MAPPING SUSTAINABLE DEVELOPMENT IN INVESTMENT TREATIES: AN ANALYSIS OF ASEAN STATES' PRACTICE

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ABSTRACT

The interaction between sustainable development and international investment treaties is of growing concern. Could investment protection stymie health regulation? Will States be sued for introducing measures to tackle climate change? A growing body of sustainability-related case law is evidence that arbitral tribunals balance investment obligations against States' ability to regulate for national security, health, the environment, labour rights, transparency, and corporate social responsibility. Against this background, this paper maps sustainable development issues in 371 bilateral investment treaties (hereinafter "BITs") concluded by the Association of Southeast Asian Nations (ASEAN) States. It finds that only 26% of these treaties make any reference to sustainable development issues, most of which cover matters relating to security, health, and the environment. However, a small number of recent BITs reflect an expanding concept of sustainable development beyond orthodox boundaries. This paper proposes several options to elevate sustainable development in the hierarchy of norms in investment arbitration.

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KEYWORDS: *sustainable development, investment arbitration, bilateral investment treaties, ASEAN, climate change, health regulation*

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I. INTRODUCTION

Achieving a mature reconciliation between state interests and investor interests is the defining crusade of modern investment law discourse. Born in the shadow of colonialism, the legal protection of foreign investors was originally devised as a bulwark against expropriatory actions by host governments.[1] In the decades since, the regime has been buffeted by changing geopolitical dynamics and a barrage of criticism over alleged pro-investor bias, jurisprudential inconsistency, and illegitimacy.[2] The overarching concern about international investment agreements (hereinafter "IIAs"), and the arbitrations that result from them, is whether States' have sufficient policy space to regulate for non-investment issues without breaching standards of investment protection.

Against this background, the role of public interests in global economic governance has been the subject of renewed scrutiny. Since the United Nations adopted the Sustainable Development Goals (hereinafter "SDGs") in 2015, there is an increased focus on analysing the impact of investment and trade agreements on sustainable development.[3] With this in mind, there are three dimensions to sustainable development: economic growth, social and human development, and the protection of the environment.[4] Foreign investment has a potentially significant impact on all three of these dimensions, in different ways. For example, States have considered foreign investment to be a central pillar of economic growth for three decades; the influx of capital, skills, and technology support development.[5] Certain forms of foreign investment will bolster social and human development by creating

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[1] THOMAS L. BREWER & STEPHEN YOUNG, THE MULTILATERAL INVESTMENT SYSTEM AND MULTINATIONAL ENTERPRISES 53 (1998); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 21 (2013).

[2] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 3, 20 (Karl P. Sauvant & Lisa E. Saches eds., 2009); U.N. Conf. on Trade & Development, Bilateral Investment Treaties 1959-1999, 17 (2000), https://unctad.org/system/files/official-document/poiteiiad2.en.pdf; Eric De Brabandere, *(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration*, 59(8) BOS. COLL. L. REV. 2607, 2618 (2018).

[3] *See generally Desmond McNeill et al., Trade and Investment Agreements: Implications for Health Protection*, 51(1) J. WORLD TRADE 159 (2017); Prabhash Ranjan & Pushkar Anand, *How 'Healthy' are the Investment Treaties of South Asian Countries: An Empirical Study of Public Health Provisions in South Asian Countries' BITs and FTA Investment Chapters*, 33(2) ICSID REV. 406, 416 (2018); ERIC NEUMAYER, GREENING TRADE AND INVESTMENT: ENVIRONMENTAL PROTECTION WITHOUT PROTECTIONISM 84 (2001).

[4] Pia Acconci, *Sustainable Development and Investment: Trends in Law-Making and Arbitration*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 290, 292 (Andrea Gattini et al. eds., 2018).

[5] Eduardo Borensztein et al., *How Does Foreign Direct Investment Affect Economic Growth?*, 45(1) J. INT'L ECON. 115, 123 (1998).

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employment opportunities, higher pay, and critical infrastructure.[6] Foreign investors may also benefit the environment by aiding in the construction of renewable energy plants or manufacturing energy-efficient goods.[7]

But the central problem is that the goal of protecting foreign investment and furthering sustainable development are not always aligned.[8] States have adopted protectionist measures on the premise that the entry of multinational corporations and foreign goods into domestic markets may suffocate fledgling industries.[9] Foreign investors may maintain lower labour standards, impose regressive working conditions, and "import" cheap labour from their home country.[10] Investments in mining, coal-powered energy plants, and even infrastructure can have a devastating impact upon local communities and the environment.[11] Indeed, unique protections for foreign investors in the context of economic crisis and political upheaval creates a system of two-tiered justice.[12] In short, foreign investment is not always an agent of sustainable development.

This is borne out by several investor-state arbitration cases.[13] Tribunals have had cause to examine where investment protection ends, and legitimate public policy space begins. However, outcomes have been neither predictable nor, in some cases, defensible. As a result, investment protection —once the sole focus of IIAs—increasingly shares the stage with public policy issues as States embed non-investment concerns within the legal frameworks of global economic governance. National security, health, and the environment remain the most commonly articulated inflection points at which investment protection must give way to public interests, and a

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[6] Joshua Abor & Simon K. Harvey, *Foreign Direct Investment and Employment: Host Country Experience*, 1(2) MACROECONOMICS & FIN. EMERGING MKT. ECON. 213, 219 (2008); Brian Aitken et al., *Wages and Foreign Ownership: A Comparative Study of Mexico, Venezuela, and the United States*, 40 J. INT'L ECON. 345, 351 (1996).

