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Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements

AQ 1

Gian Maria Farnelli
University of Bologna, Bologna, Italy
gianmaria.farnelli2@unibo.it

Abstract

This article studies the relevance of environmental obligations, in particular those related to climate change, in assessing breaches of investment agreements to show that investors may foster compliance with climate change policy objectives through investment arbitration. The article is organized in four parts, following an introductory section. First, preliminary issues stemming from the submission of environmental claims and arguments in investment arbitration will be addressed. This point is addressed with regard to jurisdiction and applicable law. Second, the study focuses on how the environmental arguments may be used by claimants in investment arbitration. It is shown that they may be relevant both under a factual and an interpretative perspective. Third, evidentiary differences relating to the use of environmental arguments in investment arbitration is examined. Lastly, concluding remarks are made as to the potential benefits for investors in raising climate change-related arguments in investment arbitration.

Keywords

burden of proof – climate change – environmental law – fair and equitable treatment – full protection and security – investment arbitration – litigation strategy

1 Introduction

Investment and the environment have always been intertwined. The typical activities toward which foreign investment go – such as the energy and

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extractive industries – have a significant impact on the environment. Thus, environmental issues have been raised in investment arbitration many times.[1]

It is well-known that environmental-related arguments have been used mostly by States. As 'shields',[2] within the 'regulatory powers' defence,[3] according to which a State is not 'liable for economic injury that is the consequence of bona fide regulation',[4] or for excluding protection when the relevant bilateral investment treaty (BIT) requires the investment to be made in compliance with domestic legislation or sustainable developments.[5] And as a 'sword',[6] within counterclaims, as shown by the notorious *Burlington* and *Perenco* disputes.[7]

1 On the 'surge' of environmental issues in investment arbitration, see Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 12, 19–25.

2 Jeff Sullivan and Valeriya Kirsey, 'Environmental Policies: A Shield of a Sword in Investment Arbitration?' (2017) 18 JWT&IL 100. See also Chester Brown and Domenico Cucinotta, 'Treatment Standards in Environmental-Related Investor-State Disputes' in Miles (n 1) 175.

3 On regulatory powers, see Yulia Lavashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Brill-Nijhoff 2019); Aniruddha Rajput, *Regulatory Freedom and Indirect Expropriation in Investment Arbitration* (Kluwer 2019); Catherine Titi, *The Right to Regulate in International Investment Law* (Nomos 2014).

4 Ad hoc arbitration, *Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 198. See also *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 113; *Saluka Investments BV v The Czech Republic*, PCA Case No 2001-04, UNCITRAL, Partial award (17 March 2006) paras 262 and 305; *Philip Morris SARL v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 305.

5 See, for example, Article 1(3) of the 2016 Morocco-Nigeria BIT, according to which '[i]nvestment means an enterprise within the territory of one State [...] which contribute sustainable development of that Party'. For comments on similar provisions, see Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: an Ambiguous Relationship' in Jorge E Viñuales and Emma Lees, *Environmental and Energy Law*, vol I (Elgar 2017) 244, 258–261. This appears to be a particular construction of the 'clean hands' doctrine. See, on clean hands, Attila Tanzi, 'The Relevance of the Foreign Investor's Good Faith' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (ed), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff 2018) 193.

6 See, inter alia, Sullivan and Kirsey (n 2) 104–07; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, CUP 2018) 967 ff.

7 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No ARB/08/6; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5 (formerly *Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*PetroEcuador*)). For general comments, see Anna Bilanová, 'Environmental Counterclaims in Investment Arbitration' (2020) 5 EILA Rev 400; Maxi Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) 36 ICSID Rev-FILJ 413; Jason Rudall, 'The Tribunal

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However, investors, too, may benefit from using environmental issues as part of their litigation strategy. This flows from the fact that environmental law, and climate change-related obligations in particular, is developing towards acknowledging a wider role to private enterprises. Indeed, private investments have a peculiar role in achieving sustainable development and climate change-related goals, given the costs of the transition to a 'green economy'.[8]

Consequently, an increasing number of tribunals have been faced with environmental and climate change-related issues raised by claimants.[9] This shows that States measures allegedly in contrast with climate change-related goals and obligations may impinge on the investors' rights. By way of example, reference may be made to the change of the incentives' regime for investment in renewable energies,[10] or measures affecting how the impact of a project is assessed to favour fossil fuel activities rather than low-carbon activities,[11] as being allegedly in contrast with climate change-related environmental obligations and investment law. Similarly, a failure to comply with relevant due diligence obligations under the 2015 Paris Agreement concerning the adoption

with a Toolbox: On *Perenco v Ecuador*, Black Gold and Shades of Green' (2020) 11 JIDS 485; Sullivan and Kirsey (n 2) 107–29.

