RETHINKING INVESTMENT TREATIES FOR SUSTAINABLE DEVELOPMENT: FROM THE "NEW DELHI DECLARATION" PRINCIPLES TO MODERN INVESTMENT LAW & POLICY

Xu Qian*

ABSTRACT

Sustainable development in the fields of human rights and environment has been in the works for decades since its introduction by the Brundtland Commission Report in 1987. While the World Trade Organization has taken to incentivizing sustainable development, international investment law and arbitration are only catching up. Given the international efforts in recognizing sustainable development as an important national and international goal, it is important to propose legal solutions to incentivize sustainable development for foreign investors. At an international level, technical assistance for host states, and benefit schemes for investors who contribute to sustainable development through the adoption of internationally accepted principles and corporate social responsibility (CSR) have gained ground. However, sustainable development rarely finds its place in the current design of most international investment agreements (IIAs). This Article revisits the International Law Association "New Delhi Declaration of Principles of International Law Relating to Sustainable Development" to formulate concrete legal solutions for introducing sustainable development not only as a binding obligation for

* Associate Professor & "100 Talents Program Fellow," Zhejiang University Guanghua Law School & Member, Asia Pacific FDI Network. The opinions expressed herewith are the author's own. The author can be reached at: qianxuxu@zju.edu.cn.

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investors but also as an incentive to improve sustainability through self-monitoring rather than national or international enforcement.

KEYWORDS: *sustainable development, New Delhi Declaration, international investment agreements, self-monitoring*

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I. INTRODUCTION

Sustainable development is the key objective of all countries to promote social development, economic growth, and environmental protection, however investment treaties are often unequal and do not fully promote sustainable development;[1] hence, international investment regime should take into consideration of such imperfection to leave the right to regulate domestically to the host States in order to achieve sustainable development goals. The needs will be even more important in the coming years as a consequence of the global pandemic which is devastating many economies.[2]

Over the past year, a number of key policy sustainable investment initiatives were undertaken. Firstly, the Investment Policy Framework for Sustainable Development of United Nations Conference on Trade and Development (hereinafter "UNCTAD"). The UNCTAD Policy welcomes a new generation of investment agenda which makes sustainable development a priority along with maintenance of a favorable investment climate.[3] The Policy recommends operational guidelines for inclusion of sustainable development strategies at three levels—when making national policy, when designing international investment agreements, and when investing sectors related to sustainable development goals itself. First, the Policy advises that action be taken strategically, normatively and administratively. It recommends that policies for human resources, technical know-how, infrastructure be strategically redefined in terms of sustainable development. Normatively, Corporate Social Responsibility (hereinafter "CSR") initiatives can influence investor behavior. Administratively, such policies should have clearly defined aims and measures against set time frames. Such policy implementation assessments are equally important to framing policy. Second, the Policy strongly recommends that sustainable development implications in international investment agreements be concrete and provide technical assistance in the capacity building where needed. Through investor obligations, and exceptions to fair and equitable treatment/expropriation based on sustainable development, host countries may be shielded from unjustified liabilities in disputes.[4] Third, the Policy presents options to

[1] For example, Andrew Newcombe, in assessing the current legal regime for international law, suggested that international investment agreements [hereinafter IIAs] should "include requirements for environmental or sustainability impact assessments, reporting requirements on economic, environmental and social performance, and express obligations with respect to investor conduct." Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 J. WORLD INV. & TRADE 357, 359 (2007).

[2] *See* Karl P. Sauvant, *Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1783 (Julien Chaisse et al. eds., 2021).

[3] Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15 J. WORLD INV. & TRADE 929, 932 (2014).

[4] Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health*

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incentivize investment in sustainable development which has hitherto been under-served by private investors. These include a shift to conditional investment options based on sustainable development contribution, regional initiatives towards sustainability investment, and establishing investment development agencies geared to present bankable sustainable projects.

A second policy initiative led by Karl Sauvant, recommends creating a category of investors called Authorized Sustainable Investor (hereinafter "ASI") with investment benefits for sustainable investment which is parallel to those that the Trade Facilitation Agreement of the World Trade Organization (hereinafter "WTO") provides Authorized Operators.[5] All Foreign Direct Investment (hereinafter "FDI") has the capacity to contribute to develop sustainably while maximizing host state's economic development.[6] However, the key to this balance lies in motivating, or economically speaking—incentivizing foreign investors to undertake sustainable FDI. This leads to two main questions—who can receive an ASI status and what are the benefits entailed in the ASI status. According to the authors, to qualify as ASIs, investors would have to observe internationally recognized sustainable development guidelines at the very least and record a benchmark CSR to exemplify a history of socially responsible behavior.[7] Additional criteria may include a contribution to country-specific sustainability goals. Upon qualifying as ASIs, investors would be entitled to benefits including priority in local assistance, fiscal incentives, "soft" recognition benefits such as awards, or easy access to high-ranking officials. This categorization would especially help host countries in urgent need of FDI but have weak bargaining power in a way that preserves their commitment to sustainably develop their economy.

This article focuses on the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (hereinafter "ILA Declaration").[8] Why? Because it is a definitive tool to inform the formulation

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Protections—Is a General Exceptions Clause a Forced Perspective?, 39 AM. J. L. & MED. 332, 357 (2013).

[5] *See generally* Evan Gabor & Karl P. Sauvant, *Incentivizing Sustainable FDI: The Authorized Sustainable Investor*, 256 COLUM. FDI PERSPS. 1 (2019), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/No-256-Gabor-and-Sauvant-FINAL.pdf.

[6] Julien Chaisse, *The Shifting Tectonics of International Investment Law—Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 GEO. WASH. INT'L L. REV. 563, 563-64 (2015).

[7] Nathalie Bernasconi-Osterwalder, *Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 463, 467 (Julien Chaisse et al. eds., 2021). *See also* Sauvant, *supra* note 2, at 1821.

[8] The International Law Association [hereinafter ILA] Declaration was adopted in 2002 at the 70th Conference of the International Law Association. The Declaration contains seven principles for contribution to the further development of a balanced and comprehensive international law on sustainable development. The principles find their origin in Principle 27 of the Rio Declaration on Environment and Development and Agenda 21 (UN Conference on Environment and Development, 1992). The document was prepared by the ILA Committee on Legal Aspects of Sustainable

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of policy and potentially legal arrangements. It is not limited to investment treaties/policies. For that reason, the ILA Declaration has the potential to serve as a benchmark for all policies which is important to ensure greater consistency. From a forward-looking orientation, the ILA Declaration calls for a balanced and comprehensive international law perspective on sustainable development. The Seven Principles of the New Delhi Declaration have the potential to make international investment law more effective in the pursuance of sustainable development. It also emphasizes the need for integration of all these public international policy goals in weighing the interests between the host states and foreign investors.

This article aims to provide a detailed discussion on sustainable development and the current international investment regime in relation to the concept. The first part discusses the definition of sustainable development and its transformation from a stand-alone term to a more enriched concept that includes not only environmental and health elements but also social and economic aspects. The second part of the article examines the current FDI regime and confirmed its positive correlation with the process of sustainable development. The third part of the article makes a close observation of the sustainable development aspect of the international investment law regime, especially on the incorporation of the idea into international treaties and the relationship between international investment standards guaranteed by international investment agreements and various sustainable development aspects.[9] The relationship and contribution of these principles to international investment law are discussed in the fourth part. Finally, the fifth and last part concludes and draw both academic and policy lessons for international law.

II. INVESTING IN THE SUSTAINABLE DEVELOPMENT GOALS

Before delving into the legal integration of the concept of sustainable development, this article first examines what sustainable development means. While tracing its origins, seven principles find themselves at the fore of what constitutes sustainable development. However, there is less concurrence of

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Development headed by Dr Kamal Hossain (Bangladesh) and Professor Nico Schrijver (The Netherlands), who served as Chairman and Rapporteur, respectively. The purpose of the ILA Declaration is to make international law more effective in the pursuance of sustainable development. *See* Nico Schrijver, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 49(2) NETH. INT'L L. REV. 299, 299 (2002).

[9] The seven principles are: (i) states' duty to ensure sustainable use of natural resources; (ii) the principle of equity and the eradication of poverty; (iii) the principle of common but differentiated responsibilities; (iv) the principle of the precautionary approach to human health, natural resources and ecosystems; (v) the principle of public participation and access to information and justice; (vi) the principle of good governance; and (vii) the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. *See infra* Part IV; *id.*

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views on how to integrate this notion as a legal obligation as shall be brought out.

A. Definition of Sustainable Development

Sustainable development is an evolving concept with definitions phrased in different ways. The 1987 Brundtland Report provides the most commonly accepted definition as:

> [D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of "needs," in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[10]

The definition not only limits economic activity but also connotes the necessity of a long-term plan.[11] In other words, sustainable development is the key objective of all countries to promote social and economic growth. In addition, in order to achieve sustainable development, the world has to be considered as a system that goes beyond space and time because the pollution in the West affects the other side of the world, and the decisions we make today also affect the future generation's lifestyle.[12] This further requires sustainable development on the international level.

