>
- Using and incorporating such language would provide the ability for states to accommodate and regard defenses anchored on competing obligations;
- The binding nature of the right to regulate draws the tribunal's attention to its comprehensive context.

Similar to these general exceptions, if the state can establish the environmental purpose of the regulatory measure that allegedly led to a substantial deprivation of the investor's rights, the burden shifts to the investor who has to prove that the measure was arbitrary, discriminatory, or taken in bad faith according to the conditions imposed. This burden shift also helps the state to prove that their regulatory measures are non-expropriatory.

In addition, some innovative steps have been introduced to ensure that these treaties will be interpreted in light of the overriding objectives that drafters had in mind when conceiving the treaties, especially pertaining to the dispute resolution aspects of these treaties. These steps include introduction of inter-state consultative mechanisms and inter-state bilateral appellate mechanisms to review arbitral awards under the IIA's investor-State dispute settlement mechanism, or the outright omission of Investor-State Dispute Settlement mechanisms under the IIA. The *ad hoc*

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188. See generally *Methanex Corp. v. United States, Final Award* (Aug. 3, 2005).

189. LONE W. MOUYAL, *INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE* 115 (2018).

joint decision review mechanism is a relatively recent device in the newer generations of IIAs, and it may be utilized in the future to enable states to collectively control the interpretation of an IIA through mutual consultations and re-negotiations so that treaty drafting states continue to retain sufficient policy flexibility to respond to domestic public interest and regulatory objectives.<sup>190</sup>

One example of such a standard can be found in Article 30(3) of the U.S. Model Bilateral Investment Treaty (BIT).<sup>191</sup> According to Article 30(3), parties to an IIA reserve the right to issue a “joint decision” declaring their interpretation of any provision of the IIA, which would be binding on any present or future arbitral tribunal constituted under the IIA’s dispute settlement mechanism. The states parties may issue the joint decision interpreting an IIA standard (such as, the fair and equitable treatment standard) at any stage, with or without reference to pending investor-State disputes, and with or without reference to contemporaneous interpretations by other international tribunals of the same IIA standard contained in other IIAs.<sup>192</sup> Other joint decision mechanisms are present in Article 30(3) of the 2005 United States-Uruguay BIT,<sup>193</sup> Article 30(3) of the 2008 United States-Rwanda.<sup>194</sup>

These mechanisms openly permit states parties to agree on any interpretation of IIA provisions that would prevail over decisions of arbitral tribunals. While the IIA interpretations of treaty-based commissions are generally binding on arbitral tribunals, they are nevertheless issued presumably with a more institutional view of the interpretation’s consequences for the future implementation, oversight, and supervision of the IIA.

#### CONCLUSION:

This research attempts to empirically examine the current trend in recent IIAs, in which a growing amount of weight has been attributed to non-economic values. The research applied content analysis to quantitatively examine different techniques employed to provide more space for host states to take care of their public policy objectives. After scrutinizing provisions identified in these treaties, this research concludes that most of these provisions actually place more emphasis on host state’s regulatory spaces. Such a paradigm shift suggests that international investment law has discernibly turned away from perceiving investment treaties as a vehicle to promote and protect solely foreign direct investment to the detriment of sustainable development principles. The piece also argues that incorporating sustainable development-friendly provisions in preambles allows host states to adapt to a

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190. Diane A. Desierto, *The ICESCR in State Public Policy-making in the International Investment System*, in PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT (2015). Chapter 5 of this book provides a brief overview of the role of *Ad Hoc* Committee, *id.* The explanation could be found in pages 308-379. It discusses the importance of this committee as an alternative means to provide ICESCR compliance and its capabilities of being applied extraterritorially, *id.* The premise of this framework is founded upon states’ duties to “respect, protect, and fulfill” the duties of social protection under the ICESCR in the design of regulatory risk assessments affecting the investment, *id.*

191. U.S. MODEL BILATERAL INVESTMENT TREATY art. 30 ¶ 3 (U.S. TRADE REPRESENTATIVE 2012).

192. *Id.*

193. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., art. 30 ¶ 3, Oct. 31, 2006, T.I.A.S. 06-1101.

194. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., art. 30 ¶ 3, Jan. 1, 2012, T.I.A.S. 12-101.

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changing climate without compromising the overall objectives in investment treaties. Preambles in this way also grant a margin of appreciation to investment tribunals to take into account emerging norms and recent scientific standards to evaluate if the adopted legislative and administrative measures protect the environment against unnecessary hazards, safeguard public health from emerging threats, and advance important public policy considerations. This research concludes that the incorporation of treaty language to preserve a host state's regulatory capacity is the primary characteristic of a "new generation" of bilateral and multilateral investment treaties.

The article also concludes that by incorporating clear and concise language, treaties allow host states the ability not to derogate or waive from the domestic health, safety, or environmental measures as an encouragement to attract foreign investment. In addition, clear wording can deliver a strong signal to tribunals that the objectives of the IIAs are to promote not only economic cooperation, but also good governance, the rule of law, and environmental standards around the words embodied in the document. It remains to be seen whether incorporation of right to regulate-friendly clauses into IIAs is expected to help preserve host state's ability to take necessary measures, otherwise inconsistent with their investment obligations from a tribunals perspective. However, we conclude that such normative framework could inform future treaties and institutional developments in each regime. A balance must be found between the state's need to regulate for the public interest and investment protection. Strengthening the right to regulate will reduce arbitrary interpretations by tribunals, will foster legal certainty, and will lead to an overall more balanced regime. Although there is a discernable change in the existing paradigm in international investment law to embrace non-commercial considerations, it remains to be seen how arbitral tribunals can catch up with the new realities when confronted with progressive norms such as sustainable development.