8 On the role of privates, see Viñuales (n 1) 13–16.

9 This is showed, inter alia, by the attention that scholars are devoting to the role of investor-state dispute settlement may have in promoting green investments (Sarah Z Vasani and Nathalie Allen, 'No Green Without More Green: The Importance of Protecting FDI Through International Investment Law to Meet the Climate Change Challenge' (2020) 5 EILA Rev 3).

10 This possibility is well exemplified by the abundant litigation concerning renewable energies against Czechia, Italy and Spain. For an overview of the relevant case law, see, inter alia, Sondra Faccio, 'The Assessment of the FET Standard Between Legitimate Expectations and Economic Impact in the Italian Solar Energy Investment Case Law' (2020) 71 QIL 3; Amélie Noilhac, 'Renewable Energy Investment Cases Against Spain and the Quest for Regulatory Consistency' (2020) 71 QIL 21.

11 The relevant example to this effect is the amendment to the United States National Environmental Policy Act enacted by the Trump Administration in January 2020, to the effect of making renewable energies' projects less cost-effective than fossil fuel projects (Lisa Friedman, 'Trump Weakens Major Conservation Law to Speed Construction Permits' (*The New York Times*, 15 July 2020) <www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html> accessed 14 October 2022). It is to be noted that the Biden Administration has recently rolled back to the previous text of the act (Jonathan D Simon, Molly A Lawrence and Rachael L Lipinski, 'Biden Administration Proposes to Walk Back Key Trump Era NEPA Regulation Changes' (*The National Law Review*, 12 October 2021) <www.natlawreview.com/article/biden-administration-proposes-to-walk-back-key-trump-era-nepa-regulation-changes> accessed 14 October 2022).

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and implementation of climate change adaptation measures[12] may correspond to a failure to take all reasonable measures to prevent damages to an investment caused by a foreseeable adverse climate event.

This article addresses this kind of reasoning with a view to assessing whether investors may play the role of 'environmental guardians' by using investment arbitration as a tool to foster compliance with climate change policy objectives.[13] In particular, the article elaborates on the relevance of environmental law, with special regard to climate change, in assessing breaches of international investment agreements (IIA). This will be made by distinguishing uses of environmental law in investment arbitration as autonomous claims,[14] or as 'arguments'[15] instrumental to claiming a breach of an investment standard. For the sake of brevity, the term 'environmental law' will refer to 'international environmental law'.

The analysis will be made taking steps from the way in which human rights-related claims and arguments have been addressed in investment arbitration.[16] Indeed, though raising human rights-related claims and arguments in investment arbitration may appear easier due to the 'common lineage' that investment standards and human rights law share with regard to the treatment of aliens[17] and the potentiality of considering investment protection as a human right in itself,[18] no compelling reasons prevent the reasoning of investment tribunals with regard to those claims and arguments to

12 On the due diligence nature of adaptation obligations under the Paris Agreement, see Irene Suárez Pérez and Angela Churie Kallhauge, 'Adaptation (Article 7)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) 196.

13 Cf Kyla Tienhaara, 'Does the Green Economy Need Investor-State Dispute Settlement?' in Miles (n 1) 292.

14 The term 'claim' refers to '[a] demand for a remedy or assertion of a right, especially the right to take a particular case to court (right of action)' (Jonathan Law and Elizabeth A Martin, 'Claim' in *A Dictionary of Law* (9th edn, OUP 2018)).

15 The term 'argument' refers to '[a] statement or fact advanced for the purpose of influencing the mind; a reason urged in support of a proposition' (entry 'Argument' in *Oxford English Dictionary*).

16 Indeed, virtually any breach of due process may be presented as a FET breach. On the issue, see Pierre-Marie Dupuy and Jorge E Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in Mark Bungenberg and others (eds), *International Investment Law* (Hart-Nomos 2015) 1739.

17 Timothy G Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 12 JWIT 27, 28; Conway Blake, 'Moral Damages in Investment Arbitration: A Role for Human Rights?' (2012) 3 JIDS 371, 390.

18 Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?' (2012) 4 GoJIL 179, 186.

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be applied with regard to environmental ones, in so far as the investment may benefit from a proper implementation of environmental-friendly obligations and policy goals.

This article is arranged in four parts, following this introductory section. First, jurisdictional issues stemming from the submission of environmental claims and arguments in investment arbitration will be addressed.[19] The issue will be dealt with under two perspectives. On the one hand, the study will consider whether claims based on environmental law may fall within the jurisdiction of an investment tribunal. On the other, it will be assessed whether rules of environmental law may form part of the law applicable to an investment dispute. To that effect, reference will be made to developments in IIA practice to assess the effect of the increasing reference to sustainable development and climate change in investment agreements.

