Stranger in a Strange Land: The "Non-Arbitrability" of State-Imposed Climate Change Mitigation Measures Before the International Centre for the Settlement of Investment Disputes

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Cite as 64 ATENEO L.J. 799 (2019).

I. INTRODUCTION

> *Climate change ... is being addressed as a pollution problem divorced from its relationship to contemporary economic structures, development paths, and powerful interests.*
>
> — Karen O' Brien[1]

A. Background of the Study

Every six years, the Intergovernmental Panel on Climate Change (IPCC) — "the international body for assessing the science related to climate change"[2] — publishes an Assessment Report, discussing a technical assessment of climate change. The report — a "how bad is it?" status update of sorts —

1. Michael J. Bradshaw, *Global energy dilemmas: a geographical perspective*, 176 THE GEOGRAPHICAL J. 275, 281 (2010) (citing Karen O'Brien, *Are we missing the point? Environmental change as an issue of human security*, 16 GLOBAL ENV'T CHANGE 1, 3 (2006)).

2. Intergovernmental Panel on Climate Change (IPCC), IPCC Factsheet: What is the IPCC?, *available at* https://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf (last accessed Nov. 30, 2019) [hereinafter IPCC Factsheet].

serves as the scientific basis for prodding action from the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC),[3] the political arm of global climate change action. In its most recent Fifth Assessment Report, [4] published last 2013, the IPCC reiterated that the "warming of the climate system is unequivocal,"[5] and the "[h]uman influence on [the] climate system is clear."[6] Moreover, "recent anthropogenic emissions of greenhouse gases are the highest in history,"[7] resulting in "widespread impacts on human and natural systems,"[8] including warmer atmospheres and oceans, diminishing amounts of ice and snow, and rising sea levels.[9]

The verdict on climate change has been handed down; the sentence, if collective mitigation efforts are not undertaken, is a phase in human history marked by extreme weather events, water and food shortages, and threats to health and well-being.[10]

Notwithstanding a broad consensus over the severity of anthropogenic climate change,[11] the specific policy directions and legal actions that must be

3. United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

4. WORKING GROUP 1, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (Thomas F. Stocker, et al. eds., 2013).

5. Lisa V. Alexander, et al., *Summary for Policymakers*, *in supra* note 4, at 4.

6. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2014, CLIMATE CHANGE 2014: SYNTHESIS REPORT 2 (Rajendra K. Pachauri, et al. eds., 2014).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 14.

11. *See* Laurence Boisson de Chazourne, *The Climate Change Regime — Between a Rock and a Hard Place*, 25 FORDHAM ENVTL. L. REV. 625, 625 (2014). "Multiple studies published in peer-reviewed scientific journals show that 97[%] or more of actively publishing climate scientists agree: Climate-warming trends over the past century are extremely likely due to human activities. In addition, most of the leading scientific organizations worldwide have issued public statements endorsing this position." (e.g., the American Association for the Advancement of

undertaken to address the problem are still largely disputed. Simply put, while all those who have accepted the science of climate change as fact agree that "something's gotta give," the question remains as to what exactly that something is.

A drastic paradigm shift is called for, to address seemingly conflicting interests: Should developing countries be forced to choose between growing their economies and shrinking their carbon footprint? Can the priorities of a free market economy reliant on foreign investment somehow be reconciled with the need for stricter regulations over fossil fuel consumption? These are echoes of questions earlier posed, which must now be reheard and rethought, especially in light of the evolution in recent decades of the climate change legal regime. In the arena of international investment law, one of the subject matters of this Note, the seeming conflict between foreign investment and the regulatory power of a State — particularly with respect to climate change mitigation measures — is not novel, as evidenced, for example, by "the Record" of *Sitio* del Niño, El Salvador.

1. "The Record" of *Sitio* del Niño, El Salvador

In 2007, hundreds were protesting against *Baterías* de El Salvador (*Baterías*), a car battery company with a factory located in the town of *Sitio* del Niño in El Salvador.[12] The "Record" — the trademark name of the company's

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Science, the United States National Academy of Sciences, and the IPCC). National Aeronautics and Space Administration, Scientific Consensus: Earth's Climate is Warming, *available at* https://climate.nasa.gov/scientific-consensus/ (last accessed Nov. 30, 2019) (citing John Cook, et al., *Consensus on consensus: a synthesis of consensus estimates on human-caused global warming*, ENVIRON. RES. LETT., Volume No. 11, Issue No. 4, at 6; John Cook, et al., *Consensus on consensus: a synthesis of consensus estimates on human-caused global warming*, ENVIRON. RES. LETT., Volume No. 8, Issue No. 2, at 3; William R. L. Anderegg, Expert credibility in climate change, 107 PROC. NAT'L ACAD. SCI. USA 12107, 12107-09 (2010); P. T. Doran & M. K. Zimmerman, *Examining the Scientific Consensus on Climate Change*, 90 EOS TRANSACTIONS AM. GEOPHYSICAL UNION 22, 22 (2009); & Naomi Oreskes, *Beyond the Ivory Tower: The Scientific Consensus on Climate Change*, 306 SCIENCE 1686, 1686 (2004)).

12. Raúl Gutiérrez, Inter Press Service News Agency, EL SALVADOR: A Battery of Charges Over Lead Poisoning, *available at* http://www.ipsnews.net/2007/10/

products[13] and also the nickname given to its factory by the townspeople — was in the business of recycling lead-acid batteries.[14] In recent years, the town had been contaminated with lead, resulting in severe lead poisoning that affects the air quality, water sources, and the health of those who live there.[15] The reason for the contamination, a court later concluded, was the fact that the Record had reneged on its promises to environmental regulators that it would update its pollution controls by installing systems to remove lead from the factory's water and improving the storage of contaminated slag.[16] None of these were ever accomplished, even though profit statements of *Baterías* indicate that it could have afforded the expense.[17]

An initial unequivocal denial by the government that the factory was the cause of the pollution was soon followed by a series of finger-pointing between different government departments as to who was ultimately responsible for the failure in regulation.[18] On 23 September 2007, in response to intense public pressure, the Record was suddenly and haphazardly shut down.[19] In a town whose name meant "Children's Place," it is tragic that the those most acutely affected by the symptoms of lead poisoning — "headaches, bone pain, [diarrhea], urinary and respiratory infections, kidney failure, and even cancer" — were children.[20]

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el-salvador-a-battery-of-charges-over-lead-poisoning (last accessed Nov. 30, 2019).

13. *Id.*

14. M. Sim, El Salvador Remedy May Happen at Last, *available at* http://www.pureearth.org/blog/el-salvador-remedy-may-happen-at-last (last accessed Nov. 30, 2019).

15. Gutiérrez, *supra* note 12.

16. Chris Hamby, The Court that Rules the World, *available at* https://www.buzzfeed.com/chrishamby/super-court?utm_term=.pg606D8vE#.itxA6K2Gq (last accessed Nov. 30, 2019).

17. *Id.*

18. *Id.*

19. Sim, *supra* note 14.

20. Gutiérrez, *supra* note 12.

In 2008, in the wake of the fallout from closure of the Record, the Attorney General of El Salvador charged *Baterías* and its three owners with aggravated environmental pollution,[21] which in turn induced the latter's legal team to resort to Investor-State Dispute Settlement (ISDS) before the International Centre for the Settlement of Investment Disputes (ICSID),[22] a mechanism provided for in both the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) and the Bilateral Investment Treaty (BIT) between the United Kingdom (UK) and El Salvador (UK-El Salvador BIT).

In 2009, two letters were sent simultaneously to the government of El Salvador, addressed to its President, its Minister of Foreign Affairs, and its Minister of Public Health and Social Service.[23] Both were written by Jonathan Hamilton, the head of Latin American Arbitration at the law firm of White and Case, which specializes in the field of ISDS.[24] The first letter was on behalf of Mr. José Ofilio Guardián (Mr. Guardián), owner of *Baterías*, and a citizen of both El Salvador and the United States (US); the second, on behalf of a group of five investors of *Baterías*, all US citizens, and some of whom were also citizens of either El Salvador or Nicaragua.[25] The letters, denominated as "[Notices] of Intent to Submit a Claim of Arbitration," stipulated the provisions under both the CAFTA-DR and the UK-El Salvador BIT that the government of El Salvador had allegedly breached — national treatment, the

21. Hamby, *supra* note 16.

22. *Id.*

23. Letter *from* Jonathan C. Hamilton of White and Case LLP (on behalf of José Ofilio Guardián of Baterías de El Salvador, S.A. de C.V.) *to* President Elías Antonio Saca, Minister of Foreign Affairs Marisol Argueta de Brillas, & Minister of Public Health and Social Service José Guillermo Maza Brizuela (May 29, 2009) (on file with Chris Hamby) & Letter *from* Jonathan C. Hamilton of White and Case LLP (on behalf of Ms. Sandra Lacayo Escapini, et al.) *to* President Elías Antonio Saca, Minister of Foreign Affairs Marisol Argueta de Brillas, & Minister of Public Health and Social Service José Guillermo Maza Brizuela (May 29, 2009) (on file with Chris Hamby) [hereinafter Hamilton letters].

24. Hamby, *supra* note 16.

25. Hamilton letters, *supra* note 23.

most-favored nation clause, minimum standard of treatment, and expropriation and compensation.[26]

According to Mr. Guardián and the group of American-Salvadoran/Nicaraguan investors, the closure of the Record constituted "unlawful criminal proceedings," expropriation "without [ ] public purpose," and an "unlawful and discriminatory sanction."[27] These stipulations are standard features in BITs.[28] Essentially, they "obligate contracting [S]tates to abstain from discriminatory treatment of covered investments, including in times of war, revolution, and civil disturbance."[29] Any treatment, special protection, or compensation enjoyed by the Host State's own nationals must also be granted to foreign investors and investments within the scope of the BIT.[30]

Although the potential ISDS case was not related, legally speaking, to the criminal case pending against the company and its managers in the El Salvadoran court, the lead criminal defense lawyer of the *Baterías* owners admitted that the former was "necessary to strengthen" the latter.[31] Ultimately, the mere threat[32] of ISDS proceedings — the political cost, the legal expenses, and the possibility of having to pay an award amounting to US$70 million in damages — persuaded the prosecution to enter into a settlement, the terms of which included a promise by *Baterías* and its investors that the ISDS case would not be pursued.

2. Conflicting Interests or Two Sides of the Same Coin?

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26. *Id.*

27. Hamby, *supra* note 16 (citing Hamilton letters, *supra* note 23).

28. *See* Cornell Law School, Bilateral investment treaty, *available at* https://www.law.cornell.edu/wex/bilateral_investment_treaty (last accessed Nov. 30, 2019).

29. JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 338 (2013).

30. *Id.*

31. Hamby, *supra* note 16.

32. *Id.*

El Salvador's manmade disaster[33] and the havoc it wrecked on the lives of all those affected, is a story of seemingly conflicting interests. On the one hand, there is the obligation on the part of the Host State to protect foreign investment, while on the other hand, there is its obligation and prerogative to impose regulations when and where it sees fit, particularly with respect to health, the environment, and matters of national security. The Record of El Salvador is an example — one among many — of a dichotomy that is far too frequently forced, played out in a way that is often more detrimental to the Host State, but can likewise result in unwarranted loss on the part of the foreign investor.

In 2006, a similar situation[34] took place in Egypt, when Hussain Sajwani (Sajwani) — a wealthy real estate mogul from Dubai — acquired at an incredibly low price a large portion of land near Cairo, from former President Hosni Mubarak's (Mubarak) authoritarian government.[35] Sajwani intended to use the land for the construction and operation of a luxury resort.[36] Five years later, however, the resort had yet to materialize.[37] In February 2011, Mubarak was then overthrown by a series of mass protests,[38] and the new regime was eager to hold accountable those who had profited off its predecessor's corrupt practices — including Sajwani, who had acquired his vast expanse of Egyptian land for next to nothing.[39] An Egyptian criminal court sentenced him to five years in prison.[40] Adopting a strategy similar to that of the *Baterías* owners, he brought the case before the ICSID, effectively "[taking it] out of the Egyptian court system and [placing] it in the hands of three private lawyers ... For Egypt, the potential losses were big and would come as the country struggled to

33. *Id.*

34. The following narration of events is taken from Hamby, *supra* note 16.

35. *Id.*

36. *See* Hamby, *supra* note 16.

37. *Id.*

38. Al Jazeera and Agencies, Timeline: Egypt's revolution, *available at* https://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html (last accessed Nov. 30, 2019).

39. *See* Hamby, *supra* note 16.

40. Hamby, *supra* note 16.

revive its floundering economy. It decided to settle."[41] A statement from the Egyptian government said that the settlement would "spare [it] from the risks of international arbitration" and, more importantly, "safeguard its image abroad[,] and reassure [any] investors who [might have been] scared off by continuing political uncertainty."[42]

While many disputes brought before the ICSID are settled before a Tribunal renders an award (e.g., the Record of El Salvador and Sajwani's luxury resort in Cairo), there are instances in which the parties see the ICSID ISDS process through till the end. In these cases, the Host State may ultimately be compelled to pay a price to the foreign investor by way of compensation or damages. The following are some examples of ICSID ISDS cases[43] in which Host States were ordered by ICSID Tribunals to pay amounts that can only be described as exorbitant, vis-à-vis the formers' annual government budget.

41. *Id.*

42. Egypt says disputes with Dubai's DAMAC are resolved, *available at* http://www.reuters.com/article/egypt-damac-idUSL6N0DW4PL20130515 (last accessed Nov. 30, 2019).

43. The information in this table was taken from Hamby, *supra* note 16, which was in turn taken from the Investment Policy Hub website of the United Nations Conference on Trade and Development.

	Amount Awarded	Government Annual Budget	Percent of Government Annual Budget
Venezuela v. Mobil[44] (2014)	$1.6 billion[45]	$247 billion (in 2016)[46]	.6%
Ecuador v. Occidental Petroleum[47] (2015)	$1.1 billion[48]	$29.8 billion (in 2016)[49]	3.6%

44. Mobil Corporation, et al., v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014).

45. Hamby, *supra* note 16 & Matthew Weiniger & Florencia Villaggi, Exxon Mobil is awarded US$1.6 billion in ICSID claim against Venezuela – to be set off against award in parallel contractual arbitration, *available at* https://hsfnotes.com/arbitration/2014/10/16/exxon-mobil-is-awarded-us1-6-billion-in-icsid-claim-against-venezuela-to-be-set-off-against-award-in-parallel-contractual-arbitration/#page=1 (last accessed Nov. 30, 2019).

46. Hamby, *supra* note 16 & Z.C. Dutka, 2016 Budget Unveiled as Venezuela Pushes for Price Ceiling at OPEC Meeting, *available at* https://venezuelanalysis.com/news/11595 (last accessed Nov. 30, 2019).

47. Occidental Petroleum Corporation v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (Nov. 2, 2015).

48. Hamby, *supra* note 16 & Mark W. Friedman, et al., Expropriation and Nationalisation, *available at* https://globalarbitrationreview.com/chapter/1142558/expropriation-and-nationalisation (last accessed Nov. 30, 2019). *See also Occidental Petroleum*, ICSID Case No. ARB/06/11, ¶ 586.

49. Hamby, *supra* note 16 & Z.C. Dutka, 2016 Budget Unveiled as Venezuela Pushes for Price Ceiling at OPEC Meeting, *available at* https://venezuelanalysis.com/news/11595 (last accessed Nov. 30, 2019).

Zimbabwe v. Bernardus[50] (2005)	$10.6 million[51]	$4 billion (in 2015)[52]	.26%

When claims of this sort were first filed under the North American Free Trade Agreement's (NAFTA) dispute resolution mechanism at the beginning of the 21st century, governments and observers were caught off-guard at "the unexpectedly broad and aggressive use of this process to challenge public policy and public welfare measures, including environmental measures[.]"[53] It seemed that "the provisions designed to ensure security and predictability for the investors [had] ... created uncertainty and unpredictability for environmental ... regulators."[54]

The "growing body of cases where public welfare legislation has been challenged under trade and investment agreements"[55] has created anxiety over

50. Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009).

51. Hamby, *supra* note 16 & UNCTAD, Funnekotter v. Zimbabwe, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/216/funnekotter-v-zimbabwe (last accessed Nov. 30, 2019).

52. Hamby, *supra* note 16 & Bertelsmann Stiftung, BTI 2018 Country Report: Ecuador, *available at* https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Ecuador.pdf (last accessed Nov. 30, 2019).

53. Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 2 (2011) (citing Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment (1999 Working Paper of the International Institute for Sustainable Development) at 5, *available at* http://www.iisd.org/pdf/nafta.pdf (last accessed Nov. 30, 2019)).

54. *Id.*

55. Howard Mann, *The rights of States to regulate and international investment law: A comment*, *in* THE DEVELOPMENT DIMENSION OF FDI: POLICY AND RULE-MAKING PERSPECTIVES 211 (2003).

whether there may be an actual "loss of national sovereignty in the face of broader and deeper trade and investment obligations being generated at the international level"[56] — or, at the very least, a chilling effect on a State's regulatory powers. This gives rise to a number of legal issues — particularly in the area of international environmental law and climate change — some of which this Note seeks to address.

B. Legal Issues and Thesis Statement

1. Legal Issues

Climate change has forced a re-evaluation of the legal regimes within public international law, not least of which is international investment law, and the mechanisms and manners through which it interacts with international environmental law. A consideration of these two regimes reveals what seems to be an institutional and normative conflict between the two. One reason for this is the fact that "[i]nvestment treaties are primarily concerned with attracting foreign investment by offering substantive protections to foreign investors, including recourse to international arbitration[,] to resolve any disputes with the [H]ost [S]tate regarding violations of the treaty."[57] The question therefore is whether "the objective of investment agreements [is] to protect foreign investment, or to promote and protect sustainable foreign investment[.]"[58]

It is the submission of this Note, however, that this "one or the other" dichotomy between investment and climate change is neither inherent nor unavoidable. In fact, the two legal regimes can and should interact harmoniously with one another. Unfortunately, many BITs — including a majority of those which the Philippines has entered into with other States — pit these two areas of law against each other, because of the vagueness of their substantive provisions and the inadequacy of the dispute settlement mechanisms referred to or contained within them. This gives rise to the following legal issues:

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56 *Id.*

57. Moloo & Jacinto, *supra* note 53, at 4.

58. Mann, *supra* note 55, at 211.

(1) Whether or not a State is obliged under international law to impose regulatory measures for the mitigation of climate change (First Legal Issue);

(2) Whether or not a State may fulfill its aforementioned obligation, if any, to impose regulatory measures for the mitigation of climate change, notwithstanding the substantive protections guaranteed to a foreign investor under a BIT (Second Legal Issue); and

(3) Whether or not the ICSID ISDS Mechanism under a BIT is an appropriate remedy such that it can accommodate disputes arising out of an alleged violation of a substantive protection through the imposition of regulatory measures for the mitigation of climate change (Third Legal Issue).

It would be overly simplistic to reflect on these issues through the lens of "good versus evil" — the wily, profit-centric foreign investors versus the hapless and ineffectual government. That characterization is problematic, because it (1) glosses over the reality of a globalized economy and the nuances that come with it, and (2) assumes that international environmental law and climate change exist in a vacuum, and can only be upheld if aggressively pitted against international investment law.

Ultimately, what is called for is a balancing of rights, obligations, and, regimes (i.e., "a balance between principles regarding the protection and promotion of foreign investment on the one hand and principles regarding the protection of society and the environment on the other"[59]). This can only take place in a framework that recognizes investment and climate change as two sides of the same coin, instead of two inherently opposed legal regimes with unavoidably conflicting interests. Unfortunately, the ICSID ISDS mechanism under BITs often reflects the latter paradigm.

In effect, although a State should be able to comply with its obligations to enact regulatory measures for the mitigation of climate change, notwithstanding the substantive protections guaranteed by it to foreign investors under a BIT, the application of this principle on a case-to-case basis

59. Shalanda H. Baker, *Climate Change and International Economic Law*, 43 ECOLOGY L.Q. 53, 58 (2016) (citing Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1040-41 (2010)).

cannot be properly addressed under the ISDS mechanism of a BIT. This is due to the absence of any treaty-based general exceptions, a lack of sufficient standards for the balancing of interests when public policy is involved, among other reasons to be discussed in Part IV of this Note. The result is the forced dichotomy between investment and environment; a chilling effect on a State's prerogative to impose climate change mitigation measures; and a lost opportunity for effective global action towards climate change mitigation and sustainable development.