[7] Feng Helen Liang, *Does Foreign Direct Investment Harm the Host Country's Environment? Evidence from China*, 17 CURRENT TOPICS MGMT. 101, 110 (2014).

[8] Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17(2) LEWIS & CLARK L. REV. 521, 533 (2013).

[9] Marc J. Melitz, *When and How Should Infant Industries Be Protected?*, 66 J. INT'L ECON. 177, 179 (2005).

[10] William W. Olney, *A Race to the Bottom? Employment Protection and Foreign Direct Investment*, 91 J. INT'L ECON. 191, 198 (2013).

[11] Andrew K. Jorgenson et al., *Foreign Investment Dependence and the Environment: An Ecostructural Approach*, 54(3) SOC. PROBS. 371, 374 (2007); Muhammad Ali Nasir et al., *Role of Financial Development, Economic Growth & Foreign Direct Investment in Driving Climate Change: A Case of Emerging ASEAN*, 242 J. ENV'T MGMT. 131, 135 (2019).

[12] For an account of the protection available to foreign investors in times of crises, see Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L & COMPAR. L. Q. 325, 333 (2010).

[13] INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010 22-167 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., 2011); STEFANIE SCHACHERER, INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM THE 2010S 4-66 (Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch eds., 2018).

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minority of investment treaties also refer to corruption, labour rights, transparency, and corporate social responsibility.[14]

But how frequently are these "sustainability" clauses embedded in investment treaties? What issues are frequently addressed by these sustainable development provisions (hereinafter "SDPs")? And what is the nature of the obligations they impose? This paper seeks to address these questions through an analysis of the investment treaties concluded by Association of Southeast Asian Nations (hereinafter "ASEAN") States.

Part II provides an account of the interaction between sustainable development and investment protection. It will highlight how selected cases have addressed sustainable development issues to demonstrate the importance of development-oriented IIAs. Part III surveys existing literature and recent IIAs to identify how SDPs are embedded within investment treaties. It will advance the typology of SDPs that will be the basis of an empirical analysis of ASEAN States' IIAs. In Part IV, the paper will undertake this empirical analysis. This will provide answers as to (1) how common SDPs are, (2) what issues are frequently included within SDPs, and (3) what is the nature of the obligations they impose. Finally, Part V provides a qualitative analysis of these SDPs in ASEAN IIAs and undertakes an appraisal of the policy options available to embed sustainable development within an arbitrator's matrix of decision-making. From procedural fine-tuning to innovative provisions to joint interpretive statements, States can take steps to elevate sustainability issues within the hierarchy of norms in investment arbitration.

II. THE INTERACTION BETWEEN SUSTAINABLE DEVELOPMENT AND INVESTMENT PROTECTION

A. The Evolution of "Sustainable Development"

The evolving concept of "sustainable development" has been extensively treated elsewhere, but it is nevertheless worth revisiting as a preliminary matter.[15] Concerns regarding the role of environmental protection in global economic governance were the impetus behind the 1972 United Nations Conference on the Human Environment in Stockholm.[16] This resulted in the creation of the United Nations Environmental Program

[14] Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 7 (OECD, OECD Working Papers on International Investment No. 2014/01).

[15] Acconci, *supra* note 4, at 293; Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15 J. WORLD INV. & TRADE 929, 930; MANJIAO CHI, SUSTAINABLE DEVELOPMENT PROVISIONS IN INVESTMENT TREATIES 4 (2018).

[16] U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm*, at 6, U.N. Doc. A/CONF.48/14/Rev.1 (1973).

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(hereinafter "UNEP"), which explicitly bound together issues of development with environmental concerns. In many ways, the creation of the UNEP was the point of conception for a process that culminated in the SDGs in 2015.

One of the most important milestones in this process is the conclusion of the Brundtland Report concluded in 1987.[17] It defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[18] Development, on its own, was insufficient for assessing the furtherance of societal welfare; the impact on the environment maintained a pivotal role. However, the concept of sustainable development was confined to the field of environmental law even through the 1992 Rio Declaration on Development and Environment (hereinafter "Rio Declaration").[19] Of the twenty-seven Principles contained in the Rio Declaration, only two refer to matters of trade and investment, and they refer to them only to state that environmental regulations must not distort investment or trade or constitute a means of arbitrary or unjustifiable discrimination.[20]

Expansion of the concept of sustainable development to include social matters as well as environmental matters began around the turn of the millennium. For example, the Millennium Development Goals concretized the aims to "eradicate extreme poverty" and "achieve universal education" alongside more traditional notions of "environmental sustainability."[21] These goals were explicitly linked to the international legal framework through the "New Delhi Declaration of Principles of International Law Relating to Sustainable Development" (hereinafter "New Delhi Declaration"), the preamble of which expresses the view that "sustainable development involves a comprehensive and integrated approach to economic, social and political processes."[22] It establishes seven principles that explicitly bind together international law issues and sustainable development:

1. The duty of States to ensure sustainable use of natural resources;
2. The principle of equity and the eradication of poverty;
3. The principle of common but differentiated responsibilities;

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[17] U.N. Secretary-General, *Report of the World Commission on Environment and Development*, U.N. Doc. A/42/427, annex (Aug. 4, 1987).
[18] *Id.* ch. 2, ¶ 1.
[19] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).
[20] *Id.* princs. 12, 16.
[21] U.N. Secretary-General, The Millennium Development Goals Report 2015 (2015), at 4, https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf.
[22] World Summit on Sustainable Development, ILA New Delhi Declaration on the Principles of International Law Relating to Sustainable Development, at 3, U.N. Doc. A/CONF.199/8 (Aug. 9, 2002).