B. A Brief History of Sustainable Development

Sustainable Development's impact on international law is more of a recent phenomenon that addresses social development, economic development, and environmental protection. When first formulated, the concept of sustainable development was only aimed at environmental protection and found mentioned in the Preamble of WTO Agreement and its later documents. The 2002 World Summit on Sustainable Development tried to expand the concept of sustainable development from "primarily 'environmental protection' to an integrated environmental, social and

[10] U.N. Secretary-General, *Development and International Economic Co-operation: Environment*, U.N. Doc. A/42/427, at 54 (1987).
[11] Justice Mensah, *Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review*, 5(1) COGENT SOC. SCI. 1,16 (2019).
[12] Schrijver, *supra* note 8.

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development agenda, with attention to poverty eradication, sanitation, and health,"[13] even though no clear result is achieved at the moment.

A more remarkable development in this field was the draft of the New Delhi Declaration on the Principles of International Law Related to Sustainable Development (ILA Declaration) by the International Law Association (hereinafter "ILA") Committee on the Legal Aspects of Sustainable Development. The ILA Declaration proposed seven principles in relation to sustainable development, which are: holding States responsible for the sustainable use of natural resources; the principle of "both intergenerational equity (the rights of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the rights of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources);" the principle that "the polluter pays;" the principle of the precautionary approach to human health, natural resources and ecosystems; the principles incorporating public participation, access to information, justice, good governance at both the domestic and international levels into the concept of sustainable development;[14] and lastly the principle of integration and interrelationship in terms of human rights and social, economic, and environmental objectives.

C. Importance of Sustainable Development

The ILA Declaration's seven principles further entrenched the concept of sustainable development from the original environmental protection to include social and economic aspects of development. The references to sustainable development in many international documents and discussions on its definition and scope have proved its significance and helped in reaching an international consensus as a result.[15]

Despite sustainable development's value towards social and economic growth, its legal value remains controversial.[16] One approach suggests that sustainable development could be viewed as a "label for a general policy goal which may be adopted by states unilaterally, bilaterally, or multilaterally."[17] Sustainable development can serve as a standard that guides, influences, or inspires judges and tribunals. More efficiently, it could influence the drafting

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[13] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS 26-28 (2004).

[14] The 70th Conference of the International Law Association, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, at 3-7, U.N. Doc. A/CONF.199/8 (Aug. 9, 2002) [hereinafter *ILA Declaration*].

[15] Schrijver, *supra* note 8.

[16] Gazzini, *supra* note 3.

[17] Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19, 30 (Alan Boyle & David Freestone eds., 1999).

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of international agreements.[18] Another approach believes that the concept of sustainable development does not carry any obligations and rights by itself but only integrates principles of law and policy commitments. This could have a long-term effect in the sense that by constantly renewing the underlying principles, they could be developed in a dynamic and coherent manner. The *Iron Rhine* arbitral tribunal has taken the initiative to adopt this approach and make it binding upon States that:

> The emerging principles [of international environmental law], whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations . . . Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on the development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm . . . . This duty, in the opinion of the Tribunal, has now become a principle of general international law.[19]

The third approach considers the concept as an evolving one that may merge into a single rule or principle of international customary law through state practice and opinion juris,[20] but this approach may cause legal uncertainty without much additional advantage compared to previous ones.[21] It is arguable that various principles revolving around the concept of sustainable development allow for flexibility while single principle will result in the translation into obligation.[22]

III. FOREIGN INVESTMENT AND SUSTAINABLE DEVELOPMENT

To assess the policy space that sustainable development takes in FDI, first it requires an assessment of recent trends in FDI.[23] While there is agreement that policy coherence is the need of the hour as explained in

[18] Gazzini, *supra* note 3.
[19] Kingdom of Belg. v. Kingdom of the Neth., PCA Case No. 2003-2, Award of the Arbitral Tribunal, ¶¶ 58-59 (May 24, 2005).
[20] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Separate Opinion of Vice-President Weeramantry, 1997 I.C.J., at 7, (Sept. 25).
[21] Gazzini, *supra* note 3, at 934.
[22] *Id.*
[23] *See generally* Julien Chaisse & Christian Bellak, *Navigating the Expanding Universe of International Treaties on Foreign Investment—Creation and Use of a Critical Index*, 18(1) J. INT'L ECON. L. 79 (2015); Liesbeth Colen et. al., *Bilateral Investment Treaties and FDI: Does the Sector Matter?*, 83 WORLD DEV. 193 (2016).

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section 3.3, the article explains how the legal framework of FDI arbitration and existing international investment agreements (hereinafter "IIAs") are yet to catch up with it.

A. Significance of Foreign Direct Investment

To promote social and economic growth sustainably, FDI is a key factor for both developing and developed countries.[24] Developing countries need to attract more capital for infrastructure constructions while developed countries need to invest in less developed countries for higher returns. FDI, as a win-win solution, emerges as an economic phenomenon to serve as a means for such exchange of benefits.

FDI's importance and challenges in relation to sustainable development have been highly recognized on many occasions. For example, Agenda 21 from the United Nations Conference on Environment and Development highlighted that:

> Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed.[25]

This relationship is not only recognized in Agenda 21 but also in the report of the International Conference on Financing for Development where it is stated that "[p]rivate international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes towards financing sustained economic growth over the long term."[26]

B. The Rise, Fall . . . and, Green Rise: Trends in Global FDI Flows

Here it becomes essential to understand the context in which the present sustainable development framework is to be implemented. This section

[24] Newcombe, *supra* note 1, at 357.
[25] U.N. CONF. ON ENV'T & DEV., REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, ¶ 2.23, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), U.N. Sales No. E.93.I.8 (June 3-14, 1992).
[26] U.N., REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, ¶ 20, U.N. Doc. A/CONF. 198/11, U.N. Sales No. E.02.II.A.7 (Mar. 18-22, 2002) [hereinafter *Monterrey Consensus*].

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compares investment flows of FDI before and after the COVID-19 pandemic. FDI flows steadily continued to decline, following the trend from before the pandemic, and are predicted to fall until the vaccine is disseminated.

1. Effects of the Pandemic on Global Investment — Owing to the COVID-19 pandemic, global FDI flows have fallen by 50% to USD 364 billion in the first half of 2020 from USD 858 billion in the second-had of 2019, hitting its lowest half-year level since 2013. With COVID-19 returning in waves and FDI flows steadily decreasing in the past five years, it is expected that they could remain below pre-COVID-19 levels if public health measures and economic support policies remain ineffective. Organisation for Economic Co-operation and Development (hereinafter "OECD") pessimistically predicts FDI flows to remain flat till the end of 2021 when the introduction of a vaccine would allow recovery[27] while UNCTAD expects a slow recovery to begin as late as 2022.[28]

While FDI inflows to non-OECD G20 countries decreased by 30%, the global FDI inflows took a larger hit of 49% and decreased from USD 777 billion to USD 399 billion. Although FDI inflows have not shown many fluctuations after a dramatic rise in 2014, it fell much more than was predicted by the UNCTAD.[29] Developed economies have been hit significantly more than developing economies with reductions in inflows of 75% based on half-year calculations.[30] Europe was especially worse hit with inflows going from USD 203 billion to a negative of USD 7 billion. North American FDI inflows fell by 56%. The 16% drop of inflows into developing countries was lower than predicted owing to the resilience of investments in China. Inflows into Asia fell by 12% but were 28% in Africa and 25% lower in Latin America and the Caribbean.[31]

Following the global onset of COVID-19, International Monetary Fund (IMF) released a statement announcing the largest capital outflow ever recorded of USD 83 billion from developing countries by investors.[32] This is in line with the trend of increasing FDI outflows from the developing, especially from China since 2017.[33] Despite this, FDI remains the most

[27] *See* ORG. FOR ECON. COOP. & DEV. [hereinafter OECD], FOREIGN DIRECT INVESTMENT FLOWS IN THE TIME OF COVID-19, at 10 (May 4, 2020), https://read.oecd-ilibrary.org/view/?ref=132132646-g8as4msdp9&title=Foreign-direct-investment-flows-in-the-time-of-COVID-19.

[28] Ashutosh Pandey, *Global Foreign Direct Investments Could Halve in Next Two Years*, DW (June 16, 2020), https://www.dw.com/en/global-foreign-direct-investments-could-halve-in-next-two-years/a-53825731.

[29] *Global Foreign Direct Investment Falls 49% in First Half of 2020*, UNCTAD (Oct. 27, 2020), https://unctad.org/news/global-foreign-direct-investment-falls-49-first-half-2020.

[30] *Id.*

[31] *Id.*

[32] *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, INT'L MONETARY FUND (Mar. 23, 2020), https://www.imf.org/en/News/Articles/2020/03/23/pr2098-imf-managing-director-statement-following-a-g20-ministerial-call-on-the-coronavirus-emergency.

[33] Adnan Seric & Jostein Hauge, *COVID-19 and the Global Contraction in FDI*, IAP (May, 2020), https://iap.unido.org/articles/covid-19-and-global-contraction-fdi.