Second, the study will focus on how the environmental arguments, rather than claims,[20] may be used by claimants in investment arbitration to foster compliance by States with environmental obligations. Attention will be given to two possibilities. From a factual standpoint, it will be assessed whether a breach of an environmental obligation may constitute evidence of a breach of a standard of protection. From an interpretative perspective, consideration will be given to the possibility that a breach of an environmental obligation amounts to a breach of a standard of protection. To that effect, recent case law tackling climate change-related issues will be analysed, with special regard to the abundant ECT case law concerning incentives in renewable energies, looking at the degree by which investors have referred to climate change-related policy objectives and obligations in their pleadings as elements evidencing breaches of fair and equitable treatment (FET). Consideration will also be given to how a systemic interpretation of investment agreements in the light of environmental obligations may impact the assessment of the 'reasonableness' of State measures.

Third, evidentiary issues relating to the use of environmental arguments in investment arbitration will be addressed. In particular, the case will be made that the reversal of the burden of evidence[21] typical of full protection

19 For the sake of brevity, the distinction between 'jurisdiction' and 'admissibility' will not be addressed in this study. For few remarks on the blurred distinction between the two notions, see Attila M Tanzi and Filippo Fontanelli, 'Jurisdiction and Admissibility in Investment Arbitration – A View from the Bridge at the Practice' (2017) 16 LAPICT 3.

20 See text at supra nn 14–15.

21 The burden of evidence, also 'burden of going forward with the evidence' or 'evidentiary burden', is 'the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or nonexistence of a fact in issue'

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and security (FPS) claims favours investors when it comes to submitting environmental-related arguments.

Lastly, concluding policy and litigation strategy-related remarks will be made as to the potential benefits for investors in acting as 'environmental guardians' by raising climate change-related arguments in investment arbitration.

2 Preliminary Issues

2.1 *Environmental Claims and Jurisdiction of Investment Tribunals*

The first preliminary issue is one of jurisdiction. Namely, it is to be determined whether an investment tribunal would be entitled to exercise its jurisdiction over a claim by an investor encompassing an alleged breach by the host State of its international environmental obligations.

Preliminarily, one has to consider that environmental obligations are applicable only between States. They usually do not recognise rights which might be claimed by individuals before an international adjudicative body. This has been acknowledged in the *Bayview* arbitration. The case revolved around Mexico's alleged violation of the US-Mexico bilateral treaty on the apportionment of waters of the Rio Grande. The Claimants, several nationals of the United States having activities on the territory of the United States alleged that the alleged breach of the Rio Grande Treaty amounted to a breach of several North American Free Trade Agreement (NAFTA) provisions on indirect expropriation, FET and national treatment.[22]

The Tribunal declined jurisdiction over these claims. It held that the Rio Grande Treaty 'does not create property rights amounting to investment' because the Treaty was exclusively meant to apply between States.[23] It also added that, 'The simple fact that an enterprise in one NAFTA State is affected

('Burden of Proof' in Law and Martin (n 14)). It is separated from the persuasive burden, which is 'carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue' (ibid).

22 For an overview of the case, see Lisa Bohmer, 'Looking Back: In *Bayview v Mexico*, Arbitrators Considered Whether Rio Grande River Water Rights Under Texas Law Could Be Used as a Basis for Claiming that Mexican Diversion of Water Was Contrary to NAFTA' (*IAReporter*, 6 July 2018) <www.iareporter.com/articles/looking-back-in-bayview-v-mexico-arbitrators-considered-whether-rio-grande-river-water-rights-under-texas-law-could-be-used-as-a-basis-for-claiming-that-mexican-diversion-of-water-was-contrary-to-n/> accessed 14 October 2022.

23 *Bayview Irrigation District et al v United Mexican States*, ICSID Case No ARB(AF)/05/1, Award (19 June 2007) para 121.

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by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA.'[24]

The possibility of being adjudicated before an investment tribunal is limited even for those few environmental obligations that recognise rights to individuals, such as the right to access to justice or public participation in environmental matters, or the obligation of prevention which forms part of the right to an healthy environment.[25] This flows from the fact that the boundaries of the jurisdiction of the arbitral tribunal are courtailed by the jurisdictional clause of the relevant IIA.[26] The case law shows that investment tribunals usually follow a 'granular' approach to jurisdictional issues.[27] Accordingly, they narrowly interpret the scope of their jurisdiction on the basis of the relevant

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24 ibid para 101. The Tribunal further stressed that NAFTA 'was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party' (ibid para 103).

25 See, for example, the Inter-American Court of Human Rights, according to which '[t]o comply with the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must fulfil a series of obligations with regard to both damage that has occurred within their territory and transboundary damage' ('The Environment and Human Rights', Advisory Opinion OC-23/17 (15 November 2017) para 125 ff). The Court then referred to the obligations the obligation of prevention, the precautionary principle, the obligation of cooperation and the procedural obligations relating to environmental protection as construed in relevant international environmental treaties (ibid paras 127 ff). On the Inter-America Court case law on the matter, see Diego G Mejía-Lemos, 'The Right to a Healthy Environment and Its Justiciability Before the Inter-American Court of Human Rights: A Critical Appraisal of the *Lhaka Honhat v Argentina* Judgement' (2022) 31 RECIEL 317. More in general, see Elena Cima, 'The Right to a Healthy Environment: Reconceptualizing Human Rights in the Face of Climate Change' (2022) 31 RECIEL 27; Marc Limon, 'United Nations Recognition of the Universal Right to a Clean, Healthy and Sustainable Environment: An Eyewitness Account' (2022) 31 RECIEL 155.