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4. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of public participation and access to information and justice;
6. The principle of good governance; and
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

These principles in the New Delhi Declaration represented an obvious linkage between general international law and issues of sustainable development, and touch upon several issues that overlap with international investment law. For example, stipulations that the use of natural resources must be "sustainable" will be relevant to foreign investors operating in oil and gas exploitation or mining. The interrelationship between economic and social and environmental objectives and the precautionary approach to human health should encourage the value of foreign investment to be assessed with respect to its impact on local communities and the environment, as opposed to merely the increase in employment opportunities or economic activity. Processes of investment arbitration, and investor-state dispute settlement (ISDS) reform, may be influenced by the principles on access to information and good governance.

Finally, the latest development in the evaluation of the "sustainable development" concept is the promulgation of the SDGs in 2015.[23] While the SDGs cover similar ground to the previous iterations of sustainable development, they are more specific. For instance, they refer explicitly to "food security," "management of water," "inclusive and sustainable industrialization," "climate change," and use of "oceans, seas, and marine resources."[24] More than any other milestone in the evolution of "sustainable development," the SDGs recognise the role of consumption and economic activities in explicit terms.

Despite these guiding principles, the legal status of "sustainable development" issues remains contested. Gazzini describes three different, approaches to interpreting the role of sustainable development issues within the jurisprudence of courts and tribunals: a general policy goal that can assist judges in navigating conflicting norms, a convenient way to synthetize laws and policy commitments, or a single rule or custom that may emerge through state practice and *opinio juris*.[25] As will be seen, investment treaty law contains some elements of all three of these approaches. Indeed, there are several cases in which matters clearly within the realm of sustainable development have come before arbitral tribunals.

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[23] G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).
[24] *Id.* at 14.
[25] Gazzini, *supra* note 15, at 932-34.

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B. Investment Arbitration Cases and Sustainable Development Issues

One of the most prominent issues relates to the interaction between investment protection and the environment. Two cases demonstrate this interaction. In *Bilcon v. Canada*, an investor challenged a decision to reject a project to develop a quarry.[26] The project had initially been approved, but the subsequent administrative process found the project to have adverse effects on the environment and on "core community values."[27] Despite the environmental concerns, the investment tribunal found that the investor's legitimate expectations had been breached. Moreover, in *Eiser v. Spain*, an investor challenged a decision by the Spanish government to reduce incentives for the production of renewable energy.[28] A number of cases have been filed in relation to similar regulatory changes in Spain, including *Isolux v. Spain*, in which the respondent state prevailed.[29] However, the tribunal in *Eiser v. Spain* concluded that the investor's legitimate expectations had been frustrated, and awarded EUR 128 million.

Investment arbitrations have also intersected with human rights and indigenous rights. In *Bear Creek v. Peru* an investor alleged that a decision to bar the exploitation of silver ore deposits they had discovered constituted an expropriation and violated other free trade agreements (hereinafter "FTA") provisions.[30] Significant local opposition to the project had prompted social unrest and violence because of the effect on land and cultural identity, resulting in a revocation of Bear Creek's license to operate. The tribunal found that the obligation to facilitate consultations fell (primarily) on the State, and the actions taken constituted an indirect expropriation. Sunk costs were awarded; future profits were not.

Furthermore, the case of *Tecmed v. Mexico* highlights the relevance of public health issues in investment arbitration.[31] The Mexican Government revoked a permit to operate a landfill after breaches of environmental regulations, including accepting liquid and biological-infectious wastes despite not having permission to do so. There was also community opposition to the landfill on public health grounds that allegedly resulted

[26] Bilcon of Delaware, Inc. v. Gov't of Can., PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 478-87 (Mar. 17, 2015).
[27] *Id.* ¶ 503.
[28] Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 154 (May 4, 2017).
[29] Isolux Infrastructure Neth., B.V. v. Kingdom of Spain, SCC Case No. V2013/153, Final Award, ¶ 621 (July 17, 2016).
[30] Bear Creek Mining Corp. v. Republic of Perú [hereinafter Bear Creek v. Peru], ICSID Case No. ARB/14/21, Award, ¶ 112 (Nov. 30, 2017).
[31] Tecnicas Medioambientales TECMED S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

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from these breaches. Tecmed argued that this constituted a breach of the expropriation clause and a violation of the Fair and Equitable Treatment (FET). The tribunal decided in favour of the investor, awarding Tecmed 5.3 million Mexican pesos.

Several cases have touched upon other issues relevant to the modern concept of sustainable development. The tribunal in *Metal Tech v. Uzbekisan* had to contend with issues of good governance and potential corruption.[32] It was reasoned that the "in accordance with law" provision that often accompanies definitions of "investment" means that corruption at the admission stage of an investment will constitute a bar to jurisdiction. In other words, if an investor obtains entry to a country and establishes their investment using corrupt practices, they are unable to claim protections of investment treaties at a later stage. *Metal Tech* is also significant as the tribunal undertook its own investigation into whether the investment was established by corruption.