While similar issues have always been at the heart of international environmental law and investment law, the matter "takes on renewed importance in the climate change era[.]"[60] Last 22 April 2016, the Paris Agreement was opened for signature at the United Nations (UN) Headquarters in New York.[61] The Agreement was hailed as unprecedented, not only because it is a remarkable display of political will,[62] but because it imposes a hard law obligation on State parties to reduce their greenhouse gas emissions in line with their Nationally Declared Contributions (NDCs). Yet under the status quo (i.e., the ICSID ISDS mechanism under BITs), both the willingness and ability of a State to comply with this obligation is threatened. Investment treaty arbitration, including ISDS, has been called the "last frontier of climate change-related disputes,"[63] with a number of investment treaty arbitrations concerning climate change regulatory measures ongoing.[64] Further complicating matters, "[c]limate change and foreign direct

60. *Id.* at 58.

61. Conference of the Parties on its twenty-first session, Paris, France, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Jan. 29, 2016) & The Paris Agreement under the United Nations Framework Convention on Climate Change, 2016 O.J. (L 282) 4, *opened for signature* Apr. 22, 2016 [hereinafter The Paris Agreement].

62. *The Paris Agreement marks an unprecedented political recognition of the risks of climate change*, THE ECONOMIST, Dec. 12, 2015, *available at* https://www.economist.com/news/international/21683990-paris-agreement-climate-change-talks (last accessed Nov. 30, 2019).

63. Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*, 48 VAND. J. TRANSNAT'L L. 1285, 1315 (2015).

64. *Id.*

investments have traditionally been dealt with through separate subfields of international law."[65] This Note thus seeks to "[provide] a useful entry point to [understanding] the climate change problem at the intersection of international [investment] law and international environmental law[,]" [66] particularly with respect to the ICSID ISDS mechanism under a BIT.

2. Thesis Statement

A State is obliged under international law to impose regulatory measures for the mitigation of climate change. [67] It may fulfill this obligation notwithstanding the substantive protections guaranteed to a foreign investor under a BIT. However, the status quo ICSID ISDS mechanism under a BIT is an inappropriate remedy, because it cannot accommodate disputes concerning an alleged violation arising out of a State's imposition of regulatory measures for the mitigation of climate change.

C. Significance of the Study

The significance of this Note is rooted in two realities. *First*, the continuing development and increasing prevalence of international investment arbitration, particularly those cases concerning alleged breaches of the substantive protections guaranteed under BITs, initiated under the ICSID ISDS mechanism. *Second*, the Philippines' foreign investment status quo, specifically the fact that the Philippines still relies on BITs with (1) vaguely and overly general substantive protection provisions and (2) referrals to the ISDS mechanism of the ICSID.

1. International Investment Arbitration

The continuing development and increasing prevalence of international investment arbitration show no sign of slowing, according to the "Investor–

65. Vadi, *supra* note 63, at 1343.

66. Baker, *supra* note 59, at 58.

67. *See generally* Office of the High Commissioner for Human Rights, Understanding Human Rights and Climate Change (A Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change), *available at* https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf (last accessed Nov. 30, 2019).

State Dispute Settlement: Review of Developments in 2016"[68] (Review of Developments) — a yearly report published by the UN Conference on Trade and Development (UNCTAD) that provides facts and figures, as well as identifies certain trends in international investment arbitration. The Review of Developments reported 767 known investment arbitration cases as of 2016,[69] two-thirds of which were brought pursuant to violations of BITs[70] (as opposed to multilateral investment treaties). In that same year, 62 new cases were initiated, mostly by foreign investors from developed countries.[71] Foreign investors from the Netherlands, the UK, and the US initiated the most number of ISDS cases, bringing 10, 10, and seven, respectively.[72] With respect to the sectors of the economy involved, approximately 60% of investment arbitration cases filed in 2016 concerned the service sector, as reflected in the following table:[73]

Services Sector Activity	Number of Cases Filed in 2016
Supply of electricity and gas	11 cases
Construction	six cases
Information and communication	six cases
Financial and insurance services	four cases
Real estate	three cases
Transportation and storage	two cases

68. *See* United Nations Conference on Trade and Development, Investor-State Dispute Settlement: Review of Developments in 2016 (Report Published Online by the United Nations Conference on Trade and Development) at 2, *available at* http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf (last accessed Nov. 30, 2019). The facts, figures, and trends mentioned in this Section (*International Investment Arbitration*) were all taken from this source.

69. United Nations Conference on Trade and Development, *supra* note 68, at 4.

70. *Id.* at 3.

71. *Id.* at 2.

72. *Id.*

73. *Id.* at 3-4.

Arts, entertainment, and recreation	two cases
Accommodation and food service	one case
Administrative and support service	one case

Following the services sector, the primary industries — those involved in the extraction of natural resources, such as mining, forestry, fisheries, among others — and manufacturing industry make up 24% and 16% of new cases respectively.[74] With respect to the nature of the actions challenged in investment arbitration cases filed in 2016, a majority concerned "alleged direct expropriations of investments" and "legislative reforms in the renewable energy sector," as reflected in the following table:[75]

Nature of Host State Action Challenged	Number of Cases Filed in 2016
Alleged direct expropriations of investments	At least seven cases
Legislative reforms in the renewable energy sector	At least six cases
Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions	At least five cases
Termination, non-renewal or alleged interference with contracts or concessions	At least five cases
Revocation or denial of licenses or permits	At least five cases
Other measures (e.g., the designation of national heritage sites, environmental conservation zones, indigenous protected areas and national parks, and money	No available numbers, as information about several cases is lacking.

74. *Id.* at 4.

75. United Nations Conference on Trade and Development, *supra* note 68, at 4.

laundering and anti–corruption investigations)	

Approximately 60% of all published decisions on the merits by the end of 2016 were decided in favor of the foreign investor, while 40% were decided in favor of the Host State.[76] With respect to the amounts claimed by foreign investors — and granted to them, in those instances in which an award was issued in their favor — information is incredibly limited, as only about half of all settled arbitration case awards have been publicly disclosed.[77] The following table reflects the mean and median of the awards claimed and granted, based on the available data.[78]

	Award Claimed	Award Granted
Mean	$1.4 billion	$545 million
Median	$100 million	$20 million

2. The Philippines' Foreign Investment Status Quo

BITs, under which a majority of international investment arbitration cases are brought, are still a considerable part of the Philippines' foreign investment status quo and the policy and legal regimes that its government makes use of to attract and regulate foreign investment. The Philippines is a party to 32 active BITs, most of which provide for recourse to the ICSID as the primary dispute settlement mechanism, assuming attempts at amicable settlement fail. Among these are BITs with the Netherlands and the UK, the two developed countries from which foreign investors initiated the most number of cases (20 each). The Philippines is also heavily reliant on the service industries — the sector from which approximately 60% of international investment cases arise — with much of the foreign investment it receives going directly into that particular sector of the economy. The mining and manufacturing industries are likewise a significant part of its economy.

76. *Id.* at 5.

77. *See* United Nations Conference on Trade and Development, *supra* note 68, at 4 & 39-40.

78. United Nations Conference on Trade and Development, *supra* note 68, at 5.

The following hypothetical further illustrates the significance of this Note in the Philippine context. The hypothetical is based on facts (i.e., the Philippines-Thailand BIT, the Bangchak Corporation's investments, the tax exemption for petroleum exploration contractors, and the Philippines' Paris Agreement commitments).[79]

Among the Philippines' 32 active BITs is a BIT with Thailand that has been in force since 1996.[80] The Bangchak Corporation, a Thai energy company,[81] is invested in petroleum exploration in the Philippines, because one of its wholly owned subsidiaries owns Nido Petroleum, which is a Joint Venture Partner of the Philippine National Oil Company in the West Calamian and East Sabina Service Contracts. The Bangchak Corporation's investment is thus protected under the Philippines-Thailand BIT. As a general rule, petroleum exploration contractors enjoy an exemption from all national

79. *See generally* Agreement Between the Government of the Republic of the Philippines and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, Phil.-Thai., 1994 UNTS 423; Nido Petroleum Limited, Company Profile, *available at* https://www.bloomberg.com/profile/company/NDO:AU (last accessed Nov. 30, 2019); PNOC Exploration Corporation, Service Contract No. 63 – East Sabina, *available at* http://pnoc-ec.com.ph/service-contract-no-63-east-sabina/ (last accessed Nov. 30, 2019); PNOC Exploration Corporation, Service Contract No. 58 – East Calamian, *available at* http://pnoc-ec.com.ph/service-contract-no-58-west-calamian-2 (last accessed Nov. 30, 2019); Department of Energy, Oil and Gas, *available at* https://www.doe.gov.ph/oil-and-gas (last accessed Nov. 30, 2019); & Republic of the Philippines, Intended Nationally Determined Contributions, *available at* https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Philippines/1/Philippines%20-%20Final%20INDC%20submission.pdf (last accessed Nov. 30, 2019 [hereinafter Philippine INDC].

80. Philippines - Thailand BIT (1995), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2768/philippines---thailand-bit-1995- (last accessed Nov. 30, 2019).

81. Bangchak Corporation Public Company Limited, About Us, *available at* https://www.bangchak.co.th/en/Aboutus (last accessed Nov. 30, 2019).

taxes, except income taxes,[82] to encourage foreign investors like Bangchak Corporation to continue making investments in the domestic petroleum industry.[83]

The Philippine government decides that, pursuant to its Paris Agreement obligations, it needs to start dis-incentivizing further petroleum exploration in favor of more renewable sources of energy, such as wind or solar. It should be noted that this is certainly within the realm of possibility, given that the Philippines has committed under the Paris Agreement to reduce its emissions by 70% by 2030, relative to its "business as usual" scenario.[84] Pursuant to this policy shift, the Philippine government imposes a regulation in the form of a tax on carbon dioxide that is emitted in excess of a certain threshold. Bangchak Corporation is angered by this latest development. According to Bangchak Corporation, this new tax constitutes indirect expropriation and a violation of the right to fair and equitable treatment under the Philippines-Thailand BIT. Bangchak Corporation decides to bring an arbitration case before the ICSID, pursuant to the Philippine-Thailand BIT. This hypothetical scenario will then play out in one of two ways.

In Scenario one, the mere threat of having to undergo ISDS proceedings — the political cost, the legal expenses, and the possibility of having to pay millions of dollars in damages and awards — persuades the Philippines to either abandon the regulation completely, or make an exception for Bangchak Corporation, which would make the regulation less effective.

In Scenario two, the Philippines decides to proceed with arbitration before the ICSID. The Philippines faces an uphill battle, however. The ICSID Tribunal may be more inclined to render an award in favor of the foreign investor, because of several reasons: Host State obligations under non-investment treaties often do not fare well in their treatment by arbitrators; the

82. Amending Presidential Decree No. 8 Issued on October 2, 1972, and Promulgation of an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds Therefor [The Oil Exploration and Development Act of 1972], Presidential Decree No. 87, § 12 (1) (1983).

83. *See* The Oil Exploration and Development Act of 1972, whereas cl. para. 2 & § 2.

84. Climate Action Tracker, Philippines: Country summary, *available at* https://climateactiontracker.org/countries/philippines (last accessed Nov. 30, 2019).

use of generally worded "stock clauses" may give rise to overly broad interpretations of the substantive protections in the BIT; neither the ICSID Convention nor the Philippine-Thailand BIT provides for "general exceptions" or "non-precluded measures clauses;" and inconsistent ICSID awards have failed to provide a sufficient standard by which regulatory measures to mitigate climate change may be evaluated. If an award is in fact rendered in favor of the foreign investor, the Philippines would be forced to bear both the financial and the equally crippling political cost of the defeat.

Clearly, neither Scenario one nor Scenario two is an acceptable outcome. There should be a fair and proper balancing of its international investment law obligations and its international climate change law obligations. But when the hypothetical dispute between Bangchak Corporation and the Philippines arose, Scenarios one and two demonstrate that there was no adequate way to resolve it. The ICSID-ISDS mechanism pitted the international investment law obligations and the international climate change law obligations against each other and forced them to go head to head, in such a way that a proper balancing of obligations and circumstances cannot be guaranteed. It is from such a problem that the aforementioned legal issues of this Note arise.

D. Methodology

Following this Part I and Part II focuses on the first legal issue of this Note (i.e., whether or not a State is obliged under international law to impose regulatory measures for the mitigation of climate change).

Part III is a Review of Related Literature for international investment law. It discusses the evolution of international investment treaties, the ICSID system, and the standard substantive protections under BITs.

Part IV addresses the second legal issue and third legal issue of this Note (i.e., whether or not a State may fulfill its aforementioned obligation to impose regulatory measures for the mitigation of climate change, notwithstanding the substantive protections guaranteed to a foreign investor under a BIT; and whether or not the ICSID ISDS mechanism under a BIT is an appropriate remedy, such that it can accommodate disputes arising out of an alleged violation of a substantive protection due to a State's imposition of regulatory measures for the mitigation of climate change).

The Analysis in this Part is propped up by three normative (i.e., relating to standards of behavior) pillars: (1) the obligation to impose regulatory measures for the mitigation of climate change; (2) the international

environmental law principles of sustainable development and the obligation not to cause transboundary harm; and (3) the Article XX General Exceptions under the GATT of the WTO. It begins with a discussion of sustainable development and the obligation not to cause transboundary harm — two environmental law principles of a renewed importance, in light of climate change.

Applying the concept of systemic integration, which is used to harmonize seemingly conflicting norms rooted in different international legal regimes, it will then make the case that the Paris Agreement and the aforementioned principles are part and parcel of the same system of international law as the substantive protections guaranteed to foreign investors, and these must be read together and reconciled. Thus, the substantive protections guaranteed to foreign investors under BITs do not, cannot, and should not interfere with a State's obligation to impose regulatory measures for the implication of climate change. A discussion of the Article XX General Exceptions follows, to demonstrate that the Article itself embodies the principle of systemic integration (i.e., the harmonization of norms within a single legal regime) and is likewise a norm in itself, the underlying principles of which must likewise be harmonized with the norms of other regimes of international law.

Finally, Part IV will illustrate precisely how the substantive protections of prohibition against unlawful expropriation, prohibition against discrimination (national treatment), and fair and equitable treatment can and should be interpreted in order to make such an accommodation.

Part V sums up the Conclusion and Recommendation of this Note.

II. IS THE STATE OBLIGED UNDER INTERNATIONAL LAW TO IMPOSE REGULATORY MEASURES FOR THE MITIGATION OF CLIMATE CHANGE?

A. The Paris Agreement

The Paris Agreement is a "curious instrument."[85] While it falls under the definition of a treaty under the Vienna Convention on the Laws of Treaties,[86]

85. Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, J. ENVTL. L. 337, 337 (2016).

86. Under the Vienna Convention, a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

it is also replete with provisions that have little to no normative content (i.e., provisions that do not create rights or obligations, but instead "provide context, offer reassurances[,] and construct narratives").[87] Instead, "[c]ontext setting, mutual reassurances[,] and storytelling — usually the bread and butter of preambular recitals — [all] feature in key provisions of the Paris Agreement."[88]

This is by no means the result of clumsy drafting; rather, it is the inevitable result of having to negotiate a text that accommodates the conflicting ambitions and reservations of potential state parties,[89] with the end in view of inducing as many of them to ratify the treaty as possible. In the years leading up to the Paris Agreement, its legal outcome (i.e., whether or not the Paris Agreement would be legally binding) was the bone of contention in negotiations, beginning at COP 17 in Durban in 2011. The legal outcome of a climate change treaty is determined by its legal form and legal character. Legal character is "the extent to which the provision creates rights and obligations for Parties, sets standards for State [behavior], and lends itself to assessments of compliance/non-compliance and the resulting ... consequences."[90] In other words, the legal character of an instrument sets forth what a State Party can do, should do, and shall do, as well as the legal effect, if any, of its action or inaction.

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whatever its particular designation[.]" Vienna Convention on the Law of Treaties art. 2 (1) (a), *opened for signature* May, 23 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

87. Rajamani, *supra* note 85, at 337.

88. *Id.* at 338.

89. *See* Rajamani, *supra* note 85, at 338.

90. Rajamani, *supra* note 85, at 338.

Legally-Binding Agreement	
Advantages	Disadvantages
(1) It tends to "generate credible commitments" [91] that "[crystallize] international commitments into domestic legislative action;"[92] (2) Predictability, certainty, and accountability;[93] (3) It "[communicates] expectations,' '[produces] reliance,' and [generates] a compliance pull;"[94] (4) Violation of a legally binding instrument has a higher reputational cost;[95] and	(1) Higher "sovereignty costs;"[97] (2) Loss of autonomy in policy and decision-making, with respect to the area covered by the agreement;[98] and (3) Possible exposure of national processes to the scrutiny of the international community.[99]

91. *Id.* at 340 (citing Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L. ORG. 421, 426 (2000)).

92. Rajamani, *supra* note 85, at 340.

93. Rajamani, *supra* note 85, at 340.

94. *Id.* (citing Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law'*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 8 (Dinah Shelton ed., 2000)).

95. Rajamani, *supra* note 85, at 340.

97. *Id.* (citing Abbott & Snidal, *supra* note 91, at 426).

98. Rajamani, *supra* note 85, at 340 (citing Abbott & Snidal, *supra* note 91, at 436-41).

99. *Id.*

(5) It can better survive domestic political changes.[96]	

The Alliance of Small Island States[100] wanted "ambitious performance from Parties through internationally legally binding, quantified mitigation commitments ... . [With] developed countries [continuing] to take the lead, and developing countries, especially the most vulnerable, [receiving] support to make [these commitments] happen."[101] Likewise, the European Union (EU) wanted to bind all parties to cut emissions:[102] "We need clarity. We need to commit," emphasized its Climate Commissioner Connie Hedegaard.[103] China and India, on the other hand, refused to commit to a legally binding instrument, especially given that its particular provisions were still to be negotiated.[104] As stated by India's Environment Minister Jayanthi Natarajan, "Am I to write a blank [check] and sign away the livelihoods and sustainability of 1.2 billion Indians, without even knowing what the [E.U.]

96. *Id.* (citing Shelton, *supra* note 94, at 10–13; Jake Werksman, *The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement*, Address at the University of Edinburgh (Feb. 23, 2016) (transcript *available at* https://www.law.ed.ac.uk/sites/default/files/2019-06/BrodiesLectureontheLegalCharacteroftheParisAgreementFinalBICCLEdinburgh.pdf; & Abbott & Snidal, *supra* note 91, at 426)).

100. Alliance of Small Island States, About Us, *available at* http://aosis.org/about (last accessed Nov. 30, 2019).

101. This was the sentiment of the Alliance of Small Island States in Durban, which it reiterated in its Opening Statement for the 21st Conference of Parties to the UNFCCC in Paris in 2015. Alliance of Small Island States, Opening Statement for the 21st Conference of Parties to the UNFCCC at Paris (2015) (transcript *available at* https://unfccc.int/sites/default/files/cop21cmp11_hls_speech_aosis_maldives.pdf (last accessed Nov. 30, 2019)).

102. John Vidal & Fiona Harvey, *Durban climate deal struck after tense all-night session*, THE GUARDIAN, Dec. 11, 2011, *available at* https://www.theguardian.com/environment/2011/dec/11/durban-climate-deal-struck (last accessed Nov. 30, 2019).

103. *Id.*

104. *Id.*

roadmap contains?"[105] After the so-called "Durban huddle" — "a series of rather strange and certainly unusual public huddles"[106] — India agreed to a "protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties."[107] The final determination of legal form would not be until the end of the fourth year of the negotiations that were to follow.[108]

In the end, much of what persuaded even the most disinclined States to agree to a legally binding agreement — apart from the "irresistible political momentum [that] had built up over time[,] due to the efforts of many vulnerable countries,"[109] — was (1) the fact that they would still be able to set their own NDCs, effectively tempering the loss of sovereignty;[110] and (2) the understanding that there would be leeway to negotiate for greater or lesser legal force for certain provisions.[111] For instance, the US, in its Submission on Elements of the 2015 Agreement "[assumed] that certain elements set forth [ ] will be internationally legally binding, including that a Party [maintains] a specific commitment in a schedule, provide clarifying information, report on implementation, follow accounting provisions, and subject its implementation

105. *Id.*

106. Jeff Tollefson, Climate negotiators huddle for a dramatic deal in Durban, *available at* http://blogs.nature.com/news/2011/12/climate_negotiators_huddle_for.html (last accessed Nov. 30, 2019).