26 For an overview of typical wordings of jurisdictional clauses, and the relationship with the law applicable to the dispute, see Christoph H Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 McGill J Disp Resol 1, 6–11.

27 On the 'granular' approach of adjudicative bodies in recent case law, with special regard to the ICJ one, to jurisdictional *ratione materiae*, see Eleni Methymaki and Christian Tams, 'Immunities and Compromissory Clauses (Part I)' (EJIL: Talk!, 27 August 2020) <www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/> accessed 14 October 2022; Eleni Methymaki and Christian Tams, 'Immunities and Compromissory Clauses (Part II)' (EJIL: Talk!, 27 August 2020) <www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-ii/> accessed 14 October 2022. Contrary, inter-state adjudicative bodies established under the UNCLOS usually favour an extensive interpretation of jurisdictional clauses, so as to include claims grounded on rules other than those codified in the Convention, but nonetheless incidental to the settlement of the dispute. See Peter Tzeng, 'Jurisdiction and

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IIA to the effect of considering as falling within their jurisdiction exclusively those disputes concerning rules which have a direct bearing on investment law. Thus, absent specific provisions including within a tribunal's jurisdiction claims other than those concerning investment protection, the tribunal is not allowed to consider environmental claims.

The case law on human rights claims before investment tribunals provides elements demonstrating a restrictive approach to the jurisdiction of investment tribunals. Such restrictive approach may be applied *mutatis mutandis* to a claim concerning breaches of environmental obligations bestowing rights on individuals.

The fact that breaches of rules other than those geared towards the protection of foreign investments do not fall within the jurisdiction of an investment tribunal was first addressed in the *Biloune* arbitration. The dispute concerned, inter alia, the detention without charges and subsequent deportation from Ghana to Togo of the Claimant.[28] The investor started arbitration on the basis of the jurisdictional clause under Article 15 of the GIC Agreement, which referred to '[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise'. Mr Biloune claimed, inter alia, that he suffered a breach of his human rights.[29]

The Tribunal excluded that it had jurisdiction on the human rights-side of the investor's claim on the basis of Article 15 of the investment agreement.[30] The Tribunal acknowledged that contemporary customary law affords foreign nationals a standard of treatment not less favourable than that provided under international law. However, it held that this did not imply that it was entitled to arbitrate on any dispute in that regard, given the reference in the jurisdictional clause to disputes 'in respect of' the investment.[31]

The same restrictive approach to jurisdiction may be found in the *Rompetrol* case. There, the Tribunal expressed that 'it [was] not called upon to decide any

Applicable Law Under UNCLOS' (2016) 126 Yale L J 242; Attila M Tanzi, 'Adjudication at the Service of Diplomacy: The *Enrica Lexie* Case' (2021) 12 JIDS 448, 456 ff.

28 For further elements on the case, see Jarrod Hepburd, 'Looking Back: UNCITRAL Tribunal in *Biloune v Ghana* Found Creeping Expropriation of Resort Complex, but Declined Jurisdiction over Denial of Justice and Human Rights Claims' (*IAReporter*, 6 November 2020) <www.iareporter.com/articles/looking-back-uncitral-tribunal-in-biloune-v-ghana-found-creeping-expropriation-of-resort-complex-but-declined-jurisdiction-over-denial-of-justice-and-human-rights-claims/> accessed 14 October 2022.

29 *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) (1993) 95 ILR 183, 187.

30 ibid 202–03.

31 ibid 203.

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issue under the ECHR … Its function [was] solely to decide, as between [the parties], "legal dispute[s] arising directly out of an investment"'.[32] It however added that, 'The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes.'[33]

The Tribunal interpreted restrictively the boundaries of the dispute potentially falling within its jurisdiction also in the *von Pezold* case. The case revolved around the expropriation without compensation by Zimbabwe of three estates as part of a land reform programme.[34] During the proceedings, four indigenous communities submitted petitions to participate as *amici curiae*.[35] Their submissions revolved around their putative rights as indigenous communities on the land in point under international human rights law. On the basis of Article 37(2)(a) ICSID Rules of Arbitration, the Tribunal had to assess whether the submissions addressed issues within its jurisdiction.[36] The Tribunal