Moreover, the requirement that host states must act in a transparent manner was at the centre of the dispute in *Crystallex v. Venezuela*.[33] The Government of Venezuela denied a Natural Resources Permit to operate gold mines on the grounds of its environmental impact and the impact on indigenous people. There were two complicating factors. Firstly, Crystallex had received a letter from the Ministry of the Environment stating the authorization would be granted after a bond had been posted. Secondly, several high-profile political figures, including then-President Hugo Chavez, had expressed plans for the nationalisation of all Venezuelan gold mines. Among many issues in the case, the tribunal considered that the lack of transparency in the permit denial letter contributed to a finding of arbitrary conduct. An awarded was rendered in favour of the investor, and later settled.

However, an emerging trend in sustainable development discourse surrounds investor obligations and the corporate social responsibility of foreign investors. Some indications of this trend might be seen in the aforementioned *Bear Creek v. Peru* case. While the responsibility for the social unrest resulting from the project was found the fall upon the host state, a partially dissenting opinion by Philippe Sands argued that the damages awarded should be reduced on the basis of contributory fault.[34] It was reasoned that the International Labour Organization's Indigenous and Tribal Peoples Convention had implications for private companies; that they must

[32] Metal-Tech Ltd. v. The Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 110 (Oct. 4, 2013).
[33] Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 485 (Apr. 4, 2016).
[34] Bear Creek v. Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion: Professor Philippe Sands QC, ¶¶ 4-6, 38-39 (Nov. 30, 2017).

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obtain a "social license to operate."[35] This inclination for considering investor conduct as a counterbalance to state conduct was also apparent in *Burlington v. Ecuador*.[36] The tribunal allowed for a counterclaim against Burlington for breach of Ecuadorian environmental law and contractual obligations.

Finally, this paper considers security to be relevant to an assessment of sustainable development. This approach is not uncontested.[37] However, security is relevant for two reasons. Firstly, the nature of security-type clauses impacts upon the ability of a State' to respond to economic crises. This was famously demonstrated in over forty investment arbitrations initiated that relate to an economic crisis in Argentina.[38] Secondly, the geoeconomic challenge to global economic governance is resulting in the conflating of economic and security issues.[39] Therefore, matters that are not traditionally associated with national security may become shielded under a broadened "security" umbrella. As such, this assessment of the interaction between investment treaties and sustainable development will also consider security clauses.

III. A FRAMEWORK FOR ANALYSING SUSTAINABLE DEVELOPMENT PROVISIONS IN INVESTMENT TREATIES

Several scholars have developed overlapping frameworks for analysing the interaction between investment treaties and sustainable development. Newcombe examines selected provisions against the background of the International Law Association (hereinafter "ILA") "principles of international law relating to sustainable development" in concluding that investment treaties are not an impediment to such issues.[40] On the contrary, Mann contends that the vague process and opaque standards contained with investment treaties do, in fact, pose a risk to sustainable development that can only be remedied by fundamental paradigm shift towards a more

[35] Joshua Paine, *Bear Creek Mining Corporation v Republic of Peru: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties*, 33(2) ICSID REV. - FOREIGN INV. L.J. 340, 342 (2018).

[36] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 606 (Feb. 7, 2017).

[37] Gordon et al., *supra* note 14, at 8.

[38] Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision LG&E v. Argentina*, 24 J. INT'L ARB. 265, 267 (2007); Kurtz, *supra* note 12, at 330; José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime* 9 (Inst. for Int'l L. & Just., Working Paper No. 2008/5, 2008).

[39] Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22(4) J. INT'L ECON. L. 655, 655 (2019); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1031 (2019).

[40] Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 J. WORLD INV. & TRADE 357, 360 (2007).

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development-oriented approach.[41] Van Aaken and Lehman consider that treaty drafting and arbitral interpretation can be refocused using insights from economics to more closely bind investment protection to sustainable development.[42] Pia Acconci traces the emerging relevance of sustainable development through international organizations, exceptions clauses, treaty arbitration and EU regulations.[43]

Others have taken a more granular, provision-by-provision approach. Bonzon examines the evolution of Switzerland's bilateral investment treaties (hereinafter "BITs") and finds that the flexible and pragmatic approach can both contribute to and prevent sustainable development.[44] Gazzini identifies features of BITs that incorporate environmental, health, safety, human rights and labour standards.[45] This enquiry highlights the role of preambles and interpretive statements, dedicated SDP provisions, "policy space" provisions, and exceptions clauses as drafting innovations that States have utilized to introduce embed issues of sustainable development alongside investment protection. Levashova identifies recent trends in incorporating sustainable development clauses in the Model BITs of the United States and Canada, but concludes the approaches remain inconsistent, reflecting a lack of consensus.[46]

While our analysis will benefit from all this scholarship, this paper is primarily concerned with those that focus on SDP clauses in particular. It seeks to answer three questions: how frequent are SDPs in ASEAN IIAs? What issues are frequently addressed by SDPs? And what is the nature of the obligations they impose?

The sample in our survey contains 371 BITs concluded by ASEAN States. Multilateral investment treaties and other treaties with investment provisions are not included. The sample includes BITs that were publicly available as of February 2022. Treaties have been included regardless of whether they are in force, signed but not in force, or terminated.