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important source of external finance for developing countries despite the 2020 drop. Outflows from the OECD decreased by 43% in the first half of 2020 while EU's outflows declined by 33%. Belgium and Austria led in disinvestments within the OECD while Brazil largely contributed to non-OECD disinvestments.[34]

2. Looking Ahead: Sustainable Investment for Global Economic Recovery — Almost half of the global FDI inflows go to developing countries. Considering the high dependence of developing countries on FDI, outflows and contraction of inflows will particularly hit them hard. United Nations Industrial Development Organization (UNIDO) suggests three policy measures that could help global FDI recover: (a) government support mechanisms to boost supply-side recovery for local firms; (b) developing express processing zones; and (c) international support to least developed countries.[35]

Sustainable development in relation to foreign investment is two folds. On the one hand, foreign investment can help to achieve sustainable development for developing countries because sustainable development has a cost when countries try to (a) revive growth and change quality; (b) meet essential needs for jobs, food, energy, water, and sanitation; (c) ensure a sustainable level of population; (d) conserve and enhance the resource base; (e) reorientate technology and manage risk; and (f) merge environment and economics in decision making.[36] On the other hand, lesser developed countries have to assess investments based on its sustainability because foreign investments such as pure manufacturing, due to host country's cheaper labor and mass production with waste discharge can be harmful to the environment. From past experiences, host States tend to relax environmental, human rights, and labor standards in order to attract foreign capital.[37]

Because of foreign investment's importance, complexity, and uncertainty, many countries have recognized the need for international collaboration to address these problems. Both the G8 Heads of State's Declaration of Responsible Leadership for a Sustainable Future and the G20 Heads of State's Core Values for Sustainable Economic Activity have emphasized this where the latter stated that:

> We share the overarching goal to promote a broader prosperity for our people through balanced growth within and across nations; through coherent economic, social, and

[34] OECD, FDI IN FIGURES 1, 4 (Oct., 2020), https://www.oecd.org/investment/investment-policy/FDI-in-Figures-October-2020.pdf.
[35] Seric & Hauge, *supra* note 33.
[36] Gazzini, *supra* note 3, at 936.
[37] Gazzini, *supra* note 3, at 937.

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> environmental strategies; and through robust financial systems and effective international collaboration . . . .
>
> We have a responsibility to recognize that all economies, rich and poor, are partners in building a sustainable and balanced global economy in which the benefits of economic growth are broadly and equitably shared. We also have a responsibility to achieve the internationally agreed development goals . . . . We have a responsibility to ensure an international economic and financial architecture that reflects changes in the world economy and the new challenges of globalization.[38]

C. Global Regulatory Framework: Enhancement Needed

In addition to the consensus on the importance of foreign direct investment and the need for international collaboration in promoting sustainable development, the legal framework at both domestic and international levels should also improve to adjust to the new standard. The Monterrey Consensus pointed out the key factors for the framework as a "transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact."[39]

To increase FDI inflows to the developing countries, they have liberalized their investment regime.[40] To promote and protect these investments, over 3,000 IIAs had been created by the start of 2022. Many critics argue that the current IIA regime impedes sustainable development[41] because it imposes obligations mainly on host states and grants rights to institute arbitration mainly to foreign investors.[42] For example, Article 9(2) of the Bilateral Investment Treaty (hereinafter "BIT") between Switzerland and Chile provides the right to file a claim in international arbitration exclusively to foreign investors. The imbalanced allocation of obligations and rights also finds mention in four high profile investment claims, *Ethyl v. Canada*, *Azinian v. Mexico*, *Metalclad v. Mexico*, and *Methanex v. United States* (hereinafter "*Methanex*"), all filed under Chapter Eleven of the North

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[38] *G20 Leaders Statement: The Pittsburgh Summit—Annex: Core Values for Sustainable Economic Activity*, G20 RSCH. GRP. (Sept. 24-25, 2009), http://www.g20.utoronto.ca/2009/2009communique0925.html#annex.

[39] *Monterrey Consensus*, *supra* note 26, ¶ 21.

[40] Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*,11(2) HASTINGS BUS. L.J. 225 (2015).

[41] Newcombe, *supra* note 1, at 358.

[42] Gazzini, *supra* note 3, at 939.

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American Free Trade Agreement (hereinafter "NAFTA").[43] Due to the existing problems in the current regime, the international consensus on the necessity of FDI to achieve sustainable development reflects a requirement for international investment treaties to be in accordance with the principles of sustainable development. We can see this from the US and Canadian model BITs where they incorporate provisions that address investor-state arbitration and define the scope of investment obligation in greater detail to allow for more transparency.[44] More recently, the EU–China Comprehensive Agreement on Investment (CAI) showed how modern IIAs can better support sustainable investment.[45] However, such improvements can only be seen from the newly created treaties; the lack of inclusion of the principle still remains a problem in a large number of older, existing IIAs.[46]

The relationship between IIAs and sustainable development is complementary in the sense that IIAs, if drafted properly, help to achieve sustainable development, and achieving sustainable development requires IIAs to address certain issues one way or another. As mentioned above, the ILA Declaration identified seven principles of international law in relation to sustainable development. An assessment of the legal regime against these principles will be undertaken in greater detail in the next section.

IV. INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE

The emergence of an international treaty is a direct response of investment promotion and protection, instead of sustainable development.[47] This casts difficulties in incorporating the idea of sustainable development into investment treaties. The ILA Declaration's seven principles provide us with a guideline to assess the current IIA regime in terms of sustainable development and will be discussed in detail in the following sections.

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[43] *See generally* Celine Levesque, *Investment and Water Resources: Limits to NAFTA*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 405 (Marie-Claire Cordonier Segger et al. eds., 2d ed. 2011).
[44] Newcombe, *supra* note 1.
[45] *See generally* Julien Chaisse, *FDI and Sustainable Development in the EU-China Investment Treaty: Neither High nor Low, Just Realistic Expectation*, 323 COLUM. FDI PERSPS. 1 (2022), https://ccsi.columbia.edu/sites/default/files/content/docs/fdi%20perspectives/No%20323%20%20Chaisse%20-%20FINAL.pdf.
[46] *See generally* Lise Johnson et al., *Aligning International Investment Agreements with the Sustainable Development Goals*, 58(1) COLUM. J. TRANSNAT'L L. 58, 58-59 (2019).
[47] *Id.*

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A. Principle 1: The Duty of States to Ensure Sustainable Use of Natural Resources

Principle 1 is premised on states' sovereign right to use their natural resources and suggests that natural resources should be used "in a rational, sustainable and safe way so as to contribute to the development of their peoples."[48] However, most IIAs do not directly prohibit unsustainable investment and set no qualitative standard in assessing investments.[49] The ILA Declaration Principle 1 suggests that IIAs should redefine "investment" in order to favor "sustainable investment" while preventing (or, at least, limiting the volume of "unsustainable investment").

Most IIAs define investment in a broad way to include "every kind of asset".[50] For instance, the US–Uruguay BIT imposes a functional requirement on the investment but has no requirement as to investment's quality and social impact.[51] This being said, investments are not automatically disqualified if they fail to conform to the sustainability criteria. Even though states retain the right to select the investment that is in accordance with their economic and social development, it cannot guarantee sustainable development if a state places economic growth in priority over environmental protection.

Principle 1 also provides that "all relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies."[52] Under the current IIA regime, investors' conduct is under host states' regulations subject to jurisdictional constraint.[53] In other words, the burden is only on the host states to ensure that the use of natural resources is in conformity with the sustainable development standard while principle 1 suggests that all parties including investors should also carry such burden with the efforts to minimize wasteful use of natural resources and waste discharge in general.

The extent to which each State and/or IIAs could favor sustainable investment of unsustainable investment is a policy decision. However, from a normative perspective (which is the present article focus), it is legally possible to redefine "investment" in IIAs to ensure that most investments are sustainable as recommended by ILA Declaration.

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[48] *ILA Declaration*, *supra* note 14, ¶ 1.2.
[49] Newcombe, *supra* note 1, at 368.
[50] *Id.*
[51] Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., art. 1, Nov. 4, 2005, T.I.A.S. NO. 06-1101 [hereinafter US–Uruguay BIT].
[52] *ILA Declaration*, *supra* note 14, ¶ 1.2.
[53] *See* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1st ed. 1995).

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B. Principle 2: The Principle of Equity and the Eradication of Poverty

This principle refers to both inter-generational equity and intra-generational equity. The principle requires the current generation to consider the long-term impact and sustain the resources for future generations. Furthermore, "whilst it is the primary responsibility of the State to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty, all States which are in a position to do so have a further responsibility . . . to assist States in achieving this objective."[54]

In assessing the IIA regime in the light of Principle 2, whether IIAs promote FDI and whether IIAs affect state's ability to distribute wealth are two main issues to be considered.[55] The first issue essentially asks for the relationship between IIAs and FDI where empirical studies have given diverging results on the causal link. Even though the empirical studies cannot fully support the causal relationship between IIAs and FDI,[56] Monterrey Consensus as mentioned above pointed out that FDI is one of the "leading actions" for "eradicating poverty, achieving sustained economic growth and promoting sustainable development"[57] where sustainable economic growth is the ultimate goal. IIA's promotion function and protection function are collateral benefits in the sense that IIAs' promotion function cannot be fully implemented without the guarantee of IIAs' protection. In other words, promotion of FDI is premised on the existence of legal safeguards such as the safety of capital imported into the host State to ensure that the project can be implemented.