107. Rajamani, *supra* note 85, at 339 (citing Conference of the Parties on its seventeenth session, Durban, Nov. 28-Dec. 11, 2011, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, ¶ 2, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012)).

108. Rajamani, *supra* note 85, at 339.

109. *Id.* at 341.

110. *Id.*

111. *Id.* at 342.

to review by others,"[112] yet put forth the question of the legal nature of the NDC in its schedule.[113]

The final text of the Paris Agreement is a mix of hard law, soft law, and non-obligations.[114] Notwithstanding the prevalence of these soft law and non-obligation provisions, the legal character of its hard law provisions are not rendered any less binding.

B. Climate Change Regime Dispute Resolution Mechanisms

Climate change dispute resolution often goes into the enforcement of climate change obligations, yet there is a distinction between these two aspects of the legal regime. While the latter pertains to ensuring a party's compliance with its obligations, the former can refer to any "dispute[ ] between two or more states that may occur within a treaty regime."[115]

During the COP 21 in Paris last November 2015, a side event was held — the first of its kind — focusing on the role of international arbitration in the climate change regime[116] — a much needed addition to the regime, given the inadequacy of the use of an adversarial system in the field of environmental law. The international lawyers in attendance at the event worked to "create [ ] and inspire[ ] new perspectives and new approaches to dispute resolution challenges in [the] field [of climate change]."[117] Although the foundation for such a mechanism had already been laid down in in Articles 14 and 24 of the UNFCCC and the Paris Agreement respectively, little had been done in the way of "[exploring] ways in which climate change issues might be factored

112. U.S. Submission on Elements of the 2015 Agreement, *available at* http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf (last accessed Nov. 30, 2019).

113. *Id.*

114. Rajamani, *supra* note 85, at 337.

115. Wendy Miles, *Introduction*, *in* DISPUTE RESOLUTION AND CLIMATE CHANGE: THE PARIS AGREEMENT AND BEYOND 13 (Wendy Miles ed., 2017) [hereinafter Miles, *Introduction*].

116. *Id.* at 8.

117. *Id.*

into existing processes and systems of international dispute resolution, in particular international arbitration."[118]

The obvious starting points for a discussion on climate change regime enforcement and dispute resolution are the applicable provisions under the UNFCCC, Kyoto Protocol, and Paris Agreement.

Article 14 of the UNFCCC provides for the resolution of disputes as follows: "In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice."[119] It also allows Parties, if they so choose, to

> declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, [Parties recognize] as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:
>
> (a) Submission of the dispute to the International Court of Justice; and/or
>
> (b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.[120]

The Kyoto Protocol provides for a review mechanism through national communications of annual inventories that take into account anthropogenic emissions and sinks,[121] as well as periodical reviews of these communications by the COP.[122] The Kyoto Protocol Compliance Mechanism, "designed to strengthen the Protocol's environmental integrity, support the carbon market's credibility[,] and ensure transparency of accounting by Parties[,]"[123]

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118. *Id.*

119. UNFCCC, *supra* note 3, art. 14 (1).

120. *Id.* art. 14 (2).

121. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 7, *opened for signature* Mar. 10, 1998, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

122. *Id.* art. 8.

123. United Nations Framework Convention on Climate Change, An Introduction to the Kyoto Protocol Compliance Mechanism, *available at*

is composed of two branches: the facilitative branch and the enforcement branch. While the facilitative branch "aims to provide advice and assistance to Parties in order to promote compliance,"[124] the enforcement branch "has the responsibility to determine consequences for Parties not meeting their commitments."[125] With respect to the resolution of climate change disputes, Article 19 of the Kyoto Protocol adopts Article 14 of the UNFCCC "*mutas mutandis*."[126]

The Paris Agreement followed through with the facilitative approach of the Kyoto Protocol's review mechanism,[127] stating in Article 15 that its implementation mechanism would be "expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial[,] and non-punitive."[128] It reiterated in Article 24 the dispute resolution mechanism provided for in Article 14 of the UNFCCC, quoted above, likewise stating that the same "shall apply *mutatis mutandis*."[129]

As it stands, frequent resort to arbitration in the short term will, in all likelihood, be in the form of "mixed arbitrations involving private parties and States"[130] as opposed to inter-state arbitration.[131]

The Clean Development Mechanism and Joint Implementation projects under the Kyoto Protocol have already given rise to cases brought before the Permanent Court of Arbitration (PCA) (e.g., those brought pursuant to the arbitration clauses contained in the International Emissions Trading

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http://unfccc.int/kyoto_protocol/compliance/items/3024.php (last accessed Nov. 30, 2019).

124. *Id.*

125. *Id.*

126. Kyoto Protocol, *supra* note 121, art. 19.

127. Miles, *Introduction*, *supra* note 115, at 13.

128. Paris Agreement, *supra* note 61, art. 15.

129. *Id.* art. 24.

130. Judith Levine, *Adopting and Adapting Arbitration for Climate Change-Related Disputes: The Experience of the Permanent Court of Arbitration*, *in supra* note 115, at 27.

131. *Id.*

Association's Model Emissions Trading Agreements).[132] The same is true for the financial mechanisms under the Paris Agreement, like the Green Climate Fund, the financial flows of which are governed by several legal instruments that provide for arbitration before the PCA.[133]

Senior Legal Counsel at the PCA Judith Levine[134] has suggested three ways in which arbitration can be better adapted for use within the climate change legal regime. First, arbitration must be made accessible, particularly by opening up the process to non-State actors, increasing transparency, and giving a voice to non-parties in proceedings (e.g., by inviting comments and *amicus* submissions, or allowing other States to observe and have access to pleadings).[135] Second, arbitration must be able to accommodate "the technical needs of climate change disputes, many of which involve technical scientific evidence."[136] This can be done by mandating that at least one member of a tribunal to be an expert in the science of climate change; by requiring a tribunal to retain technical experts; or by incorporating rules for site visits when the same would aid the tribunal in making a well-informed decision.[137] Third, arbitration rules must have some degree of flexibility.[138] For example, there should be room for conciliation when appropriate, as well as special rules for special circumstances (e.g., a fund for or a ceiling on costs for parties to arbitration who can show they are in need of the same).[139]

It is worth nothing that some have predicted that the resolution of disputes with respect to climate change will continue to depend more on diplomatic relations,[140] as opposed to any judicial or quasi-judicial methods, such as submission to the International Court of Justice (ICJ) or arbitration before an

132. Miles, *Introduction*, *supra* note 115, at 28.

133. *Id.*

134. Permanent Court of Arbitration, Staff, *available at* https://pca-cpa.org/en/about/staff/ (last accessed Nov. 30, 2019).

135. Miles, *Introduction*, *supra* note 115, at 28.

136. *Id.* at 29.

137. *Id.*

138. *Id.* at 30.

139. *Id.*

140. *Id.* at 13.

ad hoc tribunal. As a counter to this hypothesis, the more vulnerable small island developing States have too much to lose and too little time to spare to rely on the relatively unreliable efforts at diplomacy between States that may not have as strong a sense of urgency.[141] The Recommendation portion of this Note under Part V posits arbitration before the PCA as a viable alternative to dispute settlement by an ICSID Tribunal.

C. The Obligation of the State to Impose Measures for the Mitigation of Climate Change

Following the three preceding Review of Related Literature Sections (Paradigms of the Climate Change Legal Regime, Climate Change Regime Dispute Resolution Mechanisms, and The Obligation of the State Impose Measures for the Mitigation of Climate Change), this Section deals with the first legal issue in this Note, and seeks to establish the obligation of the State to impose regulatory measures for the mitigation of climate change. In particular, it will use as bases: (1) the "third-generation" human right to a healthy environment and (2) a State's ratification of the Paris Agreement, to be discussed in turn. It will also provide an overview of *Urgenda Foundation v. the State of Netherlands* (*Urgenda*),[142] a ruling by a Hague District Court holding the government of the Netherlands liable for not having done enough to lessen its greenhouse gas emissions. Although *Urgenda* would have no binding or jurisprudential effect outside of the Netherlands, it is worth discussing, because it lays some groundwork for citizens to hold their State accountable for not sufficiently undertaking efforts to mitigate climate change based on the fact that to do so is an obligation, the derogation of which is a violation of law.

1. The Right to a Healthy Environment: A "Third-Generation" Human Right

The right to a healthy environment has been recognized in a number of international instruments, and the obligation of the State to impose measures to mitigate climate change is rooted in part in its obligation to respect, protect and fulfill this right. The Declaration of the United Nations Conference on

141. Miles, *Introduction*, *supra* note 115, at 13.

142. Urgenda Foundation v. the State of Netherlands, HA ZA 13-1396 (Dist. Ct. 2015) (Neth.).

the Human Environment, also known as the Stockholm Declaration states that

> [m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[143]

The Philippines is one of many States that has recognized a right to environment in its Constitution. Section 16, Article II of the 1987 Constitution declares that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[144] Although this provision has generally been held not to be self-executing, numerous laws have been enacted to give it effect, such as those dealing with forestry, wildlife, solid waste management, clean air, fisheries, animal welfare, water, among others. Likewise, the 1993 landmark *Oposa v. Factoran, Jr.*[145] case recognized a right to a balanced and healthful ecology, along with "the correlative duty to refrain from impairing the environment."[146]

The right to a healthy environment has been characterized as a "third-generation" *human right*, thus —

> Third-generation human rights include solidarity rights, namely those rights that respond to challenges that are not addressed by civil and political rights on one hand, and economic, social, and cultural rights on the other-which can be termed first- and second-generation rights respectively. While the scope of third-generation rights remain debated, they are deemed to include the right to development, the right to self-determination, the right to a

143. United Nations Conference on the Human Environment, Stockholm, June 5-23, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 1, U.N. Doc. A/Conf.48/14/Rev. 1 (1973).

144. PHIL. CONST. art. II, § 16.

145. Oposa v. Factoran, Jr., 224 SCRA 792 (1993).

146. *Id.* at 805.

> healthy environment, and other collective rights [—] rights held by a group qua group rather than by its members severally.[147]

Reaffirming that the right to environment as a human right should be equally recognized and prioritized, the Human Rights Council Resolution 10/4 entitled "Human rights and climate change,"[148] states "that all human rights are universal, indivisible, interdependent[,] and interrelated and that they must be treated in a fair and equal manner, on the same footing and with the same emphasis[.]"[149]

Further in relation to human rights and climate change, the IPCC's Fifth Assessment Report found that "[p]eople who are socially, economically, culturally, politically, institutionally, *or otherwise marginalized are especially vulnerable to climate change* ... This heightened vulnerability ... is the product of intersecting social processes that result in inequalities in socioeconomic status and income ... for example, discrimination on the basis of gender, class, ethnicity, age, and [disability]."[150] This implies that a State, in order to fulfill its obligation to respect, protect, and fulfill human rights, is "required to adopt measures to prevent greenhouse gas emissions, to adopt mitigation measures, inter alia regulating private corporations, and to provide remedies when breaches have occurred."[151]

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147. Vadi, *supra* note 63, at 1301.

148. Human Rights Council, *Human rights and climate change*, Res. 10/4 (March 28, 2008).

149. *Id*. pmbl. cl. para. 4.

150. Christopher B. Field, et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. PART A: GLOBAL AND SECTORAL ASPECTS 6 (Christopher B. Fields, et al. eds. 2014).

151. Vadi, *supra* note 63, at 1304 (citing Siobhdn Mclrneney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENVTL. L. REV. 431, 433, 436-37 (2009); John Knox, *Climate Change and Human Rights*, 33 HARV. ENVTL. L. REV. 477 (2009); & Timo Koivurova, et al., *Climate Change and Human Rights*, *in* CLIMATE CHANGE AND THE LAW 287 (Erkki J. Hollo, et al. eds., 2013)).

2. Obligations Under the Paris Agreement Upon Ratification

State Parties that have ratified the Paris Agreement are obligated under international law to abide by its hard law provisions, following the principle of *pacta sunt servanda*. As provided for in Article 26 of the Vienna Convention on the Law of Treaties, *pacta sunt servanda* mandates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[152]

Once a State ratifies, accepts, approves, or accedes to the Paris Agreement, it enters into force for that State upon the lapse of 30 days from the deposit of its instrument of ratification, acceptance, approval, or accession.[153] A State cannot make any reservations to the Paris Agreement;[154] however, it may withdraw any time after three years from its entry into force, by giving written notification to the Secretary-General of the United Nations who serves as the Depositary.[155] Withdrawal will take effect one year from the Depositary's receipt of such notification.[156]

There are several elements[157] that can be looked at in order to determine the legal force of a particular provision of the Paris Agreement (i.e., whether it is a hard law, soft law, or a non-obligation):

(1) *Location*. The particular part of an agreement in which a provision can be found matters. A preamble, for example, provides context and sets forth the agreement's objectives and purpose, but does not, in and by itself, creates rights or obligations on the part of the State parties.[158] Conversely, if the same or similar statements

152. Vienna Convention on the Law of Treaties, *supra* note 88, art. 26.

153. *Adoption of the Paris Agreement*, *supra* note 61, art 21 (3).

154. Paris Agreement, *supra* note 61, art. 27.

155. *Id.* art. 28 (1).

156. *Id.* art. 28 (2).

157. Rajamani, *supra* note 85, at 341-42.

158. *Id.* at 343 (citing ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (3d ed. 2013) 424–27 & RICHARD GARDINER, TREATY INTERPRETATION (2d ed. 2015) 216–17).

are found in the operational part of an agreement, then it has the capacity to create rights and obligations.[159]

(2) *Subjects or Addressees*. If a provision is addressed to "each Party," it signals an individual obligation;[160] if addressed to "developed country Parties" or "developing country Parties," it signals a right, obligation, or entitlement, in favor of a particular group;[161] if addressed to "Parties," it could possibly be a cooperative or collective obligation or just a universal reference, without necessarily imposing any obligation at all, depending on the presence or absence of other factors;[162] finally, if a provision is written in the passive voice without any addressee, it could merely be generating expectations for the regime and its institutions as a whole.[163]

(3) *Normative Content*. This refers to whether or not the content of a particular provision has a norm-generating quality (i.e., does it lay down requirements for States and set standards for their behavior and compliance?) so as to create specific rights and obligations.[164]

(4) *Language*. How a provision is phrased is one of the more telltale indicators of normative content. The use of "shall" indicates that a particular provision is mandatory, while "should," "strive," and "encourage" is directory or recommendatory.[165] "Will" implies a promise or expectation.[166]

(5) *Precision*. The more precise the standard of assessment for compliance in a particular provision, the greater the obligatory

159. Rajamani, *supra* note 85, at 343.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Rajamani, *supra* note 85, at 343.

166. *Id.*

force.[167] If a provision sets goals or prescribes action, but only vaguely touches on the standard against which compliance with that goal or action will be measured, then it would seem to make the provision more directory than mandatory.[168]

(6) *Oversight*. Closely related to precision is the mechanism in place to identify and, to a certain extent, prevent oversight. These include procedures for transparency, accountability, global stock take, and compliance.[169]

Using the aforementioned elements, the legal force of the provisions of the Paris Agreement can be regarded as occupying varying positions along a spectrum, ranging from hard law obligations that create obligations to non-obligations that merely capture understanding, as illustrated in the table below:[170]

Hard Law Provisions		Soft Law Provisions			Non-Obligations
←					→
Provisions that create obligations	*Provisions that generate expectations*	*Provisions that recommend*	*Provisions that encourage*	*Provisions that set aspirations*	*Provisions that capture understanding*

> These categories — hard, soft[,] and non-obligations — are imprecise and fluid, and there is no precise line between them. Hard obligations meld into soft obligations and soft obligations into non-obligations. For instance, on

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 342 & 344.

> adaptation, an individual obligation (each party) phrased in mandatory terms (shall) is combined with discretionary language (as appropriate).[171]

All provisions of the Paris Agreement can more or less be classified as hard law, soft law, or non-obligation provisions.[172] Among the hard law provisions of the Paris Agreement, the most notable are the following, all of which deal primarily with mitigation or the reduction of greenhouse gas emissions:

(1) Article 3: "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts ... ."[173]

(2) Article 4 (2): "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[174]

(3) Article 4 (5): "Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10[,] and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions."[175]

(4) Article 4 (8): "In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference

171. *Id.* at 352 (citing Paris Agreement, *supra* note 61, art. 7 (9).

172. Many of these were identified in the Rajamani article, which this particular Chapter of this Note has greatly relied on. Rajamani, *supra* note 85, at 342 & 344-52.

173. Paris Agreement, *supra* note 61, art. 3.

174. *Id.* art. 4 (2).

175. *Id.* art. 4 (5).

of the Parties serving as the meeting of the Parties to this Agreement."[176]

(5) Article 4 (9): "Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14."[177]

(6) Article 4 (13):

Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.[178]

(7) Article 4 (15): "Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties."[179]

(8) Article 4 (16):

Parties, including regional economic integration organizations and their Member States, that have reached an agreement to act jointly under paragraph 2 of this Article shall notify the secretariat of the terms of that agreement, including the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions. The secretariat shall in turn inform the Parties and signatories to the Convention of the terms of that agreement.[180]

176. *Id.* art. 4 (8).

177. *Id.* art. 4 (9).

178. *Id.* art. 4 (13).

179. Paris Agreement, *supra* note 61, art. 4 (15).

180. *Id.* art. 4 (16).

(9) Article 4 (17): "Each party to such an agreement shall be responsible for its emission level as set out in the agreement referred to in paragraph 16 of this Article in accordance with paragraphs 13 and 14 of this Article and Articles 13 and 15."[181]

The Philippines signed the Paris Agreement on 22 April 2016 and ratified the same on 14 March 2017.[182] According to its Intended Nationally Determined Contributions (INDC), the Philippines intends to undertake greenhouse gas emissions reduction of about 70% by 2030.[183]

The Philippine INDC is premised on the philosophy of pursuing climate change mitigation as a function of adaptation. As a country highly vulnerable to climate and disaster risks, mitigation measures as presented in the INDC will be pursued in line with sustainable development and a low-emission development that promotes inclusive growth.[184]

These emissions will cut across several sectors, including energy, transport, waste, forestry and industry sectors.[185]

3. Urgenda Foundation v. the State of Netherlands

The Urgenda Foundation (Urgenda) — a contraction of "urgent agenda,"[186] an organization founded "to stimulate and accelerate the transition process to

181. *Id.* art. 4 (17).

182. List of Parties that signed the Paris Agreement on 22 April, *available at* https://www.un.org/sustainabledevelopment/blog/2016/04/parisagreementsinga tures (last accessed Nov. 30, 2019); Senate of the Philippines, Senate concurs in ratification of Paris Agreement, *available at* https://www.senate.gov.ph/press_release/2017/0314_prib1.asp (last accessed Nov. 30, 2019); & Department of Environmental and Natural Resources, United Nations Framework Convention on Climate Change, *available at* intl.denr.gov.ph/index.php/database-un-conventions/article/17 (last accessed Nov. 30, 2019).

183. Philippine INDC, *supra* note 79, at 3.

184. *Id.*

185. *Id.* pmbl.

186. *Urgenda Foundation*, HA ZA 13-1396, ¶ 2.1.

a more sustainable society"[187] — brought a claim against the Ministry of Infrastructure and the Environment of the Netherlands (State) before the Hague District Court. Urgenda's claim principally asserted that "the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020."[188] Further, it asked the court to order the State "to reduce or have reduced the joint volume of annual greenhouse gas emissions in the Netherlands that it will have been reduced by 40% by the end of 2020, in any case by at least 25%, compared to 1990."[189] In support of its claim, Urgenda made note of the following:[190]

(1) Current global greenhouse gas emissions levels threaten an average global warming of over two degrees Celsius, which would in turn result in severe, possibly catastrophic consequences.[191]

(2) The State's contribution to these emissions is excessive, both in absolute terms and per capita.[192]

(3) The State has "systemic responsibility" over its greenhouse gas emissions, given that they occur within its own territory and it has both the sovereign power and the capability to control and regulate them.[193]

(4) The State is obliged under the international law "no harm" principle, the UNFCCC, and the Treaty on the Functioning of the European Union to reduce emissions.[194]

187. *Id.* ¶ 2.2.