The process involved a manual review of 371 BITs concluded by ASEAN States to identify language relating to the SDGs. More specifically, the analysis sought to identify references to sustainable development, corruption, the environment, public health, labour rights, human rights, transparency, corporate social responsibility, and security. The survey was

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[41] Mann, *supra* note 8, at 537.

[42] Anne van Aaken & Tobias A. Lehmann, *Sustainable Development and International Investment Law: A Harmonious View from Economics*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 317, 327 (Roberto Echandi & Pierre Suavé eds., 2013).

[43] Acconci, *supra* note 4, at 293.

[44] Anne-Juliette Bonzon, *Balance Between Investment Protection and Sustainable Development in BITs: The Example of Switzerland*, 15 J. WORLD INV. & TRADE 809, 812 (2014).

[45] Gazzini, *supra* note 15, at 939.

[46] Yulia Levashova, *Role of Sustainable Development in Bilateral Investment Treaties: Recent Trends and Developments*, 1 J. SUSTAINABLE FIN. & INV. 222, 226 (2011).

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first conducted by manual review of publicly-available treaties to search for these terms. After manual review, this task was also completed using the machine-readable Electronic Database of Investment Treaties (EDIT) to confirm, correct, or supplement the findings from manual review.[47] Given the text-as-data nature of the research method, variations or non-standard language may not be included in the findings.

After establishing the frequency with which terms relating to sustainable development were included, the sample was divided on a country-by-country basis to identify similarities, divergences, and patterns. Finally, the analysis involved identifying language characteristics that were common to different types of sustainable development provisions. These characteristics allowed the separation of the provisions by the nature of the obligations they impose on States.

Therefore, this methodology amalgamates the empirical frameworks adopted by Kathryn Gordon, Joachim Pohl and Marie Bouchard,[48] and Manjiao Chi in their examination of the frequency and nature of SDPs.[49] The conclusions will be used to compare the approach of ASEAN States to the States included in previous studies.

To that end, eight different types of SDPs will be considered.[50] They are directly linked to the SDGs.

1. **General sustainable development provisions** may be contained in the preamble of investment treaties or may have a dedicated article to "sustainable development." Such clauses refer directly to "sustainable development" as opposed to one of the more specifics aspects of it that have been outlined in the case law above.
2. **Anti-corruption provisions** affirm that contracting parties' acknowledge the adverse effects of bribery and other forms of corruption on democracy and on development. Such clauses may provide that measures to combat corruption will not be inconsistent with standards of investment protection. Preventing corruption can be associated with Goal 16 of the SDGs, to provide access to justice and accountable institutions.
3. **Environment and public health provisions** relate to matters of natural environment and resources, but may also include animal life and health and safety. References to "environmental provisions" are therefore broadly construed. They may take the form of mere references in the preamble, to obligations to be followed, to an explicit type of exception.

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[47] *See generally* Wolfgang Alschner et al., *Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use*, 20(1) WORLD TRADE REV. 73 (2021).
[48] Gordon et al., *supra* note 14, at 72.
[49] CHI, *supra* note 15, at 26.
[50] These sustainable development provisions (SDPs) are drawn from Manjaio Chi and the case law highlighted in Part I.

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Environmental protection cuts across many of the SDGs, but may be particularly associated with Goal 12 on sustainable production patterns, Goal 13 on tackling climate change, and Goals 14 and 15 on the protection of oceans and territorial ecosystems.

4. **Labour rights and human rights provisions** provide that employment opportunities are not, in themselves, sufficient for sustainable development; labour standards and conditions are also relevant. Moreover, human rights, including the right to water or indigenous peoples' rights may be included within these provisions. Such provisions may contribute towards Goal 1, ending poverty in all its forms, and Goal 8, on productive employment and decent work for all.
5. **Transparency provisions of investment laws** — Transparency provisions in IIAs can be divided into two categories. Firstly, the obligation on States to make laws related to investments publicly available. This may include the process by which such laws are made, and the process by which decisions relating to investments are made. As a predictable a stable legal environment is an oft-cited factor in investors' decision-making, greater transparency may help to foster innovation and promote sustainable industrialization, in accordance with Goal 9.
6. **Transparency of arbitration process** — Secondly, obligations of transparency may relate to the arbitral tribunal itself. Specific methods of achieving transparency might include public proceedings, the opportunity to present amicus briefs, and a publicly available award. A more public-facing approach will aid in creating accountable and inclusive institutions as required by Goal 16.
7. **National security provisions** are generally framed as being related to essential security interests, or emergency or exigent circumstances. As previously argued, the securitisation of international economic law provides ample justification for considering national security provisions as an essential part of our enquiry into sustainable development and investment treaties. A range of ostensibly economic issues might fall under a broad "security" umbrella, such as reliable energy (Goal 7) and resilient infrastructure (Goal 9).
8. **Corporate social responsibility** provides that States encourage investors to operate according to standards of responsible business conduct. This may be given more context through explicit reference to internationally recognised standards or guidelines. By their nature, standards of corporate social responsibility may impact the furtherance of all of the SDGs.

While these are the issues associated with sustainable development at the moment, they are by no means the final word on the matter. For example, recent BITs concluded by Japan contain provisions related to privacy. The

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2021 Georgia–Japan BIT refers to "the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts."[51] Given the growth of the data-driven economy, privacy may emerge as a core aspect of sustainable development in the future.