32 *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013) para 170. This position was criticised in the literature as being too restrictive. See Ursuala Kriebaum, 'Case Comment: The Rompetrol *Group NV v Romania*' (2014) 15 JWIT 1022, 1030; Filip Balcerzak, *Investor-State Arbitration and Human Rights* (Brill-Nijhoff 2017) 210. For an overview of the dispute and the relevant award, see Luke E Peterson, 'Analysis: You Don't Need to Show Damage to Prove Breach of BIT, but That Also Means that Victorious Claimants May Walk Away with no Compensation' (*IAReporter*, 10 May 2013) <www.iareporter.com/articles/analysis-you-dont-need-to-show-damage-to-prove-breach-of-bit-but-that-also-means-that-victorious-claimants-may-walk-away-with-no-compensation/> accessed 14 October 2022; Luke E Peterson, 'Investor Allegations of Top-Level Political Conspiracy Not Borne Out, but Some Measures of Romania Point to Prosecutorial Animus' (*IAReporter*, 10 May 2013) <www.iareporter.com/articles/investor-allegations-of-top-level-political-conspiracy-not-borne-out-but-some-measures-of-romania-point-to-prosecutorial-animus/> accessed 14 October 2022; Luke E Peterson, 'Tribunal Says that Any Treatment of Company Officers Must Have "Necessary Link" to the Claimant Entitled to Treaty-Protection' (*IAReporter*, 10 May 2013) <www.iareporter.com/articles/tribunal-says-that-any-treatment-of-company-officers-must-have-necessary-link-to-the-claimant-entitled-to-treaty-protection/> accessed 14 October 2022.

33 *Rompetrol* (n 32) para 172(iii).

34 For further explanations and comments on the case in point, see the several comments on the case page in *IAReporter* <www.iareporter.com/arbitration-cases/bernhard-von-pezold-and-others-v-zimbabwe/> accessed 14 October 2022.

35 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2 (26 June 2012) para 1.

36 The issue of *amici curiae* in investment arbitration is addressed in many scholarly words. See, inter alia, Pascual Vives and Francisco José, 'Amicus curiae Intervention in Investment Arbitration' in Carlos Jiménez Piernas and Isabel García Rodríguez (eds), *New Trends in International Economic Law: From Relativism to Cooperation* (Éditions Romandes

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answered in the negative and stressed that a reference to general international law as the applicable law in the relevant IIA 'does not incorporate the universe of international law into the BITs or into disputes arising under the BITs'.[37] It is however to be noted that the Tribunal also added that such submission was not linked with any defence by the Respondent.[38] This suggests that the Tribunal would have been more available to consider such an issue as falling within its jurisdiction were one of the disputing parties to raise a human rights argument before the petitioners' submissions.

The above restrictive approach to jurisdiction may reasonably be applied also with regard to environmental law. Indeed, the Tribunals' reasonings were grounded on the fact that their jurisdiction exclusively encompasses investment-related claims, to the exclusion of any claim which is not grounded on investment law.

2.2 *Environmental Law as Applicable Law in Investment Arbitration*

The second preliminary issue relates to the applicable law, which is to be addressed separately from the jurisdiction of the tribunal. Indeed, as expressed by Schreuer, '[o]ne might expect that the rules on applicable law in treaties would correspond to their rules on jurisdiction … A look at the relevant treaties does not bear out this expectation'.[39] Accordingly, even if an argument based on environmental law may fall within the jurisdiction of the tribunal, this does not imply that it is allowed to assess its relevance were environmental law not to be part of the applicable law.[40]

The consideration of whether environmental law is part of the law applicable to an investment dispute is directly linked to the text of the relevant IIA, in so far as it refers to sustainability and environmental concerns.

2018) 203; Christian Schliemann, 'Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15' (2013) 12 LAPICT 365; Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Nomos 2018).

37 *Von Pezold* (n 35) para 57.

38 ibid para 59. The Tribunal also stressed that, in order to consider the petitioner submission, it would have to decide whether the communities would fall within the scope of the notion of 'indigenous people' under international law. This issue was clearly outside the scope of the dispute (ibid para 60). For an overview of the *amici curiae* phase in the dispute at hand, see Thomas J O'Leary, 'Non-Disputing Parties and Human Rights in Investor-State Arbitration: *Bernhard von Pezold and Others v Republic of Zimbabwe*' (2017) 18 JWIT 1062.

39 Schreuer (n 26) 13.

40 On the potential detachment between jurisdiction and applicable law, see also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Award (5 November 2021) para 312.

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Earlier attention to environmental issues was represented by reference to environmental concerns in the preamble of a given agreement. NAFTA is a good example to that effect. The preamble of that agreement, referring to the pursuit of its goal 'in a manner consistent with environmental protection and conservation',[41] provided the blueprint for many IIAs drafted between the late 1990s and early 2000s.[42] The subsequent practice has clearly taken steps in bolstering the State power to adopt measures aimed at 'set[ing] legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as … the environment, the conservation of living or non-living exhaustible natural resources'.[43] Though similar wording did not explicitly refer to environmental regulations, it is arguable that they implied a degree of harmonization between various sets of rules.