The second issue relates to the redistribution of wealth. States can levy tax, but taxes cannot be abusive to the extent that amounts to expropriation. In *Link-Trading Joint Stock Company v. Moldova*, the tribunal defined "abusive taking" as being based on unfairness, arbitrariness, and discrimination or the violation of a state undertaking and held that fiscal measures such as taxation could be expropriating in nature.[58] IIAs are relevant in this issue because they can limit the taxation to a reasonable level and parties to the agreement are bound by such taxation level. States can adjust their own fiscal measure levels subject to IIAs to ensure sustainable development.

The recent cases of *Vodafone International Holdings BV v. Government of India* and *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, lost by India are the perfect example for this reasoning.

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[54] *ILA Declaration*, *supra* note 14, ¶ 2.4.
[55] Newcombe, *supra* note 1, at 371.
[56] *Id.* at 372.
[57] *Monterrey Consensus*, *supra* note 26, ¶¶ 1, 20-25.
[58] Link-Trading Joint Stock Co. v. Dep't for Customs Control of the Republic of Mold., Final Award, ¶¶ 64-91 (Apr. 18, 2002).

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The amendments in the Income Tax Act and its subsequent application[59] were retrospectively regarded as a violation of the BITs with the concerned nations.

As a result, ILA Declaration Principle 2 is a reminder that tax policy and investment policy should be clearly circumscribed. For a State to be free to develop tax policies it seems appropriate and important to avoid foreign investors from using IIAs to challenge tax reforms. The main way to achieve this result is to include tax exceptions in IIAs.[60] Carving out tax from all or part of a given IIAs does not negate the purpose of investment policy; instead, it clarifies the scope of the investment policy by preserving as much as regulatory space that a state may need to deploy its tax policies and poverty alleviation policies.

C. Principle 3: The Principle of Common but Differentiated Responsibilities

The common responsibilities require all states and relevant actors to participate in and contribute to the global partnership, while "differentiation of responsibilities . . . must take into account the economic and developmental situation of the State." At the same time, the special needs for developing countries should be recognized while "developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development."[61]

Generally, IIAs do not contain differentiated treatment but reciprocal and equal legal obligations between capital exporting and importing states.[62] In practice, the capital flows in one direction and the object of protection is mainly the foreign investment in the host states.

In exceptional cases, differentiated responsibilities may appear in the form of exceptions or reservations. Reservations can exclude certain sectors for strategic economic reasons and specific social policy concerns, existing

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[59] Kshama A. Loya & Vyapak Desai, *The Cairn Energy v. India Saga: A Case of Retrospective Tax and Sovereign Resistance Against Investor State Awards*, KLUWER ARB. BLOG (July 2, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/.

[60] *See* Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*, 35 VA. TAX REV. 149, 158 (2016):

> Control over taxation matters is essential to sovereign states and, as such, states' fiscal policies are typically excluded from IIAs' scope of application. However, one should not believe that tax measures escape the purview of investment arbitrators so easily. In actuality, the regime of exception that may apply to tax matters is rather complex and often misunderstood.

[61] *ILA Declaration*, *supra* note 14, ¶ 3.4.

[62] Newcombe, *supra* note 1, at 375.

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or future non-conforming measures such as NAFTA Article 1108(1), Annex 1, and certain investment standards.[63]

The key question in applying IIA standards is whether different minimum standards should be applied depending on the level of development in different countries. In practice, tribunals do take into account the country's levels of development and stability in order to determine whether a breach of the treaty has occurred.[64]

For the differentiated responsibility of developed countries, IIAs do not contain provisions requiring cooperation except for some regional free trade agreements (hereinafter "FTA(s)") like NAFTA, Southern Common Market (MERCOSUR), Canada–Chile and, US–Chile FTAs where certain regime for environmental cooperation is specified inside the agreements.[65] In the future, newly created IIAs should consider addressing systematically, cooperation or capital building frameworks during the process of promoting sustainable development. Ideally, any IIA should take a stance on these issues and clarify—as suggested by ILA Declaration Principle 3—that there are common but differentiated responsibilities. To be more specific, most IIAs should take inspiration from NAFTA and, at least, exclude some certain sectors from the scope of the IIA for strategic economic reasons and specific social policy concerns. The outcome will be IIAs that are better adjusted to the needs of developing countries because not all economic sectors are open to foreign investors.

D. Principle 4: The Principle of Precautionary Approach to Human Health, Natural Resources and Ecosystems

The precautionary approach directs all states, international organizations and the civil society to consider, and avoid harm to human health, natural resources, or ecosystems starting from the decision-making stage, based on the independent scientific judgment through a transparent process that does not result in economic protectionism.[66] The ILA Principle 4 has been implicitly recognized by IIAs and investment tribunals as this section will explain. In this respect, although Principles 1, 2 and 3 are giving clear indication of how IIAs can be improved, Principle 4 is proof that the potential convergence between ILA Declaration and the investment does exist.

Until now, there is no investment tribunal that has directly applied the precautionary principle. Instead, in *S.D. Myers v. Canada* (hereinafter "*Myers*"), the tribunal implicitly relied on the precautionary principle in a

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[63] *Id.*
[64] *See generally* Andrea K. Bjorklund, *Sustainable Development and International Investment Law*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 38 (Kate Miles ed., 2019).
[65] Newcombe, *supra* note 1, at 376.
[66] *ILA Declaration*, *supra* note 14, ¶ 4.1-.4.

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case for a national treatment claim. Since S.D. Myers had obtained approval for imports from the US Government, they brought breach of national treatment, minimum standard of treatment and expropriation claims against the Canadian Government.[67] The tribunal held that the purpose of the ban on exports was to protect Canadian domestic industry against the US competition but not to protect the environment, and thus the ban on exports breached the national treatment and the fair and equitable treatment provisions from the NAFTA.[68] In reviewing the case, the tribunal also highlighted that states have the right to impose high environmental standards but not to the extent that affects trade because economic growth and environmental protection are mutually supportive.[69] The analysis is consistent with the precautionary principle promoted by ILA Declaration Principle 4 because the purpose of the ban was not for environmental concerns but for economic protectionism where environmental protection and economic development can and should be mutually supportive.

Myers is not an isolated case. A similar claim was brought in *Methanex* where Methanex claimed the California ban on methyl tert-butyl ether (hereinafter "MTBE") was for the purpose of industry protection and the scientific report that the Government relied on was a sham because the effects of MTBE was controversial.[70] The tribunal held that the ban was "motivated by the honest belief, held in good faith and on reasonable scientific grounds, that MTBE contaminated groundwater and was difficult to clean up."[71] The standards of honest belief, good faith, and reasonable scientific grounds the tribunal relies on are consistent with the precautionary principle. In addition, the award highlighted that "scientifically correct" was not the optimal standard (e.g., the optimal standard would coincide with the precautionary principle) since the Government can manage the risks of competing scientific views. Moreover, *Methanex* is also consistent with the precautionary ILA Principle 4 in that it also highlights the need for an open and transparent public process.[72]

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[67] S.D. Myers is a US company with a Canadian branch. The Canadian Government issued a ban on the chemical exportation of "PCB" to the US because PCB was highly toxic and could potentially harm human and animal health. *See* S.D. Myers, Inc. v. Gov't of Can., Partial Award, ¶¶ 194-95 (Nov. 13, 2000) [hereinafter Myers v. Canada, Partial Award].

[68] *Id.* ¶¶ 255-56. *See generally* Julien Chaisse & Ruby Ng, *The Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong*, 48(1) H.K. L.J. 79 (2018).

[69] Myers v. Canada, Partial Award, *supra* note 67, ¶ 247.

[70] Methanex Corp. v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, pt. III, ch. A, ¶¶ 37-38 (Aug. 3, 2005) [hereinafter Methanex v. U.S., Final Award of the Tribunal on Jurisdiction and Merits].

[71] *Id.* pt. III, ch. A, ¶ 102.

[72] *ILA Declaration*, *supra* note 14, ¶ 4.4: "Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be available."

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In a nutshell, *Myers* and *Methanex* have shown that even though IIAs do not directly address the precautionary approach, tribunals do apply them in practice to fix the gap. They set valuable precedents for later arbitrations during the process of sustainable development. There is a substantial convergence between ILA Declaration Principle 4 and the IIA regime which suggests that the interaction could be further increased. In this respect, the best normative solution would be to explicitly include the principle of a precautionary approach to human health, natural resources and ecosystems in each new IIAs as the effect would be to oblige any investment tribunals to codify the principle in the investment regime, and ensure that any new tribunals will pay due respect to the Precautionary Approach when assessing the obligations of the State *vis-à-vis* foreign investors.

E. Principle 5: The Principle of Public Participation and Access to Information and Justice

The principle of public participation requires protection of human rights, right of access to "appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies" with the guarantee of privacy and business confidentiality.[73] In a nutshell, the ILA Declaration Principle 5 encourages transparency and third-party participation.

IIAs have only started to address this principle by requiring the government to notify investors of potential changes of law and regulations.[74] However, IIAs do not specify the requirement for information disclosure on the part of foreign investors, nor do they impose an obligation on foreign investors on types of information to be disclosed and compulsion of disclosure.[75] In this respect much more remain to be done by the investment regime to recognize the ILA Declaration Principle 5.