Alongside the frequency and subject-matter of these eight types of SDPs, our enquiry involves assessing the nature of the obligations they impose. Different provisions contain different levels and forums of compulsion (or non-compulsion). The analysis will seek to highlight which types of SDPs can be associated with a particular type of obligation. Three types will be considered: declaratory, obligatory, and exceptive:[52]

1. Provisions of a **declaratory** nature do not create additional obligations, but merely provide that they will promote aspects of sustainable development or comply with existing domestic or international laws. The language found in preambles is the foremost example of SDPs that are declaratory in nature. While not creating additional obligations, they are nevertheless significant for establishing the object and purpose of a treaty which may be used to interpret other treaty standards.
2. Provisions of an **obligatory** nature provide commitments that a contracting party will act in a particular way, or refrain from acting in a particular way. In a sustainable development context, these commitments may relate to commitment not to lower labour or environment standards, or to adopt measures against corruption.
3. Provisions of an **exceptive** nature (in theory) impose a hierarchy of norms in investment arbitration. They are normally titled "exceptions" or "prohibition and restriction" clauses and provide that non-discriminatory regulation necessary for the protection of security, public health, or other permissible objectives will not be a breach of a State's international obligations.

The eight SDPs and three types of obligation will be our framework for analysing the extent to which investment treaties concluded by ASEAN states are oriented towards sustainable development.

[51] Agreement Between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment, Geor.-Japan, art. 15(1)(c), Jan. 29, 2021, https://jusmundi.com/en/document/pdf/treaty/en-agreement-between-japan-and-georgia-for-the-liberalisation-promotion-and-protection-of-investment-japan-georgia-investment-agreement-2021-friday-29th-january-2021.

[52] CHI, *supra* note 15, at 24.

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IV. SUSTAINABLE DEVELOPMENT CLAUSES IN INVESTMENT TREATIES CONCLUDED BY ASEAN STATES: AN EMPIRICAL ANALYSIS

While this study is confined to analysing BITs concluded by ASEAN States, sustainable development is gaining an increasingly prominent role in other international instruments of relevance to ASEAN States. In 2022, the Asia-Pacific Economic Cooperation (hereinafter "APEC")—containing seven ASEAN States—published the "APEC Compendium of Best Practices: Mainstreaming Voluntary Sustainability Standards (VSS) to Trade in the APEC Region."[53] The report organizes many of the SDGs into five "sustainability hotspot areas"—food security, gender equality, decent employment, consumption and production, environmental conservation—and identifies effective methods to encourage voluntary sustainable practices in different sectors throughout APEC. This is the latest in a series of APEC programs to advance sustainable development. Central to this effort is the initiative on Inclusive and Responsible Business and Investment, which expressly links the SDGs to trade and investment issues.[54] It aims to increase "social consciousness on the impact business have on their lives, society and the environment" and produce "socially relevant" and "commercially viable" business models.[55]

As well as these APEC programs, the Framework for Circular Economy for the ASEAN Economic Community recognises several sustainability-related threats to economic resilience: resource depletion, unsustainable patterns of raw material consumption, inefficiencies throughout product value chains, and climate change.[56] Consequently, ASEAN has developed five Strategic Priorities[57] and six Guiding Principles[58] to produce resilient,

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[53] APEC SUB-COMM. ON STANDARDS & CONF., APEC COMPENDIUM OF BEST PRACTICES: MAINSTREAMING VOLUNTARY SUSTAINABILITY STANDARDS (VSS) TO TRADE IN THE APEC REGION 8 (Feb., 2022). Seven Association of Southeast Asian Nations [hereinafter ASEAN] parties are members of Asia-Pacific Economic Cooperation [hereinafter APEC].

[54] APEC, *Inclusive and Responsible Business and Investment - Malaysia's Priority on Investment*, 4, APEC Doc. 2020/SOM1/IEG/016 (Feb. 10-11, 2020).

[55] *Id.* at 6.

[56] *ASEAN Adopts Framework for Circular Economy*, ASEAN (Oct. 21, 2021), https://asean.org/asean-adopts-framework-for-circular-economy/.

[57] Standard Harmonisation and Mutual Recognition of Circular Products and Services; Trade Openness and Trade Facilitation in Circular Goods and Services; Enhanced Role of Innovation, Digitalisation, and Emerging/Green Technologies; Competitive Sustainable Finance and Innovative ESG Investments; and Efficient Use of Energy and Other Resources. *See* ASEAN, FRAMEWORK FOR CIRCULAR ECONOMY FOR THE ASEAN ECONOMIC COMMUNITY 5, https://asean.org/wp-content/uploads/2021/10/Brochure-Circular-Economy-Final.pdf.

[58] "Promote ASEAN integration and the development of regional value chains"; "Consider the broader impact on the economy and society"; "Recognise the unique circumstances of each AMS"; "Encourage ASEAN-wide coordination on knowledge and technology sharing"; "Evaluate financial and institutional feasibility and sustainability prior to implementation"; "Function within the reality of international production linkages". *See id.* at 7-8.

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efficient, and sustainable economies. These will continue to inform domestic and international practice within ASEAN States. Indeed, the ASEAN Comprehensive Investment Agreement, refers to both "economic" and "social" development in its preamble, and contains exceptions for national security, health, and the environment, and makes provision for transparency.[59] Therefore, the role of sustainable development in ASEAN is broader than merely investment treaties. Its growing significance in the region is a crucial context to this study.