More clearly, the need to balance investment protection and promotion with environmental obligations has been addressed in many operative provisions in IIAs. Coordination clauses referring to specific environmental treaties,[44] 'not-lowering standard' clauses,[45] police powers clauses[46] and general exception clauses[47] have been widely employed in treaty practice.

Similar provisions, which 'add colour, texture and shading to our interpretation of the agreements',[48] are mostly aimed at enhancing the Host State power to regulate to the detriment of investors' interests. They also incorporate

41 North Atlantic Free Trade Agreement (adopted 17 December 1992; entered into force 1 January 1994) (NAFTA) preamble.

42 For an overview of relevant preambular language, see Michele Potestà, 'Mapping Environmental Concerns in International Investment Agreements How Far Have We Gone?' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (ed), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 193, 194–97.

43 Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (adopted 5 April 2019; not yet into force) preamble.

44 See eg NAFTA art 104. On coordination clauses, see Potestà (n 42) 197–202. For a commentary to NAFTA provisions concerning investment and the environment, see Claire Vines, '"It's Not Easy Being Green" – the Illusion of "Green" and Environmentally Protective Provisions Within the North American Free Trade Agreement (NAFTA)' (2004) 1 Macquarie J Intl & Comp Env L 269.

45 See eg Article 2(5) of the 2020 Italian Model BIT, as follows: 'Each Contracting Party shall encourage socially responsible behaviors by investors, in line with international standards and best practice, and shall not promote investments in its territory by lowering environment and social rights protection'.

46 See eg NAFTA art 1114, DR-CAFTA art 10(4)(b), EU-Vietnam FTA art 8(1), USMCA art 14(16), and 2016 Morocco-Nigeria BIT arts 13 and 23. On police powers, see Catherine Titi, 'Police Powers Doctrine and International Investment Law' in Gattini, Tanzi and Fontanelli (n 5) 323; Rajput (n 3).

47 See eg Regional Comprehensive Economic Partnership Agreement (RCEP) art 17(12).

48 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appelate Body (12 October 1998) WT/DS58/AB/R, AB-1998-4, para 153.

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environmental law by reference to the State power to adopt measures aimed at fulfilling its goals. However, it is to be noted that they do not exclude that an investor, too, may argue that the host State measure does not comply with environmental obligations as a counterargument to a regulatory power-defence.

On the contrary, provisions enhancing the investors' capacity to raise environmental issues within investment claims are non-existent. This is in line with the general consideration that environmental obligations are established for regulating inter-State relations, rather than for recognising individual rights.[49] However, recent trends in the EU negotiation practice are of interest in showing that States' climate change-related obligations may also be invoked by investors in enhancing the possibility of success of their claims.

First, it is worth mentioning the 2020 EU proposal for revisions to the ECT. Inter alia, the EU has proposed to include an express reference to the Parties' obligation to 'effectively implement … the Paris Agreement … including [a State's] commitments with regard to its [NDCs]'.[50] The proposal also spells out an obligation to 'promote and enhance the mutual supportiveness of investment and climate policies and measures'.[51] The principles grounding such proposals seem to have found support during negotiations on the modernisation of the ECT, given that they are referred to as relevant outcomes of the fifteenth negotiation round.[52]

Second, the EU-China Comprehensive Investment Agreement[53] devotes the entire Section IV to 'Investment and Sustainable Development'.[54] The text reiterates the Parties' right to regulate[55] and expresses the willingness

49 See Philippe Sands and others, *Principles of International Environmental Law* (4th edn, CUP 2018) 153–67

50 Council of the European Union, 'ECT Modernisation: Revised Draft EU Proposal' (20 April 2020) EU Doc WK 3937/2020 INIT, 11.

51 ibid. For comments on the proposal for amendments, see Johannes Tropper and Kilian Wagner, 'The EU Proposal for the Modernization of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?' (2022) 23(5–6) JWIT ~~XXX~~.

52 See Energy Charter Secretariat, 'Public Communication Explaining the Main Changes Contained in the Agreement in Principle' (Brussels, 24 June 2022) s 5.

53 Reference to the text may be found at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233> accessed 14 October 2022. The negotiations have apparently ended on December 2020. For comments on the text, see Selçukhan Ünekbaş, 'Scaling the Great Wall: the EU-China Comprehensive Agreement on Investment and Market Access' (2021) 22 JWIT 347.

54 The provisional text of Section IV of the EU-China Comprehensive Investment Agreement is available at <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159346.pdf> accessed 14 October 2022.

55 ibid Subsection II, art 1.