The principle of public participation is especially important for investor-state arbitration regimes. For public participation, both the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") and the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") Rules have made improvements to allow non-disputing-party submissions (*amici* submissions). Cases such as *Glamis Gold Ltd. v. United States* held that non-disputing party submissions made by organizations such as Quechan Indian Nation, the Sierra Club, Earthworks and the National Mining Association are acceptable.[76]

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[73] *Id.* ¶ 5.2.
[74] Newcombe, *supra* note 1, at 384.
[75] JOLA GJUZI, STABILIZATION CLAUSES IN INTERNATIONAL INVESTMENT LAW: A SUSTAINABLE DEVELOPMENT APPROACH 412-13 (2018).
[76] Glamis Gold, Ltd. v. U.S., Award, ¶ 286 (June 8, 2009).

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ICSID tribunals have also made efforts in improving their procedures in determining whether to accept *amici* submissions. For instance, *Suez Sociedad General de Aguas de Barcelona, SA. and Vivendi Universal, S.A. v. Argentine Republic*, a case about water concession, set out three tests to decide on accepting *amici* submissions: "a) the appropriateness of the subject matter of the case; b) the suitability of a given non-party to act as amicus curiae; c) the procedure by which the amicus submission is made and considered."[77]

More formal improvements can be seen from the new US and Canadian Model BITs where they incorporate not only provisions to allow non-disputing party submissions, but also express provisions regarding transparency for the second part of this principle, the access to information.[78] These changes are consistent with the idea of sustainable development, however the reality that existing IIAs contains no such express provisions should also be recognized.

The ILA Declaration Principle 5 is a reminder that more remain to be done by investment policymakers. Ideally, all IIAs should recognize the principle of public participation and promote public participation in investor-state disputes by allowing (and guaranteeing) third-party rights, amicus curiae submissions, and even promoting public proceedings.

F. Principle 6: The Principle of Good Governance

The ILA Principle 6 "commits States and international organizations: to adopt democratic and transparent decision-making procedures and financial accountability; to take effective measures to combat official or other corruption; to respect the principle of due process in their procedures and to observe the rule of law and human rights; and to implement a public procurement approach according to the WTO Code on Public Procurement."[79] The concept of good governance is not ignored by the business community and investors. In fact, the concept of good governance was endorsed by the World Bank (which administers ICSID) on two occasions.[80]

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[77] Aguas Argentinas, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 17 (May 19, 2005).
[78] Newcombe, *supra* note 1, at 385-89.
[79] *ILA Declaration*, *supra* note 14, ¶ 6.1.
[80] The 1992 World Bank report on Governance and Development brought the world's attention to the concept in four counts: public sector management, accountability, the legal framework for development and information and transparency; it also stated that good governance is fundamental for economic growth. The second occasion was the issuance of the Guidelines on the Treatment of Foreign Direct Investment which covered topics such as fair and equitable treatment, non-discrimination, promotion of accountability and transparency, etc. *See* World Bank Grp. [WBG], *Legal Framework for the Treatment of Foreign Investment*, at 35-36, Report No. 11415 (1992), https://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf.

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Since the principle of good governance is known by the business community and even accepted by the World Bank, there is no reason to think that the IIA regime would be incompatible with it. However, the relationship between IIAs and the principle of good governance is controversial. On the one hand, IIAs' standards on rule of law, due process, non-discrimination, protection of legitimate expectations and property rights support sustainable development because IIAs help to build a more stable investment environment.[81] On the other hand, however, the fact that IIAs provide a leeway for parties to submit directly to international arbitration, and essentially avoid domestic courts hinders the development of rule of law in the host country, especially for developing countries. In sum, the problem with good governance is not so much whether it can be part of the IIA regime; instead, the fundamental question is how good governance must be addressed by IIAs and Investor-State Dispute Settlement (hereinafter "ISDS").

The principle of good governance is complex because it has many normative facts. Another aspect of good governance is the principle of transparency and the right to access information. Many IIAs have made changes according to this principle, for example, the new US and Canadian Model BITs as mentioned above. In addition, avoidance of corruption and protection of human rights are also key aspects of this principle. *World Duty Free v. The Republic of Kenya* made it clear that contracts obtained by corruption can be rendered void.[82] The protection of human rights can also be understood in a broader sense as the 2003 Report of the High Commissioner for Human Rights suggested that "[t]he fact that investment can promote trade, growth and development suggests at first glance a potential correlation between investment, and the enjoyment of human rights, particularly economic, social and cultural rights and the right to development."[83]

The final part of Principle 6 also "calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market."[84] The current IIA regime does not address CSR and this will ultimately be left to the State's domestic law and regulations to enforce CSR implementations.[85]

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[81] *CMS Gas Transmission Company v. Argentine Republic* provides with a great example where the tribunal held that "a stable legal and business environment is an essential element of fair and equitable treatment". CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005).

[82] World Duty Free company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

[83] Comm'n on Hum. Rts., Rep. of the High Comm'r for Hum. Rts. of Its Fifty-Fifth Session, ¶ 6, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003).

[84] *ILA Declaration*, *supra* note 14, ¶ 6.3.

[85] *See generally* Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 2017(1) NORDIC J. COM. L. 90 (2017).

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Overall, it is manifest that Principle 6 has a unique status *vis-à-vis* IIAs and ISDS. On the one hand, there is no consubstantial contradiction between the principle of good governance and the investment regime. However, there are difficulties in finding the best way to integrate and give effect to this principle. In the future, it will be important for IIAs to clearly provide for corporate social responsibility obligations on the foreign investors,[86] transparency and right of access to information, and preserve the right of domestic courts when dealing with foreign investors' allegations.

G. Principle 7: The Principle of Integration and Interrelationship

Principle 7.2 asks for "all levels of governance—global, regional, national, sub-national and local—and all sectors of society" to implement the principle of integration on social, economic, financial, environmental, and human rights aspects. As the final ILA Declaration principle, it also confirms the seven principles' interrelationship among each other.[87] In addition, the ILA Committee on the International Law of Sustainable Development confirmed the relationship that "sustainable development will only be realized when the principle of integration is properly and fully implemented."[88]

The overwhelming majority of existing IIAs do not contain sustainable development provisions expressly as discussed above.[89] However, new BITs drafted based on US and Canadian Model BITs address this issue in different ways. For example, the US–Uruguay BIT 2005 constrained the way to

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[86] Bernasconi-Osterwalder, *supra* note 7, at 479-80:

> African governments have taken a leading role in this area. Regional agreements and models, including the Common Market for Eastern and Southern Africa (COMESA), the 2012 Southern African Development Community (SADC) Model BIT Template, as well as the 2016 Pan-African Investment Code (PAIC) are all examples of more balanced treaties or treaty models with investor obligations.

[87] *ILA Declaration*, *supra* note 14, ¶ 7.2.

[88] ILA, *Second Report of the ILA Committee on the International Law on Sustainable Development*, at 2 (2006), https://ila.vettoreweb.com.

[89] Gudrun Monika Zagel, *Achieving Sustainable Development Objectives in International Investment Law*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1933, 1984 (Julien Chaisse et al. eds., 2021):

> Traditional IIAs typically do not even mention the term of sustainable development and only contain lean provisions on substantive standards of treatment such as FET and expropriation that give arbitral tribunals a wide margin of discretion to consider —or disregard—sustainable development interests in their decisions. Moreover, traditional IIAs insufficiently address critical questions, such as the right of host States to adopt measures in the public interest, the protection of legitimate expectations of investors, or the calculation of indemnification.

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achieve objectives of the trade agreements "in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights." However, the substantive provisions lack the reference to sustainable development which weakens the applicability of the principle by limiting its use to interpreting provisions but not limiting the scope of investment.[90] An alternative to the absence of direct reference to sustainable development in substantive provisions is to include exceptions. This approach has been seen in many IIAs such as Canada–Uruguay 1999 and India–Singapore Comprehensive Economic Cooperation Agreement (hereinafter "CECA") though it may bring problems in interpretation.[91] The India–Singapore CECA under Article 6.10 allows measures in the public interest to meet health, safety or environmental concerns provided that these measures are not applied arbitrarily or are unjustifiably discriminatory.

Principle 7 is a strong reminder to the investment community that it is essential to foster the integration and interrelationship of IIAs with other norms of international law. The next generation of IIAs must explicitly recognize that sustainable development will only be realized when the principle of integration is properly and fully implemented, i.e., when IIAs themselves recognize that in case of conflict, other norms of international law (e.g., International Labour Organization (ILO) convention, environmental treaties, etc.) should prevail and should be prioritized by investment tribunals.[92] This not utopia as demonstrated by the innovations displayed in US and Canadian Model BITs; however, these solutions must be expanded and generalized.

V. KEY INVESTMENT PROTECTION STANDARDS

Countries have begun drafting principles of the ILA declaration in these clauses as referenced below at the end of each sub-section. This trend is new

[90] US–Uruguay BIT, *supra* note 51, art. 1.
[91] Newcombe, *supra* note 1, at 400-02.
[92] *See* Zagel, *supra* note 89, at 1951-52:

> An example of effective regulation is Art. 1 Morocco-Nigeria BIT that requires an investment to contribute to sustainable development to be an investment covered by the scope of application of the BIT. Another example is Art. 43 PAIC which establishes that arbitral tribunals must take into account a breach of the investors' obligations, such as their failure to contribute to sustainable development enshrined in Art. 22 PAIC, to mitigate or offset the merits of the claim or the damages awarded. Similar rules establish Arts. 11ff and Art. 18 ECOWAS Supplementary Act. The provisions mentioned advise arbitral tribunals on how to take into account sustainable development when applying and interpreting the IIA provisions and are therefore a useful tool to guide arbitral tribunals on how to reconcile investment protection and sustainable development.