Turning to BITs specifically, our sample contains 371 BITs concluded by ASEAN States—Brunei, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam—including BITs that these States have concluded with each other. Three questions are at issue: (1) how common are SDPs? (2) what issues are frequently included within SDPs? (3) and what is the nature of the obligations they impose? These will be addressed in turn.

TABLE 1: Frequency of SDP Provisions in ASEAN BITs

	No. of BITs in the Sample[60]	No. of BITs that contain SDPs	Percentage of BITs that refer to SD Concerns
Brunei	8	6	75%
Cambodia	23	8	35%
Indonesia	71	10	14%
Lao	24	7	29%
Malaysia	67	4	6%
Myanmar	11	6	54%
Philippines	39	11	28%
Singapore	50	24	48%
Thailand	41	7	17%
Vietnam	64	18	28%

SOURCE: Compiled by the author.[61]

There are several conclusions that can be drawn from these findings. Firstly, it is rare for treaties concluded by ASEAN States to contain language

[59] ASEAN Comprehensive Investment Agreement art. 17, Feb. 26, 2009, http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf .

[60] This will not total 371, as the sample also includes BITs between ASEAN States.

[61] For methodology, see *infra* Part III.

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that refers to sustainable development issues. In fact, the vast majority of BITs concluded by most ASEAN States contain no reference to such issues. Of the 371 treaties examined, only 95 contain any reference to corruption, health and the environment, labour and human rights, transparency, national security, and corporate responsibility. Therefore, 26% of BITs concluded by ASEAN States contain these provisions.

Secondly, the frequency with which SDPs are included within BITs concluded by ASEAN States is increasing. Forty-one of the ninety-five treaties with SDPs were concluded before 2000. Only eight of the ninety-five treaties with SDPs were concluded before 1990.

Thirdly, there is a significant divergence between ASEAN States as to the frequency of SDPs. It is unwise to draw conclusions about the treaty practice of Brunei and Myanmar from this exercise due to the small sample size involved. Nevertheless, in the few treaties that they have concluded, SDPs are included at least 54% of the time. However, it is easier to reach conclusions on the basis of Singapore's fifty treaties. The majority of Singapore's currently in force contain SDP. By contrast, the BITs concluded by Malaysia, Indonesia, and Thailand stand out as routinely being absent SDPs, notwithstanding substantial treaty practice.

Alongside frequency, there are also notable findings surrounding the issues typically covered.

TABLE 2: Issues Included Within ASEAN Investment Treaties with SDPs

	General SD	Anti-Corruption	Health and Environment	Labour and HR	Transparency of Laws	Transparency of Process	Security	Corporate Social Responsibility
Brunei	0/6	0/6	6/6	0/6	0/6	0/6	4/6	0/6
Cambodia	0/8	1/8	5/8	3/8	2/8	0/8	5/8	0/8
Indonesia	2/10	1/10	4/10	1/10	4/10	0/10	6/10	1/10
Laos	2/7	1/7	4/7	0/7	2/7	0/7	4/7	0/7
Malaysia	0/4	0/4	4/4	0/4	0/4	0/4	1/4	0/4
Myanmar	3/6	1/6	3/6	3/6	3/6	0/6	6/6	0/6
Philippines	1/11	0/11	4/11	0/11	3/11	0/11	611	0/11
Singapore	3/24	2/24	24/24	3/24	6/24	0/24	24/24	2/24

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Thailand	0/7	0/7	3/7	0/7	4/7	0/7	3/7	0/7
Vietnam	4/18	0/18	10/18	5/18	4/18	0/18	11/18	0/18

SOURCE: Compiled by the author.[62]

Firstly, when SDPs are included, provisions relating to national security, public health, and the environment are by far the most common. Therefore, measures directed towards sustainable development may be covered by these provisions, depending on the nature of the obligations they impose. On the other hand, there are very few references to sustainable development generally, labour rights, human rights and transparency. Anti-corruption and corporate social responsibility are barely mentioned at all.

Another notable trend is that all the treaties that contain the rarer SDPs are comparatively recent. The two treaties that reference corporate social responsibility were both concluded after 2016. The five treaties that reference anti-corruption were all concluded after 2006. This may reflect increasing awareness of sustainable development issues in investment arbitration due to some of the case laws outlined above. Moreover, this shift is only apparent with treaties concluded by Singapore.

As well as the frequency of SDPs and the issues referenced within them, the nature of the obligations they impose is also of relevance.

TABLE 3: Nature of the Obligations Imposed by Different SDPs

	General SD	Anti-Corruption	Environment	Labour and HR	Transparency	Security	Corporate Social Responsibility
Declaratory	X	X	X	X			X
Obligatory		X	X		X		
Exceptive			X			X	

SOURCE: Compiled by the author.[63]

General sustainable development provisions in ASEAN BITs are declaratory in nature. In our sample, all of these provisions are contained in

[62] For methodology, see *infra* Part III.
[63] For methodology, see *infra* Part III.

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the preamble. There is no standalone provision that creates additional obligations, nor are there exceptions that directly reference sustainable development. Of the five SDPs that refer to corruption, three are obligatory, providing that contracting parties "shall take measures" or "shall ensure," and two are declaratory.