188. *Id.* ¶ 3.1.

189. *Id.*

190. *Id.* ¶ 3.2.

191. *Id.*

192. *Urgenda Foundation*, HA ZA 13-1396, ¶ 3.2.

193. *Id.*

194. *Id.*

Urgenda also cited in particular the following provisions and principles of law,[195] which it alleged the State had violated because of its high levels of emissions:

(1) The duty to exercise due care in society.[196]

(2) Article 2 of the European Convention on Human Rights (ECHR), which provides that "[e]veryone's right to life shall be protected by law."[197]

(3) Article 8 of the ECHR, which provides that "[e]veryone has the right to respect for his private and family life [and] his home"[198] which can only be interfered in by public authority when necessitated by "the interests of national security, public safety[,] or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[199]

(4) Article 21 of the Dutch Constitution, which provides that "[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."[200]

The State, on the other hand, argued the following substantive points:

(1) On its part, there is no unlawful action against Urgenda, or real threat thereof.[201]

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195. *Id.*

196. *Id.*

197. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, *signed* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

198. *Id.* art. 8 (1).

199. *Id.* art. 8 (2).

200. NETH. CONST. art 21.

201. *Urgenda Foundation*, HA ZA 13-1396, ¶ 3.3.

(2) It acknowledges the need to ensure that the average global temperature does not increase more than 2 degrees Celsius, and is in fact undertaking efforts to achieve this goal.[202]

(3) It has no legal obligation to follow the goals or measures stated by Urgenda in the latter's claim.[203]

Ultimately, the court ruled in favor of Urgenda,

> [ordering] the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf.[204]

"It always seems impossible until it's done, Nelson Mandela once said. And once it's done, it becomes easier to do it again, to replicate it. *That's what makes the* [*Urgenda*] *climate case significant: it is precedent*[-]*setting*."[205]

III. *DE LEGE LATA*: BILATERAL INVESTMENT TREATIES AND THE INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM UNDER THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF DISPUTES

> *I've never believed protectionism … will lead us anywhere. I think you can have certain specific rules for engaging … [—] but there is not a shred of doubt in my mind that when you open an economy you should do it in totality. Foreign investment adds a sense of competition; we should see this as a wake-up call … .*
>
> — Ratan Tata[206]

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202. *Id.*

203. *Id.*

204. *Id.* ¶ 5.1.

205. Roger Cox, A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands (Paper Published Online by the Center for International Governance Innovation) at 13, *available at* https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf (last accessed Nov. 30, 2019) (emphasis supplied).

206. Ratan Tata, *available at* https://www.azquotes.com/quote/604603 (last accessed Nov. 30, 2019). *See also Today, an institution retires from the Tatas*, THE ASIAN AGE, Dec. 28, 2012, *available at* https://www.pressreader.com/india/the-asian-

This Chapter seeks to present the international investment law regime *de lege lata* — "the law as it exists" — with particular focus on BITs and the ICSID ISDS mechanism.

An IIA, referred to as a BIT when it is contracted between two States, has been defined by the ICSID as an "[agreement] regarding a State's treatment of investments made by individuals or companies from another State."[207] It is "designed to protect investors engaged in 'foreign direct investment' [ ] against having their investments compromised by the actions of the Host [State]."[208] In other words, a BIT entered into between State A and State B guarantees that any money or property placed within the territory of State A by the national of State B — or vice versa — is protected by the government of State A, particularly through provisions guaranteeing fair and equitable treatment, protection against unlawful expropriation, and protection against discrimination. Under international law, foreign direct investments are not governed by a single multilateral framework, but by some 3,000 of these multilateral and BITs.[209]

The right of a State to enter into treaties facilitating foreign investment arises from its sovereignty, as does the concurrent right to regulate and even exclude foreign investment when it sees fit.[210] Yet, while a State has both these rights to "enter" and "exclude" as the case may be, once it does decide

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age/20121228/281500748584965 (last accessed Nov. 30, 2019); Ratan Tata, *available at* http://www.forbes.com/profile/ratan-tata/ (last accessed Nov. 30, 2019); Tata Trusts, Ratan N Tata, *available at* http://www.tatatrusts.org/article/inside/ratan-n-tata (last accessed Nov. 30, 2019); & Simon Mundy, Ratan Tata prepares for handover at Tata Trusts, FINANCIAL TIMES, Dec. 23, 2023, *available at* https://www.ft.com/content/b4bd8516-c35a-11e6-9bca-2b93a6856354 (last accessed Nov. 30, 2019).

207. International Centre for the Settlement of Investment Disputes, Investment Treaties, *available at* https://icsid.worldbank.org/en/Pages/resources/Investment-Treaties.aspx (last accessed Nov. 30, 2019).

208. Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J. LEGAL STUD. 1, 2 (2013).

209. Vadi, *supra* note 63, at 1314.

210. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 7 (2008).

that it wants to encourage and accept foreign investment, it must uphold a minimum standard of treatment towards the foreign investor under customary law, or a standard above and beyond this minimum if the same is provided for under an investment treaty.[211] In that sense, a State voluntarily places certain limits on its own sovereignty when entering into a BIT — or any treaty for that matter — as a "necessary corollary" to attracting much needed foreign investment.[212]

What follows is an overview of the evolution of BITs, in order to contextualize the discussion of the ICSID ISDS mechanism and the substantive protections under a BIT.

A. The Evolution of Bilateral Investment Treaties

> *There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power.*
>
> — John Adams[213]

The obligation to protect alien property under international law was recognized as far back as the 18th century when, for example, the US had entered into its first Treaty on Friendship, Commerce, and Navigation with France.[214] Protecting foreign investments was not a focus of international economic relations until the end of World War II.[215] Prior to that, economic agreements were focused more on establishing trade relations between and among States, although some of these did have provisions dealing with the protection of the property of nationals from one state situated in the territory of another State.[216]

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211. *Id.*

212. *Id.* at 9.

213. *Id.* at 11 (citing 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, at 4 (1906)).

214. *Id.*

215. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. POL'Y 157, 158 (2005).

216. *Id.*

After World War II, three events took place that catalyzed the development of IIAs in general:[217] First, on 30 October 1947, 23 countries signed the GATT — the outcome of the first of eight rounds of negotiations that would take place until 1994,[218] all of which sought to liberalize worldwide trade.[219] Such efforts were in reaction to the protectionist policies of the 1920s which many believed aggravated the Great Depression in the 1930s.[220] Second, following the conclusion of World War II, a process of decolonization took place, leading to the birth of many newly independent and consequently economically underdeveloped States.[221] Third, the emergence of the so-called Eastern Bloc States — the group of socialist States in Central and Eastern Europe, led by the Soviet Union[222] — and their efforts to nationalize their key industries in part by expropriating the private sector, including foreign-owned assets within the State, often without appropriate compensation.[223] The Eastern Bloc attempted to further the view among other developing countries that fostering economic relations with Western industrialized countries would be more exploitative than advantageous, and States were better off with a tightly regulated economy, as opposed to one that relied on the free market.[224]

This combination of circumstances gave rise to BITs that were "remarkably uniform" in content,[225] particularly with respect to the following

217. Vandevelde, *supra* note 215, at 161-62.

218. World Trade Organization, The GATT years: from Havana to Marrakesh, *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed Nov. 30, 2019).

219. Vandevelde, *supra* note 215, at 161-62.

220. Vandevelde, *supra* note 215, at 161-62 (citing BERNARD HOEKMAN & MICHAEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 2-3 (1995)).

221. *See generally* Vandevelde, *supra* note 215, at 161-66.

222. What Was The Eastern Bloc?, *available at* https://www.worldatlas.com/articles/what-was-the-eastern-bloc.html (last accessed Nov. 30, 2019).

223. Vandevelde, *supra* note 215, at 167.

224. *Id.*

225. *Id.* at 170.

features: First, they dealt almost exclusively with foreign investment,[226] and did not take into account any other issues. This was deliberate on the part of negotiators and drafters, because they feared that the inclusion of non-investment issues in the treaty would either delay its conclusion or overcomplicate its interpretation and implementation.[227] Second, the parties to the BIT were usually one developing country and one developed country.[228] The former wanted to attract foreign investment by offering certain guarantees and legal protections, while the latter wanted to safeguard its nationals' investments against expropriation measures like those that had taken place amidst the nationalization of the Eastern Bloc States.[229] For the developing country, it was a sales pitch; for the developed country, a "defensive reaction"[230] to past experience. The result was that the developed country would often draft the treaty, and then turn it over to the developing country for signature and slight changes, if any — the investment law equivalent of a contract of adhesion.[231] This "added an ideological dimension to the agreements. Although both parties formally assumed the same obligations, the agreements were perceived as nonreciprocal because in practice the obligations all fell on the developing country party."[232] Third, all BITs contained similar substantive protection clauses — fair and equitable treatment, prohibitions against unlawful direct and indirect expropriation, prohibitions against discrimination, among others.[233]

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226. *Id.*

227. *Id.*

228. *Id.*

229. Vandevelde, *supra* note 215, at 171.

230. *Id.*

231. *Id.* at 170.

232. *Id.* at 170-71. (citing M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 227 (1994)). It should be noted, however, that this is no longer always the case. "Generally ... developing States have developed their own preferences for a certain scheme of treaties, sometimes with their own model draft. Also, treaties have been negotiated between developing countries." DOLZER & SCHREUER, *supra* note 210, at 9.

233. Vandevelde, *supra* note 215, at 172.

In the mid-1960s, following the 1965 convention establishing the ICSID (ICSID Convention), an early formulation of what would later evolve into the ISDS mechanism was included in BITs. An ISDS mechanism is essentially "a provision in which the [H]ost [S]tate consented to arbitration of certain disputes with investors, typically those involving the provisions of the agreement."[234] This was a crucial addition to the content of BITs, because it provided a remedy for an investor whose rights may have been violated. In effect, it gave teeth to the protections provided for in the BIT and depoliticized investment disputes by placing them in the realm of law instead of politics.[235] An overview of the other pertinent aspects of the ICSID Convention will be provided in the next proceeding section.

What followed was the so-called "Global Era" of the later 1980s, which brought about "profound changes in the context in which international investment agreements were negotiated."[236] First, BITs became far more common. The "economic success of several Asian economies that had high rates of private investment,"[237] and the sudden and significant drop in private lending due to the debt crisis of the 1980s resulting in a greater reliance on foreign investment as the only viable alternative source of capital, spurred the rapid increase in the number of BITs.[238] This increase included BITs concluded between two developing countries, unlike in the post-World War II period during which BITs almost always involved a developed country and a developing country.[239] Second, the Global Era brought on a diversification of activities that made up the economic relations between States, and the minimization of barriers to trade became just as much of a priority as the minimization of barriers to foreign investment.[240] The result was that BITs protecting foreign investment were often part and parcel of broader trade schemes devised between States, "[allowing] [ ] parties to offer concessions on investment in exchange for concessions in other areas. For example, a [S]tate

234. *Id.* at 174.

235. *Id.* at 175.

236. *Id.*

237. *Id.* at 177.

238. *Id.* at 178.

239. Vandevelde, *supra* note 215, at 182.

240. *Id.* at 180–81.

might offer to open its economy to foreign investment in exchange for another party's offer of market access to goods."[241]

Notwithstanding the changes to the context in which BITs were negotiated, drafted, and concluded, there were minimal changes in their actual content,[242] from the beginning of the Global Era to the present.

B. An Overview of the International Centre for the Settlement of Investment Disputes (ICSID) Convention

While a BIT governs the substantive rights and protections guaranteed to foreign investors — to be discussed in the succeeding section — the ICSID Convention provides the procedural mechanisms for arbitrating a case in the event that these substantive protections have allegedly been violated.

Arbitration between a Host State and a foreign investor can either be ad hoc or institutional.[243] While ad hoc arbitration "is not supported by a particular arbitration institution,"[244] institutional arbitration is precisely the opposite — it is conducted under the auspices of a particular institution that has a standard set of rules (e.g., rules for the constitution of a tribunal and the election of arbitrators) and provides support in the form of administrative or secretarial services, venues, financial arrangements, among others. Examples of these institutions include the UNCITRAL or the ICSID (the focus of this Note).

The ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the ICSID Convention or the Washington Convention.[245] The ICSID

241. *Id.*

242. *Id.* at 179.

243. DOLZER & SCHREUER, *supra* note 210, at 222.

244. *Id.*

245. International Arbitration Law, International Centre for the Settlement of Investment Disputes (ICSID), *available at* http://internationalarbitrationlaw.com/about-arbitration/international-arbitration/institutional-arbitration/international-centre-for-settlement-of-investsment-disputes-icsid/ (last accessed Nov. 30, 2019).

Convention entered into force on 14 October 1996[246] and, as of the writing of this Note, it has 153 Contracting States (i.e., States that are signatories and have deposited their instruments of ratification).[247] The ICSID is considered to be the "main forum for the settlement of disputes between a foreign investor and the [H]ost [S]tates,"[248] because a majority of these types of cases are brought before it.

As stated in its Preamble, the ICSID desires to "establish [ ] facilities"[249] to address "the need for international cooperation for economic development, and the role of private international investment therein"[250] and "the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States[.]"[251]

1. The Request for and Commencement of Arbitration of the ICSID

If a State (one that is both a Contracting Party to the ICSID Convention and a party to a BIT that provides for arbitration before the ICSID) seeks to initiate arbitration proceedings, it can do so by addressing a written request to the Secretary-General of the ICSID, who will in turn forward a copy of it to the other party.[252] The written request must provide the following information: the identity of the parties; the issues making up the dispute; and the manifestation of their consent to submit to arbitration before the ICSID as

246. Convention on the settlement of investment disputes between States and nationals of other States (Details Page at the Website of United Nations Treaty Series), *available at* https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280 12a925 (last accessed Nov. 30, 2019).

247. *Contra* International Centre for Settlement of Investment Disputes, Database of ICSID Member States, *available at* https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last accessed Nov. 30, 2019).

248. DOLZER & SCHREUER, *supra* note 210, at 225.

249. Convention on the Settlement of Investment Disputes Between States ad Nationals of Other States pmbl. cl. para. 5, *opened for signature* Mar. 18, 1965, 575 UNTS 159 [hereinafter ICSID Convention].

250. *Id.* pmbl. cl. para. 1.

251. *Id.* pmbl. cl. para. 3.

252. *Id.* art. 36 (1).

expressed, for example, in a provision in a BIT providing for the same.[253] The Secretary-General is empowered to refuse registration of the Contracting Party's request to commence arbitration, provided that the dispute is "manifestly outside the jurisdiction of the Centre," in which case he or she must inform the Contracting Party of such refusal.[254]

2. The Jurisdiction and Independence of the ICSID

For the ICSID to have jurisdiction, three requisites must be met: first, the investment dispute must be of a legal nature; second, the dispute must be between a Contracting State (Host State) and the National of Another Contracting State (foreign investor); and third, the two parties to the dispute must have given their consent to the jurisdiction of the ICSID, which is typically in the form of an express provision in a BIT.[255] With respect to the second requisite, the following summarizes the possible definitions[256] for what it means to be a "Contracting State" or a "National of Another Contracting State":

"Contracting State"	"National of Another Contracting State"
The Contracting State itself.	A natural person has "the nationality of a Contracting State other than the State party to the dispute"[257] (i.e., the foreign investor is a natural person who has *citizenship different from that of the Host State*; in other words, if the foreign investor is a citizen of the Host State, the ICSID will not have jurisdiction).

253. *Id.* art 36 (2).

254. *Id.* art 36 (3).

255. DOLZER & SCHREUER, *supra* note 210, at 223 (citing ICSID Convention, *supra* note 249, art. 25).

256. ICSID Convention, *supra* note 249, art. 25.

257. *Id.* art. 25 (2) (a).

	The reckoning point is as of "the date on which the parties consent to submit such dispute to conciliation or arbitration *as well as* on the date on which the request was registered."[258]
"[A]ny constituent subdivision or agency of a Contracting State designated to the Centre by that State,"[259] subject to "the approval of that [Contracting] State unless that [Contracting] State notifies the Centre that no such approval is required."[260]	A juridical person has "the nationality of a Contracting State other than the State party to the dispute"[261] (i.e., the foreign investor is a juridical person who has *citizenship different from that of the Host State*; in other words, if the foreign investor is a citizen of the Host State, the ICSID will not have jurisdiction). The reckoning point is as of "the date on which the parties consented to submit such dispute to conciliation or arbitration."[262]
	A juridical person has "the nationality of the Contracting State party to the dispute ... and ... because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention" [263] (i.e., the foreign investor has the nationality of the Host State, but is

258. Id.

259. *Id.* art. 25 (1).

260. *Id.* art. 25 (3).

261. *Id.* art. 25 (2) (b).

262. ICSID Convention, *supra* note 249, art. 25 (2) (b).

263. *Id.*

	foreign-controlled, and thus both the foreign investor and the Host State agree that the former should be treated as if it had the nationality of another contracting party). The reckoning point is as of the date on which the parties consented to submit such dispute to conciliation or arbitration.[264]

A key feature of the ICSID that makes it appealing to foreign investors is the fact that proceedings under it are "self-contained," meaning: (1) they are "independent of the intervention of any outside bodies,"[265] and domestic courts have no bearing and no say on what goes on before the ICSID (i.e., they cannot stay, compel, or influence proceedings);[266] and (2) consent of a Contracting Party to arbitration before the ICSID is "deemed consent to such arbitration to the exclusion of any other remedy."[267] However, a Contracting State may stipulate in a BIT that the exhaustion of local or administrative judicial remedies is a prerequisite before validly resorting to arbitration.[268]

3. The Qualifications of Arbitrators

A person is deemed qualified to serve as an arbitrator in an ICSID Tribunal if he or she possesses the following: "high moral character;" "recognized competence in the fields of law, commerce, industry[,] or finance;" and "independent judgment."[269] A majority of the arbitrators should not be nationals of either of the two Contracting States that are party to the dispute

264. *Id.*

265. DOLZER & SCHREUER, *supra* note 210, at 223 (citing ICSID Convention, *supra* note 249, art. 25).

266. *Id.*

267. ICSID Convention, *supra* note 249, art. 26.

268. *Id.*

269. *Id.* art. 14 (1).

(i.e., the Host State or the foreign investor's State), unless otherwise agreed upon by the parties.[270]

4. The Constitution, Powers, and Duties of the Tribunal

The Tribunal is constituted "as soon as possible," once the request for arbitration has been registered.[271] The parties can agree to either (1) one arbitrator or (2) any other uneven number, and can likewise stipulate the manner in which these arbitrator(s) are chosen.[272] In the absence of an agreement, the default provided for by the ICSID is three arbitrators — each party chooses one arbitrator, and the two arbitrators choose in turn the third arbitrator, who serves as the President of the Tribunal.[273]

Arguably the most important power vested by the ICSID Convention in the Tribunal is akin to the "competence-competence" doctrine under international commercial arbitration — the power to judge its own competence,[274] to decide whether or not it has jurisdiction over the entire dispute or particular issues included therein. It can decide this matter of jurisdiction either as a preliminary question or together with the merits.[275] As a general rule, deciding incidental or additional claims and counterclaims is within the Tribunal's jurisdiction, unless otherwise agreed upon by the parties.[276] The Tribunal also has the discretion to decide questions of procedure that are not specifically addressed in the ICSID's Rules of Procedure for Arbitration Proceedings.[277] Other powers of the Tribunal include requiring parties to produce documentary evidence, visiting scenes that are pertinent to the dispute, making any other inquiries it deems

270. *Id.* art. 39.

271. *Id.* art. 37 (1).

272. *Id.* art. 37 (2) (a).

273. ICSID Convention, *supra* note 249, art. 29 (2) (b).

274. *Id.*, art. 41 (1).