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and for the time being, the overwhelming majority of IIAs do not take inspiration from the ILA Declaration principles. It is important for the future of the investment regime to foster the nascent trend: more (if not all) IIAs should systematically approach some classical investment tray provisions (such as fair and equitable treatment, national treatment, and expropriation) with the ILA principles in mind.

Investment protection standards such as fair and equitable treatment, national treatment, regulatory expropriation, most favored nation, full protection and security, etc. are all guarantees that the host states promise to give to foreign investors in the view to attract more foreign investments and rights that foreign investors seek to have obtained even before the start of the investment projects. When lack of reference to sustainable development in IIAs, these investment protection standards can be used to challenge host states' actions and policies to promote sustainable development. Cases such as *Methanex*, *Myers*, *Ethyl v. Canada*, *Metalclad v. Mexico* brought claims against host states' health and environmental regulations including breach of indirect expropriation, national treatment, and most favored nation, discriminatory treatment, and fair and equitable treatment.[93] Though many investors and host states embrace these investment protection standards, their potentially negative impact on the promotion of sustainable development cannot be ignored.

The main way of obliging investors to develop investments sustainably is to include explicit reference to sustainable development in three ley substantive provisions, namely fair and equitable treatment, national treatment, regulatory expropriation. By this the article does not say that only these three provisions should be improved in light of the ILA Declaration Principles; instead, the article suggests that the best way to start strengthening the convergence of sustainable law with the reform of IIAs is to focus on the three provisions before moving further and aligning all remaining IIAs provisions with ILA Declaration.

A. Fair and Equitable Treatment

The Fair and Equitable Treatment (hereinafter "FET") is a promise to treat foreign investors "fair and equitably". It is a provision that fills the gaps where national treatment or most favored nation standards fail to apply.[94] The application of FET involves assessment on whether "the legitimate

[93] *See generally* Methanex v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, *supra* note 70; Myers v. Canada, Partial Award, *supra* note 67; Ethyl Corp. v. Gov't of Can., Award on Jurisdiction (June 24, 1998); Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[94] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 122-23 (2008). *See, e.g.*, Julien Chaisse & Jamieson Kirkwood, *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, 23 J. INT'L ECON. L. 245 (2020).

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expectations of the investor regarding the regulatory framework have been met and whether due process has been followed."[95] In practice, the FET standard can be interpreted in different ways. The "plain meaning" approach suggests it should be interpreted on a case-by-case basis to assess whether the State has treated foreign investors fair and equitably[96] and essentially creates a subjective test. A more objective application of the "plain meaning" approach is to combine FET with the minimum standard of international law. The tribunal for *Pope & Talbot, Inc. v. Government of Canada* (hereinafter "*Pope & Talbot*") held that the foreign investor is "entitled to the international law minimum, plus the fairness elements."[97] The "equating approach", on the other hand, avoids the problem of interpretation and applies the minimum standard of customary international law,[98] though the exact measure for the minimum standard is unclear. The exact meaning of FET is evolving in nature and is "shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce."[99]

The FET standard and sustainable development share many characteristics in common. Firstly, both, the FET standard and sustainable development focus on justice, equity, and good faith. The principle of equity, the precautionary principle, and the principle of transparency all coincide with the central idea of the FET. In addition, legitimate expectation, non-discrimination, fair procedures, and transparency are all aspects of the FET standard. Thus, the FET standard also embraces the concept of good governance and the rule of law. Since IIAs are aimed at protecting foreign investors from acts of host States, FET standard's good governance aspect is the center of investment arbitration. FET's equity and flexibility aspects also require it to consider social and environmental issues.[100] This being said, the principle of integration could assist in the interpretation and application of the FET standard. As a result, sustainable development and the FET standard overlap with each other.

However, the FET standard can be a threat to sustainable development. Since the State is required to treat foreign investors fair and equitably subject to foreign investors' expectations, it could potentially limit the State's

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[95] Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 261, 273 (Marie-Claire Cordonier Segger et al. eds., 2d ed. 2011).

[96] Roland Klager, *'Fair and Equitable Treatment' and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 237, 244 (Marie-Claire Cordonier Segger et al. eds., 2011).

[97] Pope & Talbot Inc. v. Gov't of Can., Award on the Merits of Phase 2, ¶ 110 (Apr. 10, 2001).

[98] Walker, *supra* note 96, at 244.

[99] Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, ¶ 125 (Oct. 11, 2002).

[100] Audley Sheppard & Antony Crocket, *Are Stabilization Clauses a Threat to Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 329, 347 (Marie-Claire Cordonier Segger et al. eds., 2d ed. 2011).

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regulatory power when it becomes too demanding. The case of *Tecmed v. Mexico* is a good example of how the FET standard is evaluated:

> [FET requires] treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor.[101]

If the "pre-existing" standard in a country is very low, the low standard becomes the pre-expected standard that foreign investors wish the host state to follow. The State's sovereignty and regulatory freedom are affected. This not only fails to promote sustainable development but also hinders the process of sustainable development. Later cases such as *Thunderbird* and *Saluka* pointed out the flexibility in regulatory freedom in the sense that foreign investors cannot expect the legal framework to be the same completely, so long as the changes are legitimate and reasonable.[102]

Another case on the features of the freedom of regulatory power is *ADC v. Republic of Hungary* where foreign investors claimed expropriation on an Airport project in Hungary. The Tribunal concluded that the right of regulation is not unlimited and is subject to the rule of law that includes the international treaty. A later argument on State's right to regulate cannot override the previously promised investment protection obligations.[103] Though this conclusion is made in relation to the expropriation claim, the Tribunal has made it clear that it is also applicable to FET.[104]

These problems lead to the question of how to measure the reasonableness and legitimacy of the changes. Ultimately, it is a question

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[101] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).
[102] Int'l Thunderbird Gaming Corp. v. United Mexican States, Award, ¶¶ 127, 166 (Jan. 26, 2006); Saluka Invs. BV v. Czech Republic, Partial Award, ¶ 309 (Mar. 17, 2006) [hereinafter Saluka v. Czech, Partial Award].
[103] ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 423 (Oct. 2, 2006).
[104] *Id.* ¶ 445.

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rooted in the indeterminate nature of the FET standard.[105] FET standard lacks guidance on how governments should treat foreign investors fair and equitably and leaves the discretion to the tribunal to exercise the balancing power weighing between investment protection and freedom of regulatory power. The purpose for such balancing exercise is to reach a state of prosperity for all contracting parties as pointed out in the *Saluka* case, "encouraging foreign investment and extending and intensifying the parties' economic relations." [106] In order to reach the overall purpose, many sustainable development factors such as environmental, cultural, and social norms are considered.

In other words, the unclear scope of application and the lack of guidance of FET standard affects the host state's freedom of regulatory power; however, at the same time, it also gives FET standard the flexibility that allows for consideration of sustainable development factors such as environmental, social, and cultural concerns. For example, the Claimant in *Maffezini v. Spain* claimed that the host State, Spain, violated the BIT as it required the Claimant to undertake an environmental impact assessment which resulted in increased production costs.[107] In deciding the case, the Tribunal highlighted the importance of environmental protection and its legal status not only under domestic law but also under international law.[108] *Parkerings-Compagniet v. Lithuania* (hereinafter "*Parkerings-Compagniet*") is a similar case about cultural reservations, where foreign investors claimed breach of FET on the ground of discrimination. Parkerings-Compagniet claimed that their proposed car park construction was prohibited while another project at the same site was allowed later.[109] The car park that the claimant proposed to build extended to the Old Town area and was too close to "the culturally sensitive area of the Cathedral." National authorities were strongly opposed to the project and had referred to international treaties and the United Nations Educational, Scientific, and Culture Organization (UNESCO) World Heritage Convention, which led to the Municipality's decision to refuse the Claimant's proposal. In deciding this case, the Tribunal has found that sustainable development factors played an important role that the risk of environmental and cultural damage was enough to justify the Municipality's differential treatment on two investors.[110] The *Parkerings-*

[105] *See* Emmanuel T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 97, 101 (Julien Chaisse et al. eds., 2021).
[106] Saluka v. Czech, Partial Award, *supra* note 102, ¶ 300.
[107] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 65 (Nov. 13, 2000).
[108] *Id*. ¶ 67.
[109] Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 281(Sept. 11, 2007).
[110] *Id*. ¶¶ 385-92.

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Compagniet was a great example that demonstrates "the other side of the coin" where the flexibility of FET standard allows for both a balance struck between the host state's regulatory freedom and investment protection, and "an integrated approach that takes the wider social and environmental concerns of a case into account."[111]

BITs have begun displaying an increasing trend, albeit recently, of legitimizing measures taken by States to protect health, labor and the environment and proving it protection against FET claims. In line with such trends are the Belgium–Luxembourg Economic Union Model BIT[112] and Slovakia Model BIT.[113]

B. National Treatment

National Treatment is a provision in IIAs to guarantee that foreign investors will be "accorded treatment no less favorable than that which the host State accords to its own investors."[114] The national treatment is a relative standard that involves steps of identification and comparison in deciding whether a violation has occurred. The identification step assesses whether foreign and domestic investors are in "like circumstances" while the second step compares these two treatments and see if foreign investors are treated less favorably.[115] The provision for national treatment standards is constructed in a very wide manner that allows for expansive interpretation where public welfare regulation may be considered a violation of the national treatment standard.[116]

Further, case law has recognized some exceptions, for example, the decision for *Myers* and *Pope & Talbot* where the Tribunal for *Pope & Talbot* specified that differential treatment can be justified if the measures had "a reasonable nexus with rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[117] The underlying rationale for such

[111] Klager, *supra* note 96, at 258.