SDPs that reference the environment fall into all three categories. They are frequently included in preambular language that is declaratory, with words to the effect that it is neither necessary nor appropriate to lower environmental standards for the promotion of protection of investment. Moreover, references to the environment in our sample can also create obligations for host states to protect human, animal or plant life. Dedicated environmental exceptions are also routinely included within BITs concluded by ASEAN States. Provisions that reference labour and human rights are included in the preamble in an acknowledgement that it is not necessary to lower standards to attract and promote investment.

All provisions that reference transparency, whether with respect to the laws of the state and related to an investment or the arbitral proceeding, are obligatory. They typically stipulate that a party "shall promptly publish, or otherwise make publicly available, its laws . . . related to the agreement."

Issues of security are always provided in the form of exceptions. This reflects the unique position of security with the notions of Statehood. Indeed, some of the security clauses in our sample are self-judging, which puts substantive review beyond the reach of arbitrators, save for good faith review. Of the two SDPs in our sample that reference corporate social responsibility, both are declaratory. They contain language that contracting parties "reaffirm the importance" of "encourage enterprises" to "voluntarily incorporate" internationally recognised standards.

Given these findings, there are several policy options for the ASEAN States to better integrate sustainable development issues within their investment treaties.

V. ELEVATING SUSTAINABLE DEVELOPMENT WITHIN THE HIERARCHY OF NORMS IN INVESTMENT ARBITRATION

There are several reforms that could and should be implemented to ensure that investment treaties concluded by ASEAN States have more of an orientation towards sustainable development. Some are obvious, and some are less obvious.

Given the research method of this paper, it is perhaps unsurprising that the most important reform that should be implemented is the frequency of reference to general sustainable development, anti-corruption, health and environment, labour and human rights, transparency, security, and corporate social responsibility within investment treaties. This problem is more acute

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with some State's than others; for example, recent BITs concluded by Singapore commonly contain SDPs. However, for Indonesia and Malaysia, failure to keep pace with developments in these areas can have profound implications for a State's ability to regulate without fear of breaching investment treaties and being compelled to pay compensation for legitimate public interest regulation. This is particularly the case given the number of BITs concluded by these States. Therefore, the first prong of reform must be the frequency of reference to SDPs.

The second prong of reform is to expand conceptions of sustainable development beyond the traditional definition. As this paper has found, security, public health, and the environment are often the only issues referenced by SDPs. The emerging case law demonstrates that the sustainable development issues that interact with international investment arbitration are far broader than this narrow definition. Transparency of proceedings and anti-corruption are increasingly recognised as crucial public law elements of investment arbitration. As multinational corporations become ever more mobile, it will be crucial that states do not commit to lowering labour or human rights standards to prevent a "race to the bottom." Moreover, while the case law on investor obligations is still developing, embedding provisions on corporate social responsibility will ensure that there are legal duties for foreign investors as well as host States, particularly in view of the reference to the "social license to operate" referred to above. It may also be prudent to get ahead of the curve and examine the value of including SDPs related to privacy.

However, perhaps the most complex element of the proposed reform program is the third prong—the nature of the obligations that SDPs should impose. On this issue, there is no one-size-fits-all approach for every nation. However, there are a few points that are generalisable. It is apparent that including a declaratory reference to sustainable development in the preamble will guide arbitrators to interpret investment protection in the context of other public policy concerns. Furthermore, issues of security, public health, and the environment should remain exceptive in character, to ensure adequate policy space to regulate in these areas. Given the uncertainties and interpretive ambiguities around exceptions clauses, it may be pertinent to clarify that the exception is separate from the state of "necessity" in customary international law. States should also clarify whether exceptions are a matter of merits or jurisdiction. To prevent frivolous claims and increase predictability, it may be preferable if exceptions clauses are regarded as a jurisdictional issue as opposed to an issue of merits.

For transparency and anti-corruption, the SDPs should impose obligatory standards. This will ensure that investors are aware of investment-related laws, the public is aware of investment arbitrations, and all parties are clear on the duty to take anti-corruption measures. Conversely, the norms

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of corporate social responsibility and investor obligations have not yet crystallised. Therefore, it may be prudent to include SDPs are declaratory for the moment, perhaps with reference to internationally recognised standards such as the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

VI. CONCLUSION

From the foregoing, it is now possible to answer the three questions posed at the outset. Firstly, SDPs are not common at all in BITs concluded by the ASEAN States, but there is considerable variance by country. Secondly, issues of security, public health, and the environment are commonly referenced when SDPs are included. While reference to transparency, corruption, and corporate social responsibility are far rarer, they are more common in recently concluded agreements. Finally, the nature of the obligations imposed by SDPs depends on the subject matter being addressed; security issues are always exceptive, but environmental concerns can be declaratory, obligatory, or exceptive.

As a result, most ASEAN States may be vulnerable to investment claims for measures taken for the furtherance of sustainable development. Consequently, it will be necessary to consider reform, both to existing treaties and to future practice. SDPs should be included in future BITs as a matter of routine. Current practice suggests that when SDPs are included, States consider that SDPs for public health, the environment, and security are sufficient to protect state interests. However, new BITs should cover a broader range of subjects, including anti-corruption, labour rights, human rights, transparency, and corporate social responsibility. As the concept of sustainable development evolves over time, so too must provisions of investment treaties evolve with it.

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