275. *Id.* art. 41 (2).

276. *Id.* art. 46.

277. *Id.* art. 44.

appropriate and necessary for the resolution of the dispute before it,[278] and recommending provisional measures if there is a need to preserve either or both of the parties' rights.[279]

With respect to the applicable law, the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties"[280] (e.g., those contained in and referred to by the BIT). If there is no such agreement, "the law of the Contracting State party to the dispute[, i.e., the Host State] (including its rule on conflicts of laws)"[281] applies. A Tribunal is prohibited from failing or refusing to decide a case brought before it on the ground that the law is silent or obscure,[282] but it may decide a dispute *ex aequo et bono* (i.e., according to what is just and fair, or according to equity and good conscience).[283]

5. The Enforcement and Review of the Award

The ICSID has a "watertight system" in the event a party to a dispute, whether the foreign investor of the Host State, refuses to participate in the proceedings.[284] For example, if a party refuses to appoint an arbitrator, the ICSID will appoint one for them;[285] if either one of the parties make objections to the jurisdiction of the Tribunal, it is the latter that ultimately determines, with finality, whether or not it has competence to decide the dispute;[286] if a party does not submit memorials or appear when required,

278. *Id.* art. 43.

279. ICSID Convention, *supra* note 249, art. 47.

280. *Id.*, art. 42 (1).

281. *Id.*

282. *Id.* art. 42 (2).

283. *Id.*, art. 42 (3).

284. DOLZER & SCHREUER, *supra* note 210, at 223 (citing ICSID Convention, art. 25).

285. *Id.* (citing ICSID Convention, *supra* note 249, art. 38).

286. *Id.* (citing ICSID Convention, *supra* note 249, art. 41).

proceedings will not be stalled;[287] and even if a party is entirely uncooperative, this does not affect in any way the binding force of an award by the Tribunal or its enforceability.[288]

Questions before the Tribunal are decided by a majority vote of its arbitrators.[289] An award rendered by a Tribunal must be in writing, must address each and every question brought before it, and must state its reasons and basis.[290] While there can be only one award, arbitrators are permitted to attach their individual statements of concurrence or dissent.[291] Awards cannot be published, unless the parties give their consent thereto.[292]

As a general rule, an award by an ICSID Tribunal is binding on the Contracting State,[293] which must accord it recognition "as if it were a final judgement of a court in that State."[294] Further, any pecuniary obligations arising from awards can be enforced by a domestic court of a State that is party to ICSID.[295] As noted by Gus Van Harten,[296] "the awards of arbitrators are more widely enforceable than any other adjudicative decision in public

287. DOLZER & SCHREUER, *supra* note 210, at 223–24 (citing ICSID Convention, art. 45).

288. DOLZER & SCHREUER, *supra* note 210, at 224.

289. ICSID Convention, *supra* note 249, art. 48 (1).

290. *Id.* art. 48 (2) & (3).

291. *Id.* art. 48 (4).

292. *Id.* art. 48 (5).

293. *Id.* art. 53.

294. *Id.* art. 54.

295. DOLZER & SCHREUER, *supra* note 210, at 224 (citing ICSID Convention, art. 54).

296. Van Harten is an expert in the field of Investment Treaty Arbitration, and currently a faculty member of the Osgoode Hall Law School of York University. Osgoode Hall Law School, Gus Van Harten, *available at* http://www.osgoode.yorku.ca/faculty-and-staff/van-harten-gus (last accessed Nov. 30, 2019).

law."[297] This is especially true in the case of the awards handed down by ICSID Tribunals, given that "if the IIA stipulates that enforcement under the ICSID Convention shall be provided, the successful claimant may use any country that is part of the ICSID Convention's court in order to have the arbitral award enforced."[298]

Awards are not subject to any kind of appeal, except the instances of review, revision, and annulment provided for in the ICSID Convention itself.[299] An award may be reviewed or revised on the grounds of a clerical or arithmetical error in the award;[300] uncertainty with respect to interpretation of an award;[301] or "some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."[302] In all these cases, it is still an ICSID Tribunal that does the reviewing or revising, whether the original one or a new one duly constituted under ICSID rules.

Likewise, the annulment of an ICSID tribunal is a narrowly construed exception to the general rule of enforceability. The following are the available grounds for annulment under the ICSID:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.[303]

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297. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 5 (2007).

298. Brown, *supra* note 208, at 4.

299. ICSID Convention, *supra* note 249, art. 53.

300. *Id.* art. 49.

301. *Id.* art. 50.

302. *Id.* art. 51.

303. *Id.* art. 52.

An ad hoc committee composed of three persons from the Panel of Arbitrators[304] of the ICSID is vested with jurisdiction to decide on whether or not a request for annulment should be granted.[305]

C. Substantial and Procedural Guarantees in Bilateral Investment Treaties

As mentioned in the preceding section, while the ICSID Convention provides the procedural remedies for alleged violations of BITs, it is the BITs themselves that guarantee substantive protections to foreign arbitrators (e.g., fair and equitable treatment, the prohibition of unlawful expropriation, and non-discrimination). This sub-Part seeks to provide an overview of these protections, as they have been defined and developed in landmark ICSID tribunal decisions.

1. The Prohibition Against Unlawful Expropriation Without Compensation

Most if not all BITs contain provisions dealing with expropriation. For instance, the French Model BIT states that "[n]either Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of disposition, direct or indirect, of nationals or companies of the other Contracting Party of their investments;"[306] the German Model BIT provides that "[i]nvestments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized[,] or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization ... ;" [307] and the UK Model BIT also stipulates that "[i]nvestments of nationals or companies of either Contracting Party shall not be nationalized, expropriated[,] or subjected to measures having effect

304. "The Centre shall have [a] ... Panel of Arbitrators" "[consisting] of qualified persons, designated as hereinafter provided, who are willing to serve thereon." ICSID Convention, *supra* note 249, arts. 3 & 12.

305. *Id.* art. 52.

306. DOLZER & SCHREUER, *supra* note 210, at 93 (citing French Model Bilateral Investment Treaty, art. 5 (2)).

307. DOLZER & SCHREUER, *supra* note 210, at 93-94 (citing German Model Treaty - 2008, art. 4 (2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (last accessed Nov. 30, 2019)).

equivalent to nationalization or expropriation."[308] The Philippines does not have a model BIT, but the BITs to which it is a party contain similar provisions with respect to expropriation. For example, the Philippines-Netherlands BIT states that

> [i]nvestments or earnings of nationals of either Contracting Party shall not be subject to expropriation or nationalization or any measure equivalent thereto in this article, all such measures are hereafter referred to as 'expropriation[,'] except for public use, in the public interest, or in the interest of national [defense] and upon payment of just compensation.[309]

Expropriation can be either direct or indirect. Whereas direct expropriation involves an actual transfer of ownership from the foreign investor back to the State, indirect expropriation has been defined as "a diminution in property rights or interference with property interests without a formal transfer of ownership,"[310] or "the notion that governments, by means of regulatory or other measures, effectively can deprive an investor of the use and benefit of an investment without direct physical occupation or transfer of title."[311]

A Host State has the right to expropriate the property of a foreign investor, whether directly or indirectly, provided that the following conditions are met:

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308. DOLZER & SCHREUER, *supra* note 210, at 94 (citing United Kingdom Model Treaty, art. 5 (1)).

309. Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, art. 5, Phil.-Neth., Feb. 27, 1985.

310. Kate Miles, *Arbitrating climate change: Regulatory regimes and investor-state disputes*, 1 CLIMATE L. 63, 71-72 (2010) [hereinafter Miles, *Arbitrating climate change*] (citing M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 349-50 (2d ed. 2004); G. C. Christie, *What Constitutesa Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 309 (1964); Burns H. Weston, "*Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"*,16 VA. J. INT'L L. 103 (1975).

311. Miles, *Arbitrating climate change*, *supra* 310, at 72 (citing Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, at 54 (2003)).

(1) the expropriation is for a public purpose; (2) it is on a non-discriminatory basis; (3) it is in accordance with due process and the law; and (4) compensation is paid to the investor.[312] If all these are met, then the expropriation is considered lawful; otherwise, it is unlawful.

At present, direct expropriation does not take place often, because States hesitate to make such a "drastic and conspicuous" move that would "attract negative publicity and ... do lasting damage to [its] reputation as a venue for foreign investment.[313] In contrast, allegations of indirect expropriations are frequently at the center of disputes between foreign investors and Host States, with the former claiming that it has been denied "the possibility to utilize the investment in a meaningful way," and the latter claiming that whatever steps it has taken are well within its right to regulate and do not warrant any form of compensation.[314]

The imposition of taxes, the devaluation of currency, or changes made to health, safety, and planning regulations are not usually considered as reducing the value of a foreign investment to the extent that they would qualify as indirect expropriation and thus necessitate payment of compensation.[315] But the line between indirect expropriation and non-compensable government regulation is a thin one, and is incapable of being defined in such a manner and with such a degree of certainty as to create a hard and fast rule for every situation.[316] Instead, given that "[i]t is often difficult ... to ascertain where the legitimate exercise of governmental regulatory authority ends and compensable expropriation occurs," every situation is assessed on a case-to-case basis, making it difficult to predict outcomes in individual instances.[317]

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312. Moloo & Jacinto, *supra* note 53, at 11.

313. DOLZER & SCHREUER, *supra* note 210, at 92.

314. *Id.*

315. Miles, *Arbitrating climate change*, *supra* 310, at 72.

316. *Id.*

317. *Id.* (citing B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 51 (1959); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U.L. REV. 30, 54 (2003); Alexander Fachiri, *Expropriation and International Law*, 6 BRIT. Y.B. INT'L L. 159, 170 (1925); &

Notwithstanding this, ICSID Tribunals have held, as a general rule, that it is the effect — in terms of economic use and enjoyment[318] — of the government's action that is the primary consideration in determining whether or not it constitutes indirect expropriation the purpose (i.e., the motivation or intent)[319] and the formalities (e.g., whether or not there is a formal decree or express proclamation)[320] are only a secondary consideration, if a factor at all. This is the so-called "sole-effects doctrine."[321]

This sole-effects doctrine was explained in the *Técnicas Medioambientales Tecmed, S.A. v. the United Mexican States*[322] case. In that case, the issue was whether or not the State's non-renewal of Tecmed's (the foreign investor's) license to operate a landfill amounted to an indirect expropriation. In deciding in favor of Tecmed, the Tribunal held that "[t]he government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects."[323] The Tribunal stated —

> [W]e find no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole — such as environmental protection —[ ]particularly if the negative or economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.[324]

CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 298 (2007) [hereinafter MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT]).

318. DOLZER & SCHREUER, *supra* note 210, at 101.

319. Miles, *Arbitrating climate change*, *supra* note 310, at 72.

320. Goetz v. Burundi, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999).

321. Miles, *Arbitrating climate change*, *supra* note 310, at 74.

322. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

323. *Id.* ¶ 116.

324. *Id.* ¶ 121.

In *Siemens A.G. v. The Argentine Republic*,[325] German company Siemens bid for and was granted the right to set-up, maintain, and operate a system for immigration control, personal identification, and electoral information, including data processing, communication, and the printing and home delivery of national identification cards.[326] However, the government of Argentina subsequently suspended the implementation of the system, on the grounds that (1) Siemens allegedly lacked the technical expertise to provide the service needed and had created false expectations and (2) Argentina was going through a fiscal crisis.[327] Argentina argued that the Tribunal, in determining whether an indirect expropriation warranting compensation had taken place, should not limit its considerations to the effects of the suspension. The Tribunal disagreed, however, and made use of the sole-effects doctrine, pointing out that even the Argentina-Germany BIT itself "refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate."[328]

In line with the sole-effects doctrine approach, questions of whether or not the effect is substantial, and whether or not it lasts for a significant period of time, are taken into account.[329] As stated in the case of *Telenor Mobile Communications A.S. v. The Republic of Hungary*,[330] "[i]n considering whether measures taken by the government constitute expropriation[,] the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as the result of them."[331] Awards by ICSID Tribunals relying on this sole-effects doctrine make use of different standards and expressions to characterize the degree and duration of effect that are "substantial" enough to constitute indirect expropriation warranting

325. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007).

326. *Id.* ¶ 81.

327. *Id.* ¶¶ 116 & 244.

328. *Siemens A.G.*, ICSID Case No. ARB/02/8, ¶ 270.

329. DOLZER & SCHREUER, *supra* note 210, at 101.

330. Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (Sep. 13, 2006).

331. *Id.* ¶ 70.

compensation. For example, in *RFCC v. Morocco*,[332] the Tribunal stated that if government actions were "of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure *to an extent that they render their further possession useless*," then this certainly qualified as a "substantial effect."[333]

In *CMS Gas Transmission Company v. the Republic of Argentina*,[334] the government of Argentina was forced to suspend a gas transport sector tariff adjustment scheme, because of an ongoing country-wide economic and financial crisis.[335] CMS Gas and Transportation Company (CMS), which had relied on the scheme, brought a claim before the ICSID, contending that such action on the part of the Argentinian government amounted to indirect expropriation warranting compensation.[336] In denying the claim, the Tribunal held that, although the non-implementation of the tariff adjustment scheme did affect CMS's business, "[t]he essential question [was] ... whether the enjoyment of the property [had] been effectively neutralized. The standard that a number of Tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivations."[337] CMS, however, was still "in control of the investment; Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment."[338]

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332. Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award (Dec. 22, 2003).

333. DOLZER & SCHREUER, *supra* note 210, at 101 (citing Consortium RFCC, ¶ 69 (emphasis supplied)).

334. CMS Gas Transmission Company v. The Republic of *Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

335. DOLZER & SCHREUER, *supra* note 210, at 102 (citing *CMS Gas Transmission Company*, ICSID Case No. ARB/01/8, ¶¶ 59-67).

336. DOLZER & SCHREUER, *supra* note 210, at 101) (citing *CMS Gas Transmission Company*, ICSID Case No. ARB/01/8, ¶¶ 84-90).

337. *CMS Gas Transmission Company*, ICSID Case No. ARB/01/8, ¶ 262.

338. *Id.* ¶ 263.

In *Santa Elena v. Costa Rica*,[339] the claimant company — majority of whose shareholders were citizens of the US — purchased a piece of property with the intention of developing it into a tourist resort and residential community.[340] Subsequently, however, the Costa Rican government issued an expropriation decree for the property, primarily on the ground that the same property needed to be added to the adjacent Santa Rosa National Park, because the latter was "insufficient to maintain stable populations of large feline species such as pumas and jaguars, and that a substantial area needs to be added to it if it is to carry out its conservationist objectives."[341] While Santa Elena did not contest the expropriation itself, what was disputed between the parties was the amount of compensation to be paid, in relation to which the Tribunal found that "no matter how laudable and beneficial to society as a whole ... the [S]tate's obligation to pay compensation remains."[342]

A subsequent Tribunal likewise maintained this view, stating that "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim[;]"[343] in effect, a question as to the extent of the effect on the foreign investment.[344]

While the effect of an alleged indirect expropriation is often the focus of an ICSID Tribunal, as well as the point at which its decision turns, whether in favor of the foreign investor or in favor of the Host State, there are cases in which Tribunals have had to adapt to different scenarios, choosing to widen the focus of their inquiry to include other points and circumstances[345]

339. Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000).

340. *Id.* ¶ 16.

341. *Id.* ¶ 18.

342. *Id.* ¶ 71-72.

343. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 310 (Jul. 14, 2006). This case is more thoroughly discussed under the Section on Fair and Equitable Treatment.

344. Miles, *Arbitrating climate change*, *supra* note 310, at 73-74.

345. DOLZER & SCHREUER, *supra* note 210, at 96.

For instance, the concept of "legitimate expectations" of the foreign investor, which is usually taken into account in relation to the fair and equitable treatment standard — to be discussed in the succeeding section — has in some instances "found entry" in considerations of whether or not there has been indirect expropriation warranting compensation.[346] In *Metalclad Corporation v. The United States of Mexico*,[347] the federal government of Mexico authorized Coterin, an enterprise wholly owned by Metaclad,[348] "to construct and operate a transfer station for hazardous waste" and a hazardous waste landfill in the municipality of Guadalcazar, in the State of San Luis Potosi.[349] The federal government then advised Coterin to secure a construction permit from the municipality itself, only for the sake of "[facilitating] an amicable relationship" with the latter, but guaranteed that the permit would be issued as matter of course.[350] Yet once Coterin had completed construction and began operations, thirteen months after it had applied for the municipal construction permit, the permit was suddenly denied. Subsequently, the Governor of San Luis Potosi issued an Ecological Decree mandating that a Natural Area be established for the protection of a rare species of cactus.[351] The Natural Area encompassed the land on which the landfill had been constructed, effectively prohibiting its operation.[352]

In determining whether or not there had been indirect expropriation warranting compensation, the Tribunal combined an effects-based analysis with an examination of the foreign investor's expectation, "resulting in a particularly expansive form of investor protection."[353] In particular, it stated that

346. *Id.* at 106.

347. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

348. *Id.* ¶ 7.

349. *Id.* ¶¶ 1 & 28-29.

350. *Id.* ¶ 41.

351. *Id.* ¶ 59.

352. *Id.*

353. Miles, *Arbitrating climate change*, *supra* note 310, at 74.

> expropriation under NAFTA includes ... covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use *or reasonably-to-be-expected economic benefit of property* even if not necessarily to the obvious benefit of the [H]ost State.[354]

Thus —

> [b]y permitting or tolerating the conduct of [the municipality of] Guadalcazar in relation to [Coterin] ... and ... participating or acquiescing in the denial to [Coterin] of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation ... .[355]

In *Goetz v. Burundi*,[356] the Host State was Burundi and the nationality (i.e., the home State) of the foreign investor Antoine Goetz, et al. (Goetz), was the Kingdom of Belgium. Goetz had initially been granted "free-zone status" — the ability to store and process imported goods within a specific area without having to pay import duty[357] — but this was subsequently revoked by the government of Burundi.[358] Goetz claimed that this amounted to expropriation, notwithstanding the fact that there had been no formal taking (i.e., no formal transfer of ownership).[359] The Tribunal found in favor of Goetz, noting that

> [s]ince ... the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities … which deprived their investments of all utility and *deprived the claimant investors of the benefit which they could have expected from their investments*, the disputed decision can be regarded as a 'measure having similar effect' to a measure depriving of or

354. *Metalclad Corporation*, ICSID Case No. ARB(AF)/97/1, ¶ 103.

355. *Id.* ¶ 104.

356. Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999).

357. Business Dictionary, Free Zone, *available at* http://www.businessdictionary.com/definition/free-zone.html (last accessed Nov. 30, 2019).

358. DOLZER & SCHREUER, *supra* note 210, at 107.

359. *Id.*

> restricting property within the meaning of Article 4 of the Investment Treaty.[360]

Following the sole-effects doctrine approach, the next point of inquiry is the extent to which a regulatory measure must have deprived the foreign investment before it can be considered as indirect expropriation requiring compensation. In *Consortium RFCC v. Royaume du Maroc*,[361] the Tribunal held that the measure being questioned had to "have the substantial effects of [ ] certain intensity that reduce and/or eliminate the benefits legitimately expected from the exploitation of rights subject to the said measure *to such an extent that they render the holding of these rights useless*."[362] Likewise, some Tribunals have taken the position that there "must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof[.]"[363] Other Tribunals have looked into the degree of "control" exercised by the foreign investor, either over the investment in its entirety, or a specific right related to or contained therein.[364] For example, the Tribunal in *Azurix Corp. v. the Argentine Republic*[365] held that the actions taken by the Host State affecting the management of the foreign investment did not necessarily amount to a loss of the attributes of ownership.[366] The Tribunals in *Middle East Cement Shipping and Handling Co.*

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360. *Id.* (citing *Goetz*, ICSID Case No. ARB/95/3, ¶ 124) (emphasis supplied).

361. Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award (Dec. 22, 2003).

362. Moloo & Jacinto, *supra* note 53, at 12 (citing *Consortium RFCC*, ICSID Case No. ARB/00/6) (emphasis supplied). The translation of the cited case from French original is on file with authors Moloo & Jacinto.

363. Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, ¶ 87 (Jan. 15, 2008) & Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (Sep. 13, 2006).

364. DOLZER & SCHREUER, *supra* note 210, at 107-08.

365. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006).

366. DOLZER & SCHREUER, *supra* note 210, at 107 (*See generally Azurix Corp.*, ICSID Case No. ARB/01/12).

S.A. v. Arab Republic of Egypt[367] and *Eureko B.V. v. Republic of Poland*[368] held that the expropriation of specific rights could constitute indirect expropriation under a BIT, even if the foreign investor obtained overall control over the investment.[369]

In contrast to these cases in which ICSID Tribunals seem to have consistently applied the sole-effects doctrine, some cases and commentators have gone against the trend,[370] suggesting that it is the character and purpose of a taking that is relevant to assessing whether compensation is due. Following this point of view, bona fide regulations of general application that are reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare will generally not amount to an expropriation.[371] In the ICSID case *Marvin Roy Feldman Karpa v. United Mexican States*,[372] the Tribunal noted that governments need to be free to act in the broader public interest through protection of the environment, for example.[373] Even reasonable governmental regulation of this type would be hindered if any business that is adversely affected is allowed to seek compensation. Similar examples are more commonly found outside of the ICSID regime. The Tribunal in *Methanex Corporation v. United States of America*, [374] decided under the auspices of the UNCITRAL, excluded

367. Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6 (Apr. 12, 2002).

368. Eureko B.V. v. Republic of Poland, 12 ICSID Rep. 335, Partial Award (Aug. 19, 2005).

369. DOLZER & SCHREUER, *supra* note 210, at 108 (citing *Middle East Cement Shipping and Handling Co. S.A.*, ICSID Case No. ARB/99/6).

370. Moloo & Jacinto, *supra* note 53, at 16.

371. *Id.*

372. Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 23, 2002).

373. *Id.* ¶ 103.

374. Methanex Corporation v. United States of America, Final Award, 44 I.L.M. 1345, 1456 (Aug. 3, 2005).

legitimate public welfare regulation from the scope of the protections of an investment treaty,[375] stating that a

> non[-]discriminatory regulation for a public purpose ... enacted in accordance with due process and which affects, inter alia, a foreign investor ... is not deemed expropriatory and compensatory unless specific commitments had been given to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[376]

Likewise, in the UNCITRAL case of *Saluka Investments B.V. v. The Czech Republic*,[377] the Tribunal held that the principle that "a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today."[378]

In sum, a regulatory measure or action on the part of the Host State that is challenged for being an act of indirect expropriation is, as a general rule, evaluated in terms of the effect and severity thereof on the foreign investor. While this does not absolutely exclude the consideration of other circumstances — such as the legitimate expectations of the foreign investor or the purpose of the Host State's regulation — it does serve as a useful if not indispensable starting point, with the "other circumstances" serving as qualifications, nuances, or exceptions to the general rule that is the sole-effects doctrine. The implication, overall, is that these different approaches to evaluating whether or not there has been indirect expropriation warranting compensation mean that States imposing environmental regulations in the form of climate change mitigation measures are very exposed to challenges from foreign investors alleging indirect expropriation.[379] It has been observed, however, that given the "high level of interference required" for an indirect expropriation claim to succeed, it often falls short of prospering as such, and

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375. Miles, *Arbitrating climate change*, *supra* note 310, at 74.

376. *Id.* (citing *Methanex Corporation*, 44 I.L.M. at 1456).

377. Saluka Investments BV v. Czech Republic, Partial Award, 15 ICSID Rep. 274 (Mar. 17, 2006).

378. *Id.* ¶ 262.

379. *See* Miles, *Arbitrating climate change*, *supra* note 310, at 74-75.

instead qualifies as a breach of fair and equitable treatment or non-discrimination.[380] In other words, even if a Tribunal were to choose a more narrow interpretation of the concept of indirect expropriation, a foreign investor's claim would, in all likelihood, still prosper as a violation of some other substantive protection guaranteed under a BIT.

2. The Prohibition Against Discrimination (National Treatment and Most Favored Nation Treatment)

In the context of international investment law, "discrimination" usually pertains to the nationality of the investor, and is addressed by way of either "national treatment" or "most-favored nation treatment." A national treatment clause "[accords] foreign investors and their investments 'treatment no less [favorable] than that which the [H]ost [S]tate accords to its own investors." [381] This means that there can be "no negative differentiation between foreign and national investors," with respect to an application of rules and regulations that may promote the latter over the former. [382] The application and interpretation of a national treatment clause in a BIT is "fact specific" and may vary depending on the circumstances of a particular case.[383] On the other hand, a most favored nation treatment clause mandates that "the relevant parties treat each other in a manner at least as favorable as they treat third parties."[384] For example, a most favored nation clause in a BIT between State A and State B would require that the two accord each other treatment with respect to their investment in a manner that is at par with if not better than that accorded to State C.

Determining if a state has discriminated against a foreign investor — whether in terms of national treatment or most favored nation treatment — requires a consideration of (1) "the basis of comparison for the alleged discrimination;" (2) whether or not there was discriminatory intent on the part of the host state;[385] and (3) whether there may be a justification for the

380. Miles, *Arbitrating climate change*, *supra* note 310, at 75.

381. *Id.* at 77 (citing DOLZER & SCHREUER, *supra* note 210, at 178).

382. DOLZER & SCHREUER, *supra* note 210, at 179.

383. *Id.*

384. *Id.* at 186.

385. *Id.* at 77.

allegedly discriminatory treatment on the part of the Host State — although this last one would carry the least weight between the three.

With respect to the basis of comparison, a foreign investor cannot claim that is has been discriminated against vis-à-vis a domestic investor unless the two are in like circumstances. Simply put, only different circumstances would justify different treatment. Typically, the criteria for determining whether or not foreign and domestic investors are in like circumstances are limited to "commercial considerations, framing the assessment in terms of the same business or economic sector ... [it] does not encompass social and environmental impacts as distinguishing factors."[386] Thus, if the only thing differentiating a foreign investor from a domestic one is the environmental effects of its investment, this is not enough to justify treating them differently, and "a [H]ost [S]tate's attempt to differentiate through regulation or decision-making on these grounds so as to support environmentally responsible objectives would be at risk of challenge as a breach of national-treatment obligations."[387]

There have been breaks from this approach, however, such as the ICSID case *Parkerings-Compagniet AS v. Republic of Lithuania*,[388] which

> considered cultural heritage and environmental impacts as a component of the criteria for 'like circumstances.' [The Tribunal in that case] held that the difference in the archaeological and environmental impacts between two otherwise very similar investment projects rendered them not in 'like circumstances.' [In effect], the local authority's decision to approve one project over the other on the grounds of archaeological preservation and environmental protection was clearly not [a] violation of national-treatment obligations.[389]

With respect to discriminatory intent, it is generally the effect of the government regulation that is considered, irrespective of whether or not there

386. Miles, *Arbitrating climate change*, *supra* note 310, at 77.

387. *Id.* at 77-78.

388. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007).

389. Miles, *Arbitrating climate change*, *supra* 310, at 79 (citing *Parkerings-Compagniet AS*, ICSID Case No. ARB/05/8, ¶¶ 51-52, 375, & 392).

was intent on the part of the state to discriminate.[390] In effect, a "regulation of general application can breach national-treatment obligations if it affects a foreign investor to a greater degree than domestic investors,"[391] unless it can be justified by a difference in circumstances.

With respect to justification, "there is scope to consider whether there are any applicable 'rational grounds' on which the [H]ost [ ] [S]tate action can be justified. However, arbitral practice is inconsistent, and tribunals refer to this aspect only occasionally."[392] Moreover, the grounds that would be sufficient to justify differential treatment are still unclear, and whatever sparse jurisprudence there is indicates that the "rational grounds" would certainly not create an exemption for environmental regulation automatically.[393] In an UNCITRAL case, *Pope and Talbot v. Canada*,[394] the Tribunal considered the possibility of a "rational grounds" exception, but qualified that for the same to apply, there must be "a reasonable nexus to 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."[395]

3. Fair and Equitable Treatment

"Fair and equitable treatment" comprises the elements of adherence to the "legitimate expectations of the investor, due process, and maintenance of a stable legal and business environment."[396]

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390. Miles, *Arbitrating climate change*, *supra* 310, at 79.

391. *Id.*

392. *Id.*

393. *Id.*

394. Pope and Talbot v. Canada, Award on the Merits of Phase II, 7 ICSID Rep. 102 (Apr. 10, 2001).

395. Miles, *Arbitrating climate change*, *supra* note 310, at 79 (citing *Pope and Talbot*, 7 ICSID Rep. 102, ¶ 78).

396. Miles, *Arbitrating climate change*, *supra* note 310, at 75 (citing MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT, *supra* note 317, at 223-24 & DOLZER & SCHREUER, *supra* note 210, 133-35, & 142).

The legitimate expectations of a foreign investor can be created either by "explicit undertakings on the part of the [H]ost [S]tate," such as those expressed in the BIT, or "undertakings of a more general kind," such as the law of the State at the time the investment is made.[397]

In the arbitration of *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*,[398] decided before an ICSID Tribunal in 2003, Técnicas Medioambientales (TECMED S.A.) — a commercial company organized under Spanish law and domiciled in Madrid[399] — brought a claim against Mexico.[400]

TECMED S.A. had initially been awarded a license to operate a landfill for hazardous industrial waste in the Municipality of Hermosillo by the Hazardous Materials, Waste and Activities Division of the National Ecology Institute of Mexico (INE),[401] in a public auction conducted by an agency of the municipality.[402] It had the license from November 1996 to November 1998.[403] According to TECMED S.A., it reached an agreement with the Mexican government in July 1998 to relocate operations and set up a different landfill at a new site.[404] It presented several proposals to the Mexican government for expansions of the existing landfill that would allow it to uphold the commitments under its license, pending relocation.[405] However, come November of that same year, INE released a Resolution stating that it

397. DOLZER & SCHREUER, *supra* note 210, at 104-105.

398. Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

399. *Id.* ¶ 2.

400. *Id.*

401. *Id.* ¶ 36.

402. *Id.* ¶ 35.

403. *Id.* ¶ 38.

404. *Técnicas Medioambientales Tecmed, S.A.*, ¶ 44.

405. *Id.* ¶¶ 44, 85, & 101-102

was refusing entirely to renew the license, and even ordered TECMED S.A. to submit plans for the closure of the landfill.[406]

TECMED S.A. claimed that this constituted "an expropriation of its investment, without any compensation or justification thereof"[407] and entitled it to "damages, including compensation for damage to reputation, and interests."[408] In particular, the arguments used to substantiate its claims included the following: *First*, with respect to the "legitimate expectations of the investor" element of fair and equitable treatment, TECMED S.A. alleged that the refusal to renew its license "frustrate(d) its justified expectation of the continuity and duration of the investment made and would impair recovery of the invested amounts and the expected rate of return."[409] *Second*, with respect to the "maintenance of a stable legal and business environment," TECMED S.A. alleged that the refusal to renew its license was "due to political circumstances essentially associated to the change of administration,"[410] as well as community opposition "in the Municipality of Hermosillo, in which the landfill is physically situated, rather than to legal considerations."[411] The government of Mexico countered that TECMED S.A. had committed certain "infringements" (e.g., using the landfill as a temporary storage facility and transfer center of the hazardous waste of other companies)[412] that jeopardized the possibility of renewal.

In determining whether or not there had been a violation of the guarantee of fair and equitable treatment, the Tribunal made the following pronouncements: *First*, it found that the Government of Mexico, through INE, did not expressly make known to TECMED S.A. how the alleged infringements might affect the renewal of the license.[413] This was clearly a violation of the "due process" element of fair and equitable treatment, because

406. *Id.* ¶ 39.

407. *Id.* ¶ 41.

408. *Id.* ¶ 39.

409. *Id.* ¶ 41.

410. *Técnicas Medioambientales Tecmed, S.A.*, ¶ 42.

411. *Id.*

412. *Id.* ¶ 100.

413. *Id.* ¶ 162.

the absence of such an appraisal effectively "prevented [Tecmed S.A.] from being able to express its position as to such issue and to agree with INE about the measures required to cure the defaults that INE considered significant when it denied the renewal without allowing a reasonable time [for relocation] to another site."[414] *Second*, informing TECMED S.A. would have been the "reasonable and equitable" thing to do, given that "at all times the parties considered that [TECMED S.A.] would relocate the [l]andfill to another place, and such relocation and the necessity for the [l]andfill to continue operating ... until the effective relocation, was the purpose of the recent correspondence exchanged between the parties."[415] "[The government of Mexico's] position was ... to close the Landfill inevitably, with or without relocation" and thus, it "should have expressed such position clearly."[416] Instead, it failed to generate "clear guidelines that would allow [TECMED S.A.] to direct its actions or behavior to prevent the non-renewal of the Permit" amounting to a frustration of the "legitimate expectations of the investor" element of fair and equitable treatment. Ultimately, "[t]he foreign investor expects the [H]ost 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.[417]

Azurix[418] likewise decided by an ICSID tribunal about three years following *Tecmed*, takes the obligation on the part of the State a step further: "The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT."[419] *Azurix*'s fiercely "pro-investor" approach may be disconcerting for state's seeking to implement environmental protection measures, particularly climate change mitigation regulation.[420]

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414. *Id.* ¶ 162.

415. *Técnicas Medioambientales Tecmed, S.A.*, ¶ 162.

416. *Id.* ¶ 164.

417. *Id.* ¶ 154.

418. *Azurix Corp.*, ICSID Case No. ARB/01/12.

419. *Id.* ¶ 372.

420. Miles, *Arbitrating climate change*, *supra* note 310, at 76-77.

> As [H]ost [S]tates seek to respond to changing environmental conditions and to implement international environmental obligations, the enactment of new regulation, the prioritizing of certain sectors or projects, and the introduction of new policies is inevitable — and in the course of that process, *they may also fundamentally change the legal and political landscape in which established investors are required to operate, in a manner that could not have been foreseen at the time of the original investment. In this way, legitimate environmental regulation and decision-making can be exposed to allegations of violating the fair-and-equitable-treatment standard*. This possibility also points to future investor-state arbitration on the implementation of new climate-change-related measures, alleging a failure to maintain a stable legal and business environment for established carbon-intensive investments.[421]

IV. COMPLIANCE WITH THE OBLIGATIONS; INCOMPATIBILITY WITH THE MECHANISM

Part II dealt with the first of the three legal issues of the Note by establishing the obligation on the part of a State to impose regulatory measures for the mitigation of climate change. Part IV seeks to address the second and third legal issues of the Note by proving (1) that a State may and should fulfill its aforementioned obligation to impose regulatory measures for the mitigation of climate change notwithstanding the substantive protections guaranteed to a foreign investor under a BIT; and (2) the ICSID ISDS mechanism is an inappropriate remedy, because it cannot accommodate disputes arising out of an alleged violation of a substantive protection due to the imposition of regulatory measures for the imposition of climate change.

The analysis in this Part is propped up by three "normative" (i.e., relating to standards of behavior) pillars: (1) the obligation to impose regulatory measures for the mitigation of climate change, which was discussed thoroughly in Part II; (2) the international environmental law principles of sustainable development and the obligation not to cause transboundary harm; and (3) the Article XX General Exceptions under the GATT of the WTO. It begins with a discussion of sustainable development and the obligation not to cause transboundary harm — two environmental law principles of a

421. *Id.* (citing GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 93-4 (2007) & KONRAD VON MOLTKE, AN INTERNATIONAL INVESTMENT REGIME? ISSUES OF SUSTAINABILITY 50 (2000)) (emphasis supplied).

particularly renewed importance, in light of climate change. Applying the concept of "systemic integration," which is used to harmonize seemingly conflicting norms rooted in different international legal regimes, this Part will then make the case that the Paris Agreement and the aforementioned principles and exceptions are part and parcel of the same system of international law as the substantive protections guaranteed to foreign investors — and these must be read together and reconciled. A crucial implication of this harmony is that obligations under one regime cannot be used to impede or defeat the obligations under the others. Thus, the substantive protections guaranteed to foreign investors under BITs cannot, do not, and should not interfere with a State's obligation to impose regulatory measures for the mitigation of climate change; rather, existing BITs that were previously entered into by States must be interpreted in such a way as to accommodate the Paris Agreement climate change mitigation obligations. A discussion of the Article XX General Exceptions follows, to demonstrate that the Article (1) itself embodies the principle of systemic integration (i.e., the harmonization of norms within a single legal regime) and (2) is likewise a norm in itself, the underlying principles of which must likewise, under systemic integration, be harmonized with the norms of other regimes of international law. Finally, this Part will illustrate precisely how the substantive protections of prohibition against unlawful expropriation, prohibition against discrimination (national treatment), and fair and equitable treatment can and should be interpreted in order to make such an accommodation.

A. Sustainable Development and the Obligation not to Cause Transboundary Harm

1. Sustainable Development

At the intersection of economic exploitation and development with environmental protection[422] is the principle of sustainable development. The concept of sustainable development emerged in the 1980s, and was embraced both by politicians and civil society, including non-governmental

422. Philippine Judicial Academy, Rationale to the Rules of Procedure for Environmental Cases (Learning Material Published Online by the Philippine Judicial Academy), *available at* http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_rationale.pdf (last accessed Nov. 30, 2019).

organizations and corporations.[423] It became the buzzword of the 1990s and, as a result, was given innumerable definitions, interpretations, and applications.[424] From an international law perspective, however, a starting point to understanding the concept is the report made by the World Commission on Environment and Development (Brundtland Commission) to the United Nations General Assembly in 1987. The Brundtland Commission Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[425] The Rio Declaration, which came approximately five years after the Brundtland Commission Report, makes mention of it in several of its Principles, emphasizing the indispensability of eradicating poverty,[426] protecting the environment,[427] and giving special consideration to the least developed countries of the world:[428]

> Principle 4
>
> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.
>
> Principle 5
>
> All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.
>
> Principle 6
>
> The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special

423. SUBHABRATA BOBBY BANERJEE, CORPORATE SOCIAL RESPONSIBILITY: THE GOOD, THE BAD AND THE UGLY 67 (2007).

424. *Id.*

425. DOLZER & SCHREUER, *supra* note 210, at 267.

426. U.N. Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 5, U.N. Doc. A/CONF.151/26 (vol. I), (Aug. 12, 1992) [hereinafter Rio Declaration].

427. *Id.* princ. 4.

428. *Id.* princ. 6.

> priority. International actions in the field of environment and development should also address the interests and needs of all countries.[429]

More recently in 2015, the 193 Member States of the UN adopted the Sustainable Development Agenda, the ultimate goals of which are to "end poverty" and "pursue a sustainable future."[430] The Agenda consists of seventeen global goals (e.g., to end hunger, to ensure healthy lives, to ensure access to affordable energy) to be achieved by all countries in cooperation with one another by the year 2030.[431]

Brownlie, citing Birnie and Boyle, identified five elements of sustainable development:[432] First and foremost is the integration of environmental protection and economic development, as provided for in Principle 4 of the Rio Declaration: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[433] Most highly qualified publicist in international environmental law Philippe Sands[434] has likewise recognized this element. Second is the right to development, as provided for in Principle 3 of the Rio Declaration: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[435] While the legal status of the right

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429. *Id.* princ. 4, 5, & 6.

430. United Nations, Historic New Sustainable Development Agenda Unanimously Adopted by 193 UN Members, *available at* http://www.un.org/sustainabledevelopment/blog/2015/09/historic-new-sustainable-development-agenda-unanimously-adopted-by-193-un-members (last accessed Nov. 30, 2019).

431. Transforming our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

432. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 267 (6th ed. 2003) (citing PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 86-87 (2d ed. 2002)).