[112] AGREEMENT BETWEEN THE BELGIUM-LUXEMBOURG ECONOMIC UNION, ON THE ONE HAND, AND ....., on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union Model BIT 2019) art. 3, https://edit.wti.org/document/show/54fd8446-5eea-4381-80d4-afdf772727ac.

[113] AGREEMENT BETWEEN THE SLOVAK REPUBLIC AND ..... FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS (Slovakia Model BIT 2019) art. 5(1), https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/5917/download.

[114] DOLZER & SCHREUER, *supra* note 94, at 178.

[115] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 251 (2007). *See also* Manini Brar, *The National Treatment Obligation: Law and Practice of Investment Treaties*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 235 (Julien Chaisse et al. eds., 2021).

[116] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 82-83 (2007).

[117] Pope & Talbot Inc. v. Gov't of Can., Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).

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justification is that it is very difficult to implement sustainable development measures without undermining existing foreign investors' interests and rights.[118]

The application of the national treatment standard regarding sustainable development can be seen in areas of climate change, biosafety, and water resources.[119] Concerns for climate change on carbon emissions are gaining more and more attention in the world. In order to improve on carbon emissions, countries need to implement more strict rules such as restrictions on the use of certain products, "imposition of energy efficiency standards on production processes and energy outputs of consumer goods,"[120] changes to administrative schemes such as tax structures, exemptions, and subsidies, and incentives to invest in renewable energy,[121] etc. All these measures are likely to affect foreign investors' interests and rights in host States and result in foreign investors challenging their legitimacy in violating investment protection standards such as national treatment.[122]

When the host States try to adapt to international carbon emissions standards such as the Clean Development Mechanism (CDM)'s promotion for renewable energy and low-carbon projects in developing States [123] and other standards in the United Nations Framework Convention on Climate Change (UNFCCC),[124] carbon-intensive industry is likely to bring claims for violation of investment protection standards. In order to assess whether the standard of national treatment is breached, tribunals have to first examine whether the carbon-intensive project was "like" a less-carbon-intensive project.[125] The "like circumstances" in this context is likely to exclude environmental consideration because it has generally been assessed in the past according to commercial considerations.[126] Without environmental consideration, investors are very likely to be "in like circumstances" and thus

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[118] Marie-Claire Cordonier Segger, *From Protest to Proposal: Options for an Americas Investment Regime?*, *in* BEYOND THE BARRICADES: THE AMERICAS TRADE AND SUSTAINABLE DEVELOPMENT AGENDA 145, 155 (Marie-Claire Cordonier Segger & Maria Leichner Reynal eds., 2005).
[119] Miles, *supra* note 95, at 274.
[120] Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?*, 8(1) J. INT'L ECON. L. 143, 148-49 (2005).
[121] Bradford S. Gentry & Jennifer J. Ronk, *International Investment Agreements and Investments in Renewable Energy*, *in* FROM BARRIERS TO OPPORTUNITIES: RENEWABLE ENERGY ISSUES IN LAW AND POLICY, 25, 59-64 (Leslie Parker et al. eds., 2007).
[122] *See generally* Stefanie Schacherer & Rhea Tamara Hoffmann, *International Investment Law and Sustainable Development*, *in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 563 (Markus Krajewski & Rhea T. Hoffmann eds., 2019).
[123] Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 2, 6, 17, Dec. 10, 1997, 2303 U.N.T.S. 162 (entered into force Feb. 16, 2005).
[124] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 24, 1994).
[125] Gentry & Ronk, *supra* note 121, at 67.
[126] Miles, *supra* note 95, at 279. *See also* Julien Chaisse & Lisa Zhuoyue Li, *Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss*, 52(1) STAN. J. INT'L L. 51 (2016).

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render the governmental measures in violation. Moreover, WTO agreements on non-discrimination obligations also hinder the implementation of climate change regulations. Domestic regulations on climate change like "mandatory emission caps, energy efficiency requirements, emissions trading schemes, and eco-labeling and voluntary State-industry agreements" are all potential breaches of WTO agreements.[127] They might also be a potential breach under IIAs under similar grounds as violations of national treatment and most favored nation standard.

With regard to the biosafety area of sustainable development, Genetically Modified Organisms (hereinafter "GMOs") are examples that emerge in many States and call for strict regulations. Domestic regulations are important because they can affect the State's agriculture, health, and economic development in the long run, especially for developing States. In the context of investor-State disputes with respect to national treatment, the Tribunal needs to first examine whether the foreign investor producing GMO products are in like circumstances with domestic producers of identical conventional products. Similar problems like carbon reduction measures might occur here as the assessment does not take into account the sustainable development elements but focus on commercial considerations.[128] In addition, tribunals take contradicting approaches to the assessment.[129] The tribunal for *Methanex* stated that "like circumstances" strictly require investments to be identical[130] while the tribunal for *Occidental v. Ecuador* took a broader approach to categorize exporters of flowers and exporters of oil in like circumstances for the purpose of tax refund regulation.[131] More specifically, the requirement to label GMO products can be discriminatory to GMO producers because foreign investors can make a claim based on the identical production process to make their products and domestic conventional products be in like circumstances. As stated above, since the assessment for "in like circumstances" is limited to commercial considerations, social, environmental, and health considerations are not likely to be considered which will result in the governmental regulation to label GMO products being a violation of national treatment.

The water resource is another area where investor protection standards play an important role in domestic sustainable development law and policy-making. As Hetzer said, "Water is set to become a resource more important than oil is now."[132] The scarcity of water resources, on the one side, and

[127] Green, *supra* note 120, at 143-47.
[128] Miles, *supra* note 95, at 285.
[129] Nicolas 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, 84-85 (2008).
[130] Methanex v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, *supra* not 70, at 251.
[131] Occidental Expl. and Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 173 (July 1, 2004).
[132] Kajetan Hetzer, *Cash Flows Where Water Does*, 7 UNEP FI 4, 6 (Oct. 2007), https://www.unep

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limitless need of water for human life on the other side make water supply a valuable and crucial resource for any country's social and economic development. As a strategic sector, water resource is normally controlled by the government. However, more and more foreign investors start to engage in water operations, for example in the area of water extraction and exportation.[133]

Conflicts may occur in this regard as the scarcity of water resources results in Governments constraining water usage to solve water shortage, and national treatment guarantees under IIAs might be triggered when the new policy is enacted. The national treatment guarantees may also be breached when the host State refuses to grant approval for the certain water-intensive industry. The water resource not only affects lives and environmental sustainability, but it also introduces human rights into the discussion.[134]

From the discussions above, a crucial problem of taking sustainable development elements into account while assessing if any violation of national treatment has occurred is how to assess "in like circumstances." Since IIAs are traditionally introduced to promote foreign investment and to protect foreign investors and their assets / rights in the host States, such assessment mainly focuses on commercial considerations precluding sustainable development while any new enactment of law or policy may trigger the breach of national treatment guarantee. Despite the option to introduce provisions addressing sustainable development in the IIAs, the Tribunals could also apply a more modern approach in their assessment.[135]

Currently, very few countries allow a wide interpretation of national treatment to legitimize measures based on health, labor, or environmental concerns such as the Norway Model BIT.[136]

C. Expropriation

To better understand expropriation and its relationship with sustainable development, it is necessary to first study where it came from. Without further study, the term expropriation normally reminds people of direct direction. It was so during the last century.[137] The problem back then was

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fi.org/fileadmin/documents/0618issue7200710.pdf.

[133] Miles, *supra* note 95, at 289.

[134] *See generally* Serge Pannatier & Oliver Ducrey, *Water Concessions and Protection of Foreign Investments Under International Law*, *in* FRESH WATER AND INTERNATIONAL ECONOMIC LAW 289 (Edith Brown Weiss eds., 2005).

[135] Miles, *supra* note 95, at 293.

[136] AGREEMENT BETWEEN THE KINGDOM OF NORWAY AND ..... PROMOTION AND PROTECTION OF INVESTMENTS (NORWAY DRAFT MODEL BIT 2015) art. 3(1), https://edit.wti.org/document/show/3b8bd5cf-2a4e-438c-a8cf-21ebdc1cce91.

[137] Martins Paparinskis, *Regulatory Expropriations and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 295, 300 (Marie-Claire Cordonier Segger et al. eds., 2d ed. 2011).