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to strive for increasing environmental standards[56] and cooperation to that effect.[57] Moreover, the agreement explicitly refers to the Parties' commitment to 'encourage investment in environmental goods and services'[58] and to

> promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate-friendly technologies.[59]

Clearly, similar provisions do not recognize individual rights to investors in a proper sense. However, the reference to the obligation to promote 'green' investment may enhance the benefit that a claimant would have in using climate change-related arguments in interpreting the standards of treatment included in the treaty. In particular, the reference to the promotion of climate-friendly investments fosters a construction of the relevant treaty as being breached if a State's measure adversely impacts on 'green' investment while fostering 'brown' investments. This flows from the consideration that a similar measure would be in contrast with the purpose of the treaty and, thus, unreasonable and in breach of FET.[60]

Even in the absence of express provisions in IIAs referring to the environmental standard, environmental law may form part of the applicable law as part of general international law. This may flow from the applicable rules of procedure.[61] The relevant example is Article 42(1) ICSID Convention.[62] As it

56 ibid Subsection II, art 2.

57 ibid Subsection II, arts 3 and 4.

58 ibid Subsection II, art 5(a).

59 ibid Subsection II, art 6(b).

60 This kind of argument is supported by the reasoning in *ESPF*, according to which '[t]he purpose of the ECT is to promote and protect investments in the energy sector. In light of that purpose, in the majority's view, it was unreasonable for the Respondent to alter the specifically promised tariff rates upon which the Claimants relied in making their investment' (*ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020) para 707).

61 See Schreuer (n 26) 11–13.

62 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. For a general comment on this provision, see Christoph H Schreuer and others (eds), *The ICSID Convention: A Commentary* (2nd edn, CUP 2010) 545.

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is well-known, the case law has interpreted the last part of this provision as one requiring a tribunal to apply any rule of international law which might be relevant to the dispute.[63]

The case law concerning human rights-related arguments supports the contention that bodies of international law other than investment law may be part of the law applicable by an investment tribunal. In *SAUR*, one of the many Argentine crisis disputes, the arbitrators had to assess the relevance of rules on human rights for purposes of interpreting the relevant IIA. The Tribunal held that such rules were relevant and applicable under two counts, namely as part of the constitutional domestic legal system, and because they formed part of general principles of international law.[64]

In *Rompetrol*, the investor claimed breaches of FET stemming from alleged human rights violations. With that regard, the Tribunal referred with approval to the Parties' agreement on the fact that the European Convention on Human Rights 'ought to be taken into account as relevant material for the interpretation of the BIT, under the rule in Article 31(3)(c) of the Vienna Convention on the Law of Treaties'.[65]

63 See, for example, the Tribunal in *LG&E*, which held that '[w]ith reference to the rules of international law and, particularly, to the language "as may be applicable", found in Article 42(1) of the ICSID Convention, the Tribunal holds the view that it should not be understood as if it were in some way conditioning application of international law. Rather, it should be understood as making reference, within international law, to the competent rules to govern the dispute at issue. This interpretation could find support in the ICSID Convention's French version that refers to the rules of international law "en la matière"' (*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 88). Similarly, the *Emmis* tribunal, dealing with two separate expropriations claims concerning the Claimants' investments in a broadcasting activity, one based on the relevant BIT and the other based on customary international law, held that 'the Tribunal has to apply international law as a *whole* to the claim, and not the provisions of the BIT in isolation' (*Emmis International Holding, BV and ors v Hungary*, ICSID Case No ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5) (11 March 2013) para 78; emphasis in original). See also *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) paras 61–71. For scholarly comments on the issue in point, see Schreuer and others (n 62) 616–17.

64 *SAUR International SA c République argentine*, Affaire CIRDI Nº ARB/04/4, Décision sur la compétence et sur la responsabilité (6 June 2012) para 330. For comments on the decision, see Jarrod Hepburn, 'Newly-Released *SAUR v Argentina* Decision Touches on Illegality, Test for Expropriation, and Financial "Strangulation" of a Concessionaire' (*IAReporter*, 14 June 2012) <www.iareporter.com/articles/newly-released-saur-v-argentina-decision-touches-on-illegality-test-for-expropriation-and-financial-strangulation-of-a-concessionaire/> accessed 14 October 2022.

65 *Rompetrol* (n 32) para 169.

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Last, in the notorious *Urbaser* dispute, the Tribunal, faced with a human rights counterclaim, held that investment law 'cannot be interpreted and applied in a vacuum … [An IIA] has to be construed in harmony with other rules of international law of which it forms part'.[66]

The reasoning expressed in the above decisions may be applied, *mutatis mutandis*, to environmental law. Namely, the IIA applicable to a dispute is to be interpreted and applied in harmony with environmental obligations binding upon the parties, irrespective of the fact that the IIA explicitly envisages such 'harmonization'. This includes also those provisions aimed at fostering private climate change-related activities,[67] to the effect that States' measures directly damaging foreign climate change-related investments may be presented as in contrast with standards of protection included in the IIA.

3 Environmental Arguments in the Proceedings

3.1 *Environmental Breaches as Evidence of Breaches of Standard of Protection*

The possibility for breaches of rules of international law other than those geared towards the protection of foreign investments to be relevant as elements evidencing a breach of IIA has been suggested from time to time in the case law.