433. Rio Declaration, *supra* note 426, princ. 4.

434. BROWNLIE, *supra* note 432, at 267 (citing BIRNIE & BOYLE, *supra* note 432, 205-08)).

435. Rio Declaration, *supra* note 426, princ. 3.

to development per se remains doubtful, it qualifies at the very least as an element of sustainable development.[436] Third is the sustainable utilization and conservation of natural resources.[437] Fourth is inter-generational equity that "forms a policy datum which falls within the penumbra of sustainable development and underlies a number of global environmental treaties … [yet] is question-begging."[438] The *fifth* and final element is inequity within the existing economic system, which has neither clear legal status nor an obvious place in the sphere of environmental concerns.[439]

Similarly, in the Philippine context, the Rules of Procedure for Environmental Cases identifies two key concepts that that make up sustainable development: (1) the needs of the population, particularly the poor and (2) the limitations of the environment (i.e., that it is exhaustible, yet must be made to sustain both the present and future generations).[440]

Sustainable development is an "ambiguous concept,"[441] and its precise legal status is still a matter of contention. Is it "an emerging principle of customary law binding on all States?"[442] Is it binding only on the States that have ratified treaties making reference to it?[443] Or is it no more than a "general policy objective of international law"?[444] Judge Antonio Cassese — "one of

436. BROWNLIE, *supra* note 432, at 277 (citing BIRNIE & BOYLE, *supra* note 432, 87).

437. BROWNLIE, *supra* note 432, at 277.

438. BROWNLIE, *supra* note 432, at 277 (citing BIRNIE & BOYLE, *supra* note 432, 89-91).

439. BROWNLIE, *supra* note 432, at 277.

440. Philippine Judicial Academy, Access to Environmental Justice: A Sourcebook on Environmental Rights and Legal Remedies at 42-43, *available at* http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/4_A-Sourcebook.-on-Envi-Rights-and-Legal-Remedies-FINAL-B.pdf (last accessed Nov. 30, 2019).

441. Anita M. Halvorssen, *International Law and Sustainable Development Tools for Addressing Climate Change* 39 DENV. J. INT'L L. & POL'Y 397, 405 (2010).

442. *Id.* at 409.

443. *Id.*

444. *Id.*

the most distinguished figures in international justice ... the first President of both the [Special Tribunal for Lebanon] and the International Criminal Tribunal for the former Yugoslavia"[445] — has characterized it as a "general guideline" laid down in "soft law" documents.[446] Most authorities seem to agree that, while it is not be strictly binding per se, it nevertheless plays a role in most legal regimes, with the exact nature of that role depending on the particular area of law. For instance, the principle is "central to the interpretation, implementation, and further development" of the climate change legal regime.[447] This implies that, at the very least, sustainable development has some degree of normative status, although the exact degree of this normativity and the actions that must be taken to satisfy the same, are by no means set in stone:

> [T]here is no international legal obligation that development must be sustainable and the decision on what is sustainable is left to the individual governments. Yet ... development decisions are required to be the outcome of a process which promotes sustainable development.[448]
>
> ...
>
> States which commit to sustainable development through treaties or other international legal instruments have an obligation to balance economic, social, and environmental priorities in their development process, in the interest of future generations.[449]

In the 1997 case of *Gabčikovo-Nagymaros Project*[450] — which concerned a treaty between Hungary and Czechoslovakia for the construction of a dam system that would "attain 'the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

445. Special Tribunal for Lebanon, Tributes to Judge Antonio Cassese (1937 to 2011), *available at* https://www.stl-tsl.org/en/about-the-stl/biographies/judges-of-the-special-tribunal-for-lebanon/1244-tributes-to-judge-antonio-cassese (last accessed Nov. 30, 2019).

446 BROWNLIE, *supra* note 432, at 267.

447. Halvorssen, *supra* note 441, at 397.

448. *Id.* at 410.

449. *Id.*

450. Hungary v. Slovakia (Gabcikovo-Nagymaros Project), Judgment, 1997 I.C.J. 7 (Sep. 25).

resources, energy, transport, agriculture and other sectors of [their] national [economies]" — the International Court of Justice (ICJ) noted that the two State parties were obligated to protect nature, particularly the quality of the water of the Danube, and this had to consider the environmental risks posed by the project.[451] With respect to sustainable development, the ICJ discussed the principle as follows —

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment ... [N]ew norms and standards have been developed ... to be taken into consideration ... given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[452]

Notably, it has been posited that it is precisely the ambiguity in the legal status of the principle of sustainable development which "[affords it] the flexibility needed for it to be incorporated into legal instruments in both hard law and soft law form at the international, regional, national, and local levels."[453]

Notwithstanding a lack of consensus as to the legal status of the principle of sustainable development, the Philippines — as a party to the Rio Declaration and several other international instruments containing such a principle — has recognized the same.

Applying the sustainable development principle to the climate change legal regime in particular, the latter's "dual relationship" with the former is clear: "On the one hand, climate change influences key natural and human living conditions and [is] thereby also the basis for social and economic development, while on the other hand, society's priorities on sustainable development influence both the [greenhouse gas] emissions that are causing climate change and the vulnerability."[454]

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451. Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic, ¶ 140, Hung.-Czech, Oct. 10, 1983, 1724 U.N.T.S. 120.

452. *Id.*

453. Halvorssen, *supra* note 386, at 405.

454. CLIMATE CHANGE 2007 MITIGATION OF CLIMATE CHANGE: WORKING GROUP III CONTRIBUTION TO THE FOURTH ASSESSMENT REPORT OF THE

As the adverse effects of climate change worsen and their effects become increasingly severe, it is clear that climate change poses a major and imminent threat to achieving sustainable development, and could even result in the destruction of any progress that has already been made.[455] For example, cataclysmic weather events can destroy standing infrastructure and ravage food crops; a change in average global temperature can increase the spread of infectious diseases; and the imperative to reduce greenhouse gas emissions can limit the potential source of energy that is both sustainable and affordable. Countries — especially those least developed and developing, with large percentages of their population living below the poverty line and lacking access to essential resources and services — must have the legal and political leeway to enact regulatory measures for the mitigation of climate change that are in line with or can be incorporated into the policy framework for economic development.

2. The No Harm Principle

The obligation to prevent transboundary harm, also called the *no-harm principle*, was first affirmed and given recognition in the landmark arbitration of the *Trail Smelter Case*[456] between the US and Canada. In *Trail Smelter*, the US brought a claim against Canada, because a smelter plant that was owned by a corporation domiciled in the latter was emitting air pollution to the detriment of the nearby state of Washington in the US.[457] One of the questions sought to be answered by the Tribunal was whether the Canadian government "should be required to refrain from causing damage in the state of Washington in the future."[458] The Tribunal, constituted by agreement of the parties specifically for the resolution of this dispute, held that

> [c]onsidering the circumstances of the case, the Tribunal holds that [ ] Canada is responsible in international law for the conduct of the [corporation] ... it is, therefore, the duty of the Government of [ ] Canada

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INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 121 (B. Metz, et al. eds., 2007).

455. Halvorssen, *supra* note 386, at 397.

456. Trail Smelter Arbitration (United States v. Canada), 3 R.I.A.A. 1905, 1924 & 1930 (1941).

457. *Id.* at 1917.

458. *Id.* at 1962.

> to see to it that this conduct should be in conformity with [its] obligation ... under international law as herein determined.
>
> ...
>
> So long as the present conditions in the Columbia River Valley prevail, the [corporation] shall be required to refrain from causing any damage through fumes in the [s]tate of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the [US] in suits between private individuals.[459]

Principles 2 and 14 of the Rio Declaration also deal with the no-harm principle. Principle 2 mandates States to ensure that, in the exploitation of their own natural resources, they do not cause damage to areas beyond the limits of their national territory, such as environmental damage to other States.[460] Likewise, under Principle 14, "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health."[461]

This obligation of the State under *Trail Smelter* and Principles 2 and 14 of the Rio Declaration were confirmed in the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[462] which noted that the same was "part of the corpus of international law relating to the environment."[463]

About 60 years after *Trail Smelter*, the International Law Commission adopted during its fifty-third session in 2001 the Draft Text of the Prevention of Transboundary Harm from Hazardous Activities (Draft Text), which provides a definition of transboundary harm and sets out the obligations of a

459. *Id.* at 1965-1966.

460. Rio Declaration, *supra* note 426, princ. 2.

461. *Id.* princ. 14.

462. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ¶ 29. I.C.J. 1996, 206 (July 8).

463. *Id.*

State with respect to the same.[464] The text defined "transboundary harm" as "harm caused in the territory or otherwise under the jurisdiction or control of a State other than the Sate of origin, *whether or not the States concerned share a common border.*"[465] The scope of the Draft Text thus includes activities (1) with physical consequences that cause transboundary harm (2) that are not already prohibited by international law.[466]

While the *Trail Smelter* case involved a situation in which the "harm" which should have been prevented had already happened — fumigations from Trail Smelter had caused reduction crop yield damage to the trees, among others[467] — it should be emphasized that the subsequent Draft Text deals primarily with "prevention" not compensation after the fact. Its concern is "the phase prior to the situation where significant harm or damage might actually occur"[468] and imposes an obligation on the state of origin to "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof,"[469] failing which the origin States must undertake remedial measures. [470] The rationale behind this is that environmental law principles are often impossible or, at the very least, overwhelmingly difficult to reverse or return to the status quo.[471] The fact that the no-harm principle centers on "prevention" necessarily implies that it is the "risk" of the occurrence that must be taken into account, as opposed to the occurrence itself. Thus, an equally important provision in the Draft Text is Article 2 (a) providing for the scope of "risk of causing significant transboundary harm," which "includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of

464. International Law Commission, *Draft articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, art. 2 (c), U.N. Doc. A/RES/56/82 (2001) [hereinafter Draft Articles] (emphasis supplied).

465. *Id.* (emphasis supplied).

466. *Id.* art. 1.

467. *Trail Smelter Arbitration*, 3 R.I.A.A. at 1924 & 1930.

468. Draft Articles, *supra* note 464, at 148, ¶ 1.

469. *Id.* art. 3.

470. *Id.* at 148, ¶ 1.

471. *Id.*

causing disastrous transboundary harm[.]"[472] Such a definition takes into account "the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact[,]"[473] making them the factors that determine whether or not an event or activity has passed the threshold for being considered a "risk," so that the origin State is obligated to take cautionary and preventive measures. It should be noted that the "take all appropriate measures" requirement under Article 1,[474] falls short of an absolute prohibition on authorizing any and all activities which involve a risk of causing significant transboundary harm. Rather, it provides that a State must take certain steps, to be discussed in the succeeding paragraphs, as a prerequisite for the validity of any such authorization.

Article 10 of the Draft Text provides some guidance by listing the factors that States should take into account when undertaking a balancing of interests in the determination of whether or not to authorize a particular activity.[475] These include the degree of the risk involved and the means available to minimize or repair the same, including an express mention of the risk to the environment; the importance of the activity; its economic viability, in relation to what could be done to minimize the risk caused by the same; among others.[476]

The Draft Text also requires States to be proactive in their implementation of the no harm principle, mandating that they "take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the [ ] [A]rticles."[477] This includes making "an assessment of the possible transboundary harm[,]" such as an environmental impact assessment, before authorizing an activity which carries with it a risk of causing significant transboundary harm.[478] An origin State that wants to authorize such an

472. *Id.* art. 2 (a).

473. *Id.* at 152, ¶ 2.

474. Draft Articles, *supra* note 464, art. 1.

475. *Id.* art. 10.

476. *Id.*

477. *Id.* art. 5.

478. *Id.* art. 7.

activity within its jurisdiction must notify the States most likely to be affected of the results of these impact assessments, and must wait at least six months for their response before proceeding.[479]

Apart from the provisions already discussed, the Draft Text also provides for good faith cooperation amongst States,[480] including consultations on preventive measures[481] and the exchange of available information on the activities covered by the Draft Text;[482] informing the public likely to be affected;[483] emergency measures on the part of the State of origin;[484] among others.

Recalling the definition of transboundary harm in the Draft Text, climate change arguably falls within that scope, thus imposing an obligation on States to reduce greenhouse gas emissions in order to minimize their contribution to and commission of transboundary harm.[485] In September 2013, the Yale Center for Environmental Law and Policy published a report entitled "Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court"[486] (Yale Report), the subject matter of which was the global initiative, began by the country of Palau, "to secure an advisory legal opinion from the ... [ICJ] on climate change."[487] The Yale Report posits that, in the context of transboundary harm, States are now perceiving and treating greenhouse gas emissions as they would any other pollutant, effectively justifying their accommodation into the

479. *Id.* art. 8.

480. Draft Articles, *supra* note 464, art. 4.

481. *Id.* art. 9.

482. *Id.* art. 12.

483. *Id.* art. 13.

484. *Id.* art. 16.

485. Yale Center for Environmental Law and Policy, Climate Change and the International Court of Justice: The Role of Law (Research Paper Published Online by the Yale Center for Environmental Law and Policy), *available at* https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2309943 (last accessed Nov. 30, 2019).

486. *Id.*

487. *Id.* at ii.

international legal framework of the no-harm principle.[488] In Australia, the US, and the UK, for example, environmental impact assessments and state planning statutes are required to include climate change considerations.[489] Likewise, the Canadian government, as early as 2003, began attempts to integrate greenhouse gas impact assessments into the overall general environmental impact assessment framework, and the same is now a prerequisite for any and all major development projects.[490] It also requires yearly reports to be submitted by any industry that surpasses a certain threshold of greenhouse gas emissions.[491] Brazil, Denmark, France, and South Africa have each began the practice of requiring corporations to incorporate greenhouse gas emissions into their corporate sustainability reports and, in addition, have gotten together to advance the practice among other States.[492] These examples "provide support to the argument that greenhouse gas emissions do constitute harmful transboundary pollutants."[493] One obstacle to such an approach is the challenge that it could pose to traditional models for the determination of damage and liability. For example, determining the transboundary harm (i.e., the greenhouse gas emissions) caused by a State of origin would be fairly straightforward, but the same cannot be said for measuring the effect of such harm on a particular State, or the concurrent compensatory and remedial undertakings owed to it. To a certain extent, "[t]he injury, the causal chain ... must be fairly clear [yet] [c]limate change does not fit this model."[494]

B. The Article XX Exception Under the General Agreement on Trade and Tariffs

Article XX of the General Agreement on Trade and Tariffs (GATT) — under which the adoption and enforcement of certain measures are deemed valid, notwithstanding their violation of certain general obligations, and provided they are not arbitrary or unjustifiably discriminatory — addresses a "major

488. *Id.* at 84-85.

489. *Id.* at 85 & 87.

490. *Id.* at 85.

491. Yale Center for Environmental Law and Policy, *supra* note 485, at 85.

492. *Id.* at 85-86.

493. *Id.* at 88.

494. *Id.*

challenge [of] the world trading system [which] is to ensure that the freedom of governments to pursue legitimate national policies is not compromised."[495] It also serves as the most compelling counter to the criticism — often times justified — that "[t]he WTO has been a disaster for the environment [and] [t]hreats ... of WTO-illegality are being used to chill environmental innovation and to undermine multilateral environmental agreements."[496]

In the WTO Appellate Body case of *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,[497] also known as the China-Audiovisual case, the US challenged certain regulatory measures by the Chinese government for the importation and distribution of reading materials, audiovisual home entertainment products, sound recordings, and films for theatrical releases, including the latter's limitation of trading rights to wholly Chinese State-owned enterprises.[498] One of the issues was whether or not China could rely on (1) Paragraph 1.5 of its Accession Protocol, which states that its membership in the WTO is "[w]ithout prejudice to [its] right to regulate trade in a manner consistent with the WTO Agreement;" and (2) Article XX(a) of the GATT 1994 which provides for a general exception for measures "necessary to protect public morals," in order to justify, among others, its limiting of trading rights of the aforementioned goods to wholly Chinese State-owned enterprises.[499] In holding that these defenses were available to China, provided the latter could satisfy the requisites for their invocation, the Appellate Body noted that the right to regulate trade is actually an inherent

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495. Yenkong Ngangjoh-Hodu, *Relationship of GATT Article XX Exceptions to other WTO Agreements*, 80 NORD. J. INT'L L. 219, 221 (2011).

496. MITSUO MATUSHITA, ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 786 (2d ed. 2006) (citing LORI WALLACH & MICHELLE SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION 27 (1999)).

497. World Trade Organization, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/19 (2009) [hereinafter China — Publications and Audiovisual Products].

498. *Id.* ¶¶ 1-2.

499. *Id.* ¶ 205.

power of the State, not something that is granted by any international treaty.[500] In other words, the right to regulate is a basic attribute of sovereignty under international law, and any treaty-based restriction on the same must be understood as an exception to the general rule (i.e., that a state has the right to regulate) to be applied in the public interest, not vice versa.[501] Precisely, the Article XX exceptions of the GATT recognize this principle, and affirm the paramount importance of considerations of life, health, natural resources — as well as the other 10 exceptions or "categories" enumerated — enforced through regulatory measures imposed by the government. To quote —

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (b) necessary to protect human, animal[,] or plant life or health;
>
> ...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.][502]

For a government regulation on trade to be considered valid within the WTO regime, either (1) it simply does not contravene any WTO obligation, or (2) if it does, it must fall under one of the exceptions in Article XX, as well as satisfy certain requisites for the valid application of these exceptions.

Thus, the general rule is that a state has the inherent power to regulate. An "exception" to this general rule is when a state enters a treaty (e.g. the GATT 1994), effectively consenting to a limitation on its inherent power to regulate. In the case of the WTO, this "exception" (i.e., limitation) is itself

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500. *Id.* ¶ 222.

501. United Nations Conference on Trade and Development, *supra* note 68, at 213-15.

502. GATT 1994: General Agreement on Tariffs and Trade 1994 art. XX (b) & (h), *opened for signature* Apr. 15, 1994, 1867 U.N.T.S. 187.

limited by Article XX (e.g., the paramount considerations of public morals, health, environment, etc.). Article XX is thus a "treaty-based limitation" on the "treaty-based exception" to the general rule of a sovereign State's inherent regulatory power. It is not meant to defeat the other provisions of the GATT (e.g., provisions on most-favored nation treatment and national treatment), but to be read into them, coming in to play when the circumstances call for them to be applied.

Ultimately, what this demonstrates is that it is a misconception that trade and environment are at odds, as both are indispensable to the welfare of mankind and mutually supportive.[503] It is not a case of "overlap and opposition[;]"[504] rather, "what is sought is balance between the two objectives of free trade and environmental protection."[505]

C. Applying Systemic Integration

Proceeding from sub-Parts A and B, this sub-Part C seeks to apply the principle of systemic integration to support the assertion that a State can and should comply with its obligations to impose regulatory measures for the mitigation of climate change, notwithstanding the substantive protections guaranteed by it under a BIT. First, it discusses fragmentation, including a definition of what specifically constitutes a "conflict" of norms. Second, it defines systemic integration and explains how it can address the challenges posed by fragmentation. It concludes by integrating these two with the prior discussion on the principle of sustainable development, the obligation not to cause transboundary harm, and the Article XX General Exceptions.

1. The Fragmentation of Public International Law

The fragmentation of public international law has been defined as "the potential [ ] normative conflict in the international legal system [arising] from a proliferation of norms, regimes, actors[,] and institutions[,]"[506] or most recently and more pertinently for the purposes of the Note, "the specialization

503. MATUSHITA, ET AL., *supra* note 496, at 786.

504. *Id.*

505. *Id.* at 787.

506. Nele Matz-Lick, *Harmonization, Systemic Integration, and 'Mutual Supportiveness' as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation*, 17 FINNISH Y.B. INT'L L. 39, 39 (2006).

of certain branches of public international law[.]"[507] A breakdown of this definition into "elements," so to speak, yields the following:

(1) There is potential or seeming conflict in the international legal system which, it should be noted, need not be rooted in treaty-making or text;[508] and

(2) It arises either from:

  (a) A proliferation of norms, regimes, actors, and institutions[509] ("fragmentation-proliferation"); or

  (b) The specialization of certain branches of public international law[510] ("fragmentation-specialization").

Fragmentation-proliferation was recognized and written about as early as the late 16th and early 17th centuries, when they were noted in Father of International Law Hugo Grotius' writings.[511] More recently in the 1950s, Clarence Wilfred Jenks — international lawyer and former Director-General of the International Labor Organization — identified the two "phenomena" that contribute to fragmentation in international law, particularly with respect to treaties: First, the absence in international law of a single, general law-making body. In effect, "treaties are tending to develop in a number of historical, functional[,] and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law."[512] Second, in relation to the first, the constant creation and revision of multilateral treaties, together with the frameworks for regulation established by or within them. In other words, Jenks attributed fragmentation to various bodies creating multiple treaties,

507. *Id.* at 40.