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that lawmakers ignored the rule itself but focused more on "the remedial consequences of direct expropriation."[138] At the same time, the international investment law has transformed from customary international law to international treaties.[139] However the unclear understanding of expropriation has rooted more problems when the term regulatory expropriation started to emerge at the end of 1990s.[140]

Expropriation essentially is an obligation of host states not to deprive foreign investors of their property right without compensation. Expropriation consists of both direct and indirect expropriation. Direct expropriation involves the transfer of title from a foreign investor to the Government or its agency where host states ultimate control the investment, while indirect expropriation achieves the same result without transferring the title.[141]

Examples about expropriation in relation to sustainable development can be found from many environmental-dispute cases mainly including "environmental regulation concerning nature protection and reforms to strengthen public ownership of natural resources, and environmental policies which substantially restrict economic profits from private operations (the issue of "regulatory takings")."[142] For example, the Tribunal for the *Telenor* case provided a list of governmental acts that would amount to indirect expropriation:

> Repudiation of the concession agreement.
> . . .
> The imposition of taxes which would substantially erode profits.
> Denial of permits necessary to operate the concession, and associated measures.[143]

Enactment of law and policy on health and environment is likely to touch upon actions listed above, and expropriation may be triggered as a result.[144] Modern IIAs generally follow the UN Resolution on Permanent Sovereignty over Natural Resources not to prohibit expropriation so long as they are

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[138] *See generally* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); G. Matteo Vaccaro-Incisa, *Arbitration Clauses Limited to Compensation due to Expropriation: Relevant Case Law, Interpretive Trends, and the Case of China's Treaty Policy and Practice*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1223 (Julien Chaisse et al. eds., 2021).

[139] *See generally* George J. Somi, Bilcon v. Canada*: A New Paradigm for Causation in Investor-State Arbitration?*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1261 (Julien Chaisse et al. eds., 2021).

[140] PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 5-13 (1990).

[141] ÅSA ROMSON, ENVIRONMENTAL POLICY SPACE AND INTERNATIONAL INVESTMENT LAW 246-47 (2012).

[142] *Id.* at 243.

[143] Telenor Mobile Commc'ns A.S. v. Republic of Hung., ICSID ARB/04/15, Award, ¶ 69 (Sept. 13, 2006).

[144] Zagel, *supra* note 89.

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lawful and compensation is accorded.[145] However, what is considered an adequate compensation and proper interpretation of expropriation provision in IIAs are left to be determined. In order to clarify the situation, US Model BIT 2004 issued explanatory text to recognize environmental or health protection not being indirect expropriation:

> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.
>
> (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[146]

Other IIAs such as Canada–Colombia FTA 2008, US–DR–CAFTA 2004, and ASEAN–Australia FTA 2009 also have similar texts.[147] Even though the explanatory text is still ambiguous as to what constitutes "rare circumstances", it is remarkable because it rules out the absolute equation between public regulation and expropriation. A more modern approach in interpreting expropriation provisions is a balancing exercise between the right to compensation and the right to regulate.[148]

Though this approach has rarely been used except in the Norwegian Draft Model BIT 2008,[149] it could potentially be the best approach to

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[145] ROMSON, *supra* note 141, at 244.

[146] TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [COUNTRY] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT (US MODEL BIT 2004), Annex B, ¶ 4, https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf.

[147] ROMSON, *supra* note 141, at 253.

[148] Ole Kristian Fauchald & Kjersti Schiøtz Thorud, *Protection of Investors Against Expropriation—Norway's Obligations Under Investment Treaties*, *in* DOG FRED ER EJ DET BEDSTE: FESTSKRIFT TIL CARL AUGUST FLEISCHER PA HANS 70-ARSDAG 26 [HOWEVER, PEACE IS NOT THE BEST: CELEBRATION OF CARL AUGUST FLEISCHER ON HIS 70TH BIRTHDAY, AUGUST 26, 2006] 113, 126 (Ole Kristian Fauchald et al. eds., 2006).

[149] AGREEMENT BETWEEN THE KINGDOM OF NORWAY AND ..... FOR THE PROMOTION

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incorporate environmental law and other sustainable development elements into the IIAs. Additionally, the *Methanex* case, *Saluka* case, and International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development represent another approach where the requirement of bona fide[150] and compliance with the due process [151] are also compulsory to justify the "expropriation".

In the context of sustainable development, later approaches represented by Norwegian BIT, *Methanex*, and *Saluka* seem to have a more positive influence because they require tribunals to consider the nature of governmental measures. The former approach represented by US and Canada may be more controversial as it saves the possibility of declaring non-expropriation even if the governmental measure does not satisfy the sustainable development elements (such as transparency, predictability, etc.) but qualify as non-discriminatory and carry public purposes.[152]

From the discussion above, it is clear that expropriation's relationship with sustainable development is different from that of the national treatment guarantee, and fair and equitable treatment standard.[153] Not many IIAs address sustainable development elements in relation to national treatment and fair and equitable treatment standard, while the sustainable development elements, especially health and environmental concerns are addressed in many IIAs in relation to expropriation provisions.[154] However, different IIAs and different organizations present different articulations for what is considered expropriation, which brings difficulty in applying them in practice. Though credit should be given to the awareness of sustainable development and incorporation of health and environmental elements into the IIAs, the uneven progress of sustainable development may hinder the process in the long run.

At present, although no BIT, signed or in force, explicitly refers to the ILA Declaration, the Azerbaijan Model BIT,[155] Hungary–Kyrgyzstan BIT

AND PROTECTION OF INVESTMENTS (THE NORWEGIAN DRAFT MODEL BIT 2008) art. 6(1)(2), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download.

[150] *See generally* Saluka v. Czech, Partial Award, *supra* note 102, ¶¶ 255-64; HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT (2d ed. 2006), https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf.

[151] Methanex v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, *supra* note 70, pt. IV, ch. D, ¶ 7.

[152] Paparinskis, *supra* note 137, at 322.

[153] *See* Chaisse, *supra* note 4, at 359.

[154] Schrijver, *supra* note 8.

[155] AGREEMENT BETWEEN THE GOVERNMENT OF ..... AND THE GOVERNMENT OF THE REPUBLIC OF AZERBAIJAN ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS (AZERBAIJAN MODEL BIT 2016), art. 6, https://edit.wti.org/document/show/919117e8-070c-4aba-a19c-b4c6999feeae?textBlockId=37aef2f4-1504-4e5d-826e-1c3ae786e0b1&page=1.

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(2020),[156] Armenia–Korea BIT,[157] Belarus–Georgia BIT[158] are some BITs that carry clauses legitimizing expropriation on grounds of human health and environment. For instance, Art 6(2)(c) of Hungary–Kyrgyzstan BIT stipulates that "non-discriminatory measures that the Contracting Parties take for reason of public purpose including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation."

Some BITs like the Brazil–India BIT, [159] Chile–Hong Kong, China SAR BIT,[160] Slovakia–United Arab Emirates BIT[161] Canada–Moldova BIT[162] recognize the right of States to invite investments without lowering labor, health and environmental protection standards in addition to allowing expropriation on those grounds.

VI. CONCLUSION

The current IIA regime lacks direct and express reference to sustainable development. However, tribunals have recognized the need for sustainable development and incorporated the idea in both procedures, like allowing amici submissions, and substance. Even for modern BITs with sustainable development provisions, they lack substantive provisions for practical guidance. In other words, IIAs cannot directly and fully support sustainable development. In the absence of direct reference in international law, the

[156] Agreement Between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, Hung.-Kyrg., art. 6(2)(c), Sept. 29, 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6037/download.

[157] Agreement Between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments, Arm.-S. Kor., Annex I, ¶ 3(b), Oct. 19, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5892/download.

[158] Agreement Between the Government of the Republic of Belarus and the Government of Georgia on the Promotion and Reciprocal Protection of Investments, Belr.-Geor., art. 4, Mar. 1, 2017, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5946/download.

[159] Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India, Braz.-India, art. 22, Jan. 25, 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download.

[160] Investment Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, Chile-H.K., art. 15, Nov. 18, 2016, https://www.tid.gov.hk/english/ita/ippa/files/IPPAChile.pdf.

[161] Agreement Between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, Slovk.-U.A.E., art. 12, Sept. 22, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5926/download.

[162] Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments, Can.-Mold., art. 15, June 12, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5806/download.

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burden is on the States to incorporate such ideas into domestic law and regulations and thus reach sustainable development internationally.

Sustainable development is an important concept to sustainably promote foreign investment in order to maintain social and economic growth. Based on the research, it is clear that the rising awareness of sustainable development has assisted in the progress. Though many improvements have been made including incorporating environmental aspects into international treaties and applying sustainable development ideas in investor-state dispute arbitrations,[163] due to the vague nature of the concept itself, other potential changes will be expected to arise in the future.

The concept includes all soft aspects of society including environmental, health, human rights, social, cultural, etc. The current international law regime does not provide a sufficient system to cover all these sustainable development aspects while their considerations are necessary. As a result, many scholars have proposed solutions for future efforts. The underlying rationale for such suggestion is that the current IIAs normally contains a large section of obligations for host States aiming to protect foreign investors' rights while the flaw in the assessment system for national treatment guarantee and fair and equitable treatment standard is crucial in promoting domestic sustainable development as discussed above. However, the objective of sustainable development should be two-way where host States should also have the legitimate right to choose not only based on commercial considerations but also social and environmental considerations.

[163] *See generally* Sungjin Kang, *Jurisdictional Objections and Defenses (*Ratione Personae*,* Ratione Materiae*, and* Ratione Temporis*)*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 983 (Julien Chaisse et al. eds., 2021).

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