In *SD Myers*, dealing with a case concerning a ban on exports of wastes from Canada to the United States, the Tribunal held that

> [T]he breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied 'fair and equitable treatment', but the fact that a host Party has breached a rule

66 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 dicembre 2016) para 1200. On the issue in point, see Dupuy and Viñuales (n 16); Eric De Brabandere, 'Human Rights and Foreign Direct Investment' in Markus Krajewski and Rhea Tamara Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Elgar 2019) 619; Johannes Hendrik Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68 ICLQ 741; Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes' (2019) 34 ICSID Rev-FILJ 136.

67 On the relevant developments on the role of privates in climate change-related policies under the Paris Agreement, see Freya Beatens, 'Combatting Climate Change Through the Promotion of Green Investment: From Kyoto to Paris Without a Regime-Specific Dispute Settlement' in Miles (n 1) 107.

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> of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach [of FET].[68]

The same reasoning was applied in the *Biloune* case referred to above, to the effect of suggesting that a breach of human rights obligations binding on the Respondent may provide useful elements for assessing alleged breaches of standards of protection.[69]

In *Toto costruzioni*, the dispute revolved around alleged interferences by Lebanon causing damages to a highway construction project.[70] Inter alia, the Claimant advanced a claim based on international customary law, and human rights in particular, concerning the denial of justice stemming from alleged delays in domestic proceedings. The Claimant argued that such conduct by the domestic Lebanese courts constituted a breach of Article 3(1) of the Italy-Lebanon BIT, affording FET protection to foreign investors.[71] It referred to the case-law of the ECtHR and Article 14 ICCPR as elements strengthening its argument.[72] Apparently, Lebanon, though rejecting reference to the ECtHR, did not challenge the jurisdiction of the Tribunal on this claim.[73]

Interpreting the jurisdictional clause contained at Article 7(3) of the relevant BIT,[74] the Tribunal found that in principle it had jurisdiction over claims arising out of breaches of customary law.[75] In the absence of a clear standard for assessing a denial of justice, the Tribunal referred to human rights law and

68 *SD Myers, Inc v Canada*, UNCITRAL Ad hoc arbitration, Partial Award (13 November 2000) para 264.

69 Biloune (n 30) para 203.

70 For an overview of the dispute, see Luke E Peterson, 'Arbitrators Reject Italian Builder's Claims Against Lebanon, While Papering over Divergences on Meaning of Key Treaty Obligations' (*IAReporter*, 11 June 2012) <www.iareporter.com/articles/arbitrators-reject-italian-builders-claims-against-lebanon-while-papering-over-divergences-on-meaning-of-key-treaty-obligations/> accessed 14 October 2022.

71 *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 140 and 143. For a complete overview of the decision on jurisdiction, see Luke E Peterson, 'Analysis: Arbitrators in Lebanon Case Grapple with Non-Treaty Breaches, Denial of Justice, Human Rights Law, and Land Occupation' (*IAReporter*, 30 October 2009) <www.iareporter.com/articles/analysis-arbitrators-in-lebanon-case-grapple-with-non-treaty-breaches-denial-of-justice-human-rights-law-and-land-occupation/> accessed 14 October 2022.

72 *Toto costruzioni* (n 71) para 144.

73 ibid para 150.

74 'The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law'.

75 *Toto Costruzioni* (n 71) para 154. Similarly, *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, PCA Case No 2007-02/AA277, Interim Award (1 December 2008) para 209

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in particular to the ICCPR Commission practice concerning alleged breaches of a fair trial.[76] On the basis of such practice, the Tribunal deemed that the delays would constitute a denial of justice relevant as a breach of the FET exclusively if the Claimant had used the domestic remedies meant to speed up domestic proceedings. Since the Claimant had not provided evidence to that effect, the Tribunal declined jurisdiction over the denial of justice claim.[77]

The decision in *Toto Costruzioni* not to assess the merit of the claim due to evidentiary failures corroborates the consideration that investment tribunals do not have jurisdiction over claims exclusively grounded on rules other than those relating to the protection of foreign investments. It also suggests that the Tribunal deemed that a human rights breach could also amount to a breach of FET. However, the Tribunal implied that the threshold is different: while the delays in the domestic proceedings might have amounted to a breach of human rights provision, they were not sufficient to be relevant as a breach of the FET. Thus, that specific conduct did not fall within the Tribunal's jurisdiction.

The reasoning which may be inferred from the above decisions may also be applied to breaches of environmental-related obligations. For example, environmental obligations may provide factual elements for assessing whether the State measure is arbitrary or unreasonable, thus breaching FET.[78] Few examples of similar lines of reasoning may be made.

In *Bilcon*, the investor lodged a claim concerning a breach of FET consisting, inter alia, in the departure of Canadian authorities from their regular practice regarding environmental impact assessment,[79] to the effect of erroneously quantifying the impact of the Claimant's investment. The Tribunal, after reconstructing the Respondent's