508. *Id.*

509. *Id.* at 39.

510. *Id.*

511. *Id.*

512. International Law Commission, *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, ¶ 5 , U.N. Doc. A/CN.4/L.682 (May 1-June 9 & July 3-Aug. 11, 2006) [hereinafter ILC Report].

each of which gives rise to its own regulatory regime/s. In recent years (i.e., the last couple of decades or so) there has been resurgent focus on fragmentation-specialization. In legal writing, its revival was marked by the Report published by a Study Group of the International Law Commission, entitled "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"[513] (ILC Report). The ILC Report provides an accurate yet succinct characterization of fragmentation-specialization, worth quoting in full —

> What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law[,'] 'human rights law[,'] 'environmental law[,]' 'law of the sea[,'] 'European law[,'] and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law[,]' etc. [—] each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[514]

Given this definition and overview of fragmentation, the logical follow-up is: What precisely are these "conflicting norms" that constitute fragmentation? To answer this question, two points must be noted: First, conflicting norms must belong to the same "subject matter" of international law. *Second*, a conflict between norms need not always be express or direct (e.g., "Do action A" vs. "Do *not* do Action A").

With respect to the first point, there can be no conflict between norms unless they exist in the same space and come face to face with one another. Thus, determining whether or not the norms in question belong to the same "subject-matter" of international law is a necessary starting point for gauging the existence of a conflict. After all, the rules of interpretation under Article 30 of the Vienna Convention expressly apply to "the rights and obligations of States parties to successive treaties relating to the same subject-matter."[515] But this subject-matter based approach must be nuanced and applied carefully, in

513. Matz-Lick, *supra* note 506, at 40.

514. ILC Report, *supra* note 512, ¶ 8.

515. Vienna Convention on the Law of Treaties, *supra* note 86, art. 31 (1).

order to avoid over-simplifying the question of whether or not a conflict exists. First, what determines whether or not two norms are part of the "same subject-matter"? Conventional wisdom dictates that "subject matter" refers to "trade law," or "investment law," or "environmental law." This is problematic, however, because these "[classifications] ... have no normative value per se [ ] [but] are only informal labels that describe the instruments from the perspective of different interests or different policy objectives."[516] Moreover, "[m]ost international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and vice versa."[517] They are not set in stone, can be subject to argumentation, and run the risk of being reduced to absurdity — *reductio ad absurdum*. To demonstrate, the ILC Report provides a simple example:[518] A treaty governing the transportation of hazardous industrial chemicals will have implications on trade law, transportation law, the law of the sea, and environmental law — and its subject-matter will thus be perceived differently by different parties. An insurer for chemical cargo is more concerned about the transportation law implications of the treaty, and will thus argue that it is a "transportation law" treaty. Likewise, an international environmental organization concerned about a possible leakage of the industrial chemicals into the water might view it instead as an "environmental law" treaty. Thus, fulfilling this "same subject-matter" criterion should not be made to depend on these "classifications;" rather, it should be deemed fulfilled if "two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a part."[519]

With respect to the second point — that a conflict between norms need not always be direct or express — the ILC Report pointed out that, while the "basic situation of incompatibility" is one in which a State cannot comply with rule or norm unless it fails to comply with another, "there are other, looser understandings of conflict as well."[520] For instance, "[a] treaty may sometimes frustrate the goals of another treaty without there being any strict

516. ILC Report, *supra* note 512, ¶ 21.

517. *Id.*

518. *Id.* ¶¶ 21–22.

519. *Id.* ¶ 23.

520. *Id.* ¶ 24.

incompatibility between their provisions"[521] or "[t]wo treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends."[522] According to the ILC even if these so-called "policy conflicts" are not, strictly speaking, logical incompatibilities, they are also "relevant for fragmentation."[523] In particular, the ILC Report gives the example of trade law and environmental law, whose varying origins and objectives may have an effect on how the norms involved are interpreted and applied by a state party.

2. Systemic Integration

Having discussed fragmentation and defined what constitutes a conflict of norms, this sub-Part will now proceed to define systemic integration and explain how it can address the challenge posed by fragmentation.

In the 1928 *Georges Pinson* arbitration case between France and Mexico — over a decade before the adoption of the Vienna Convention — the Tribunal stated that "[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."[524] It was essentially a statement of the principle of systemic integration, and is also fixed in Article 31(3)(c) of the Vienna Convention, which states that "[t]here shall be taken into account, together with the context ... Any relevant rules of

521. *Id.*

522. ILC Report, ¶ 24.

523. *Id.*

524. Campbell McLachlan, *The Principle of Systemic Integration and Article 31 (3) (C) of The Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 279 (2005) [hereinafter McLachlan, *Systemic Integration*].

international law applicable in the relations between the parties."[525] The principle recognizes that any treaty, regardless of how wide its scope may be, is ultimately a creature of international law. Consequentially, a treaty is (1) "limited in scope and predicated for [its] existence and operation on being part of the international law system[;]"[526] and must always be interpreted and applied against the backdrop of general principles of international law.[527] Systemic integration and the provision in the Vienna Convention in which it is rooted have, for the most part, been taken for granted. It was a major but typically unarticulated premise of treaty interpretation, because it "flowed so inevitably from the nature of a treaty as an agreement 'governed by international law' that one might think that it hardly needs to be said, and that the invocation of it would add little to the interpreter's analysis."[528] But fragmentation-specialization has brought to the forefront the issue of potential and actual conflicts between the norms and institutions of different regimes of international law,[529] once again breathing some life into the systemic integration aspect of international legal writing and discourse. Despite this "resurgence," so to speak, and a "general approval" of the principle as expressed in the Vienna Convention, there are only a small number of cases that have expressly turned or relied on this principle, primarily in decisions before the Iran-US Claims Tribunal and the European Court of Human Rights.[530]

The Iran-US Claims Tribunal was established on 19 January 1981 by Iran and the US in an effort to resolve the "crisis in relations between [the two States] arising out of the November 1979 hostage crisis at the [US] Embassy in Tehran, and the subsequent freezing of Iranian assets by the [US]"[531] One

525. Vienna Convention on the Law of Treaties, *supra* note 86, art. 31 (3) (c).

526. McLachlan, *Systemic Integration*, *supra* note 524, at 280.

527. *Id.*

528. *Id.*

529. Matz-Lick, *supra* note 506, at 39.

530. McLachlan, *Systemic Integration*, *supra* note 524, at 293.

531. Iran-United States Claims Tribunal, About the Tribunal, *available at* https://www.iusct.net/Pages/Public/A-About.aspx (last accessed Nov. 30, 2019).

of the issues which confronted the Tribunal was the nationality requirement imposed on those who sought to bring a claim before it (e.g., the case of *Esphahanian v. Bank Tejara*, in which the question was whether someone with dual Iran/US nationality could bring a claim).[532] The Tribunal had to use systemic integration under Article 31 (3) (c) to as a basis for its resort to the law on diplomatic protection in international law, in order to justify its conclusion that the principle of dominant and effective nationality was applicable in the case.[533] In other cases before it, the Tribunal also made use of "the rules of customary law ... in order to fill in possible [gaps] in [treaties] to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions."[534]

The ECHR — "an international court set up in 1959 [that] rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights" — had recourse to systemic integration in several cases. In *Golder v. United Kingdom*,[535] the issue was whether or not the right to fair trial guaranteed under Article 6 of the European Convention on Human Rights was limited to the conduct of action that had already been initiated. In ruling against this proposition, the court applied systemic integration and referred to Article 38 (1) of the Statute of the ICJ which recognizes general principles of law as a source of international law. It held that "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally '[recognized]' fundamental principles of law ... Article 6[, paragraph] 1 ... must be read in the light of these principles."[536]

Proceeding from this background, how is systemic integration applicable to the legal issue at hand? The Rio Declaration, as well as other international instruments that refer to sustainable development and the obligation not to cause transboundary harm, the Article XX exceptions under the WTO, and

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532. McLachlan, *Systemic Integration*, *supra* note 524, at 293.

533. *Id.* at 294.

534. *Id.*

535. Golder v. United Kingdom, Merits and Just Satisfaction, Judgment, App No 4451/70, (Feb. 21, 1975).

536. *Id.* ¶ 13

the Paris Agreement, must not be treated as separate and isolated from the substantive protections in a BIT. Concurrently, these substantive protections cannot be used to justify non-compliance with environmental law principles and the obligation to mitigate climate change. This is especially true for a State like the Philippines that is a party to and has ratified these instruments.

It has been cautioned, however, that the principle of systemic integration does not sanction the uninhibited lifting of provision in one treaty so that it can be automatically applied to or used as a tool of interpretation for another treaty. "[E]ach treaty-based provision has to be read and understood in its own context and [ ] analogies to provisions in other treaties or to rules of customary law may therefore not be appropriate."[537] For example, as held in *Sporrong and Lönnroth v. Sweden*,[538] the landmark ECHR case on the protection of private property, "[t]he tripartite structure of Article 1 of the First Additional Protocol to the ECHR is peculiar to this particular treaty."[539] Thus, in applying systemic integration, there is a fine line between harmonization and overstepping. Ensuring that the former does not cross over into the latter is ultimately a balancing act, the success or failure of which must be determined on a case-to-case basis.

3. Reconciling the Substantive Protections with the Obligation to Mitigate Climate Change

As discussed in Part III, the "sole-effects doctrine" is often what is used to determine whether or not there has been indirect expropriation warranting compensation. Under the sole-effects doctrine, the Tribunal does not consider the regulatory measure's purpose and does not consider whether or not the same may justify the regulatory measure's effect. An alternative approach, one that has been used by UNCITRAL Tribunals is the so-called "police powers doctrine." The police powers doctrine posits that "general regulation, adopted bona fide and in a non-discriminatory manner to protect public health or safety, or to prevent a public nuisance, does not amount to expropriation and cannot be compensated,"[540] because "[S]tates do have the right — and, some

537. DOLZER & SCHREUER, *supra* note 210, at 99.

538. Sporrong and Lönnroth v. Sweden, 5 Eur. H.R. Rep. 35 (Sep. 23, 1982).

539. DOLZER & SCHREUER, *supra* note 210, at 99.

540. Vadi, *supra* note 63, at 1327. *See generally* Saluka Inv. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17, 2006).

would argue, the duty-to restrict private property to prevent a public nuisance."[541] To be valid under the police powers doctrine, however, the measure must be both reasonable and proportional.[542] A State can only be considered to have violated the prohibition against discrimination of a foreign investor if the regulatory measure imposed treats the latter differently from other foreign investors in "like circumstances." Recalling that ICSID Tribunals typically consider only the type or sector of business involved in determining whether or not foreign investors are in like circumstances — irrespective of any difference in the social or environmental impact of the foreign investor's activities — regulatory measures for the mitigation of climate change may be reconciled with substantive protections under BITs if it is recognized that

> carbon-intensive investments and climate-friendly economic activities are not 'like investments' because they have different impacts on climate change. Therefore, the Host State would be able to defend its regulatory measures on the ground that no discrimination is at issue since there is a legitimate distinction between economic activities, which have different impacts on climate change.[543]

Such an approach may allow validity to regulations that are prima facie found to be discriminatory, but are actually justifiable upon taking a closer look at the novelty and complexity of climate change regulation.[544]

D. Demonstrating the Incompatibility

One of the most common ways by which States seek to attract foreign investment is by entering BITs, the primary objective of which is to guarantee foreign investors the stability and security the latter requires before placing any money or property under the territory and effective control of the Host State. Taking this into account, it is not completely unexpected that BITs, and the ICSID ISDS provisions contained in them, are skewed in favor of the foreign

541. Vadi, *supra* note 63, at 1328. *See generally* Chemtura Corp. v. Canada, UNCITRAL, Award (Aug. 2, 2010).

542. Vadi, *supra* note 63, at 1328. *See generally* Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progrès v. Republic of Poland, UNCITRAL, Award (Feb. 14, 2012).

543. Vadi, *supra* note 63, at 1329.

544. *Id.*

investor, making them inappropriate remedies for resolving complex and nuanced issues, such as those relating to climate change. In effect, while investment and environmental law regimes are not inherently at odds, they are pitted against each other before the BIT-ICSID ISDS mechanism, with the result often being that the environmental consideration is forced to take a back seat. This Part thus seeks to answer the third legal issue in this Note by demonstrating such an incompatibility, as a prelude to the succeeding Conclusion and Recommendation Part.

First, an ICSID tribunal is more inclined to rule in favor of the foreign investor. "Generally speaking, conflicting [H]ost [S]tate obligations under non-investment treaties do not fare well in their treatment by arbitrators in investor-state disputes."[545] "Despite the lack of a formal hierarchy amongst the treaties to which a [S]tate has consented, the obligations under international investment agreements are effectively given priority by arbitral tribunals in investment disputes."[546] Further —

> [i]nternational investment treaty jurisprudence suggests that [T]ribunals consider environmental issues as factual rather than legal matters. Because States often rely on environmental considerations to explain a measure's legality and reasonableness, a [T]ribunal's findings on these factual issues will impact how it assesses whether the State has violated a treaty obligation. A [T]ribunal's findings on environmental facts can also be relevant to other legal determinations, such as jurisdiction and an investor's entitlement to compensation as well as the quantum of damages owed. However, these decisions leave unanswered questions about evaluating government motives, conflicting scientific evidence, and the regulatory choices of States in implementing public policy objectives. In particular, the case law leaves open the fundamental question of the appropriate standard by which to review regulations addressing public health and the environment.[547]

Second, neither the ICSID Convention nor any of the Philippines' active BITs provide for "general exceptions," such as the one found in Article XX of the GATT, discussed in the immediately preceding Part. Other examples of these exception clauses include some of Canada's BITs, and a number of

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545. Miles, *Arbitrating climate change*, *supra* note 310, at 82.

546. *Id.*

547. Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 402-03 (2015).

other free trade agreements. Further, certain types of public interest regulation often at issue in investment disputes, are rarely expressly the subject of Non-Precluded Measures clauses. "Traditionally, there has been very limited engagement with wider policy issues in the text of investment treaties or in investor-state disputes."[548] "[M]ost [BITs] do not reference substantive policy issues and thus [T]ribunals have no guidance on how to weigh ecological aims of governmental measures."[549] Traditionally, BITs do not contain express references to environmental protection or human rights. Further, they have not integrated principles from other areas of international law or referred to any non-investment law issues; they do not incorporate non-investment law principles into the substantive body of treaty texts; and there has been a notable failure to incorporate sustainability considerations into interpretations given to investor protections in arbitral awards.[550]

Third, the use of stock clauses gives rise to overly broad interpretations of the substantive protections under BITs.

Stock clauses, often the result of hasty negotiations, can be incorporated into the text of a treaty, even though their potential effect on the Host State's sovereignty have yet to be fully considered.

> As suggested above, the use of stock clauses in IIAs can be problematic. The reason lies less with the clauses, and more with the interpretation of these clauses. Take, for example, the stock 'National Treatment' clause. This clause stipulates that foreign investors be treated in the same manner as national investors, and is meant to ensure that foreign investors are not discriminated against. However, many 'national treatment' clauses are vaguely worded, and it has been open to Tribunals to interpret the clause widely or narrowly. A wide interpretation of the clause would encompass de facto discrimination as a breach of the clause, which means that if the government were to act in a manner that resulted in prejudice to a foreign investor, it could be found to have violated this clause even if there were no evidence of intent to discriminate. A narrow interpretation would require evidence of discrimination to find a breach. The discrepancy between the interpretations demonstrates the difficulty faced by [H]ost [States] under IIAs: they cannot know how an arbitration [T]ribunal will interpret the law.

548. Miles, *Arbitrating climate change*, *supra* note 310, at 80.

549. Beharry & Kuritzky, *supra* note 547, at 403.

550. Miles, *Arbitrating climate change*, *supra* note 310, at 80.

> This same problem occurs with other stock clauses used in IIAs, such as the 'Most [Favored] Nation' clause.[551]

Fourth is the issue of inconsistent awards, or the fact that previous cases do not provide a sufficient standard by which regulatory measures to mitigate climate change may be evaluated. "[T]here is a risk that arbitral tribunals will focus on the persuasive precedents of previous arbitral awards, not necessarily dealing with climate change-related disputes."[552]

> [Q]uestions arise as to whether the multiplicity of claims and the diversity of arbitral tribunals can lead to divergent awards on the interpretation of recurring legal and factual issues ... [thereby impeding] the harmonious development of international investment law and [jeopardizeing] the coherence and predictability of the same.[553]

"[F]ragmentation and increasingly narrow specialization sometimes produced awards that suffered from failing to situate their analyses within the wider legal or contextual frame of reference."[554]

Fifth, "the general lack of transparency of investment treaty arbitration is of particular concern."[555]

V. CONCLUSION AND RECOMMENDATION

A. Conclusion

Climate change has forced a re-evaluation of the legal regimes within public international law, not least of which is investment law, and the mechanisms and manners through which it interacts with environmental law. When considering environmental law and investment law, there is a seeming institutional and normative conflict between the two. It is the submission of this Note that such a conflict is neither inherent nor unavoidable. In fact, these two regimes can and should work in harmony with one another. Unfortunately, many of the BITs that have been entered into by the Philippines and other States pit these two areas of law against each other,

551. Brown, *supra* note 208, at 5.

552. Vadi, *supra* note 63, at 1318.

553. *Id.* at 1333.

554. *Id.* at 1349.

555. *Id.* at 1332.

because of their vagueness and the inadequacy of the dispute settlement mechanism referred to or contained within them. This gives rise to the three legal issues which this Note seeks to address. Ultimately, it is the submission of this Note that: (1) States are obliged to enact regulatory measures for the mitigation of climate change; (2) the obligation of the state to enact regulatory measures for the mitigation of climate change can and should be complied with, notwithstanding the substantive protections guaranteed to foreign investors under bilateral investment treaties; and (3) the ICSID ISDS Mechanism under a BIT is an inappropriate remedy such that it cannot accommodate disputes arising out of an alleged violation of a substantive protection under a BIT due to the imposition of regulatory measures for the imposition of climate change.

B. Recommendations

The particular wording of a BIT is important, both for the negotiation and drafting of future ones, as well as the re-negotiation and interpretation of active ones. The following are this Note's Recommendations with respect to the provisions contained in a BIT:

New-generation BITs should contain either a general exception clause or a security exception clause. These security exception clauses "protect the public order and essential security interests."[556]

> Although some such clauses adopt an expressly military framing, and therefore would be inapposite to shield climate change measures, others adopt a looser wording, which may be susceptible of evolutionary interpretation. In other words, the term 'security' could be interpreted in an evolutionary manner so as to include 'climate security.'[557]

BITs can also be re-drafted to provide for express consent for counterclaims.

As an alternative to the ICSID ISDS mechanism, any and all claims relating to a State's imposition of climate change regulatory measures should be referred instead to arbitration by an ad hoc tribunal or to the Permanent Court of Arbitration.

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556. *Id.* at 1346.

557. *Id.*

Active BITs can be amended to reflect the aforementioned recommendations or, if this is not feasible, the parties can agree to protocols that provide for interpretations to provisions that are acceptable to both parties.

The following is the suggested Model Clause "carve-out" provision to be incorporated into both active and future BITs, either through renegotiation or interpretation in the case of the former, or negotiation and drafting in the case of the latter.

Article __.

(1) This Article applies to

    (a) Any regulatory measure adopted by the host state;

    (b) In furtherance of its obligations under international law to mitigate climate change;

    (c) That has either been formulated or, at the very least, recommended by the Climate Change Commission.

(2) A challenge to any such measure by the foreign investor shall not be subject to Investor State Dispute Settlement under the auspices of the International Centre for the Settlement of Investment Disputes.

(3) Such measure shall instead be subject to arbitration before one of the following bodies, to be selected by agreement of the parties.

    (a) The Permanent Court of Arbitration

(4) The parties may also agree to Ad Hoc Arbitration, subject to the prerequisite of entering into an agreement in writing stipulating the following, among others:

    (a) Qualifications and Manner of Selecting the Arbitrators;

    (b) Jurisdiction of the Tribunal; and

    (c) Any other Matters the Parties Deem Fit to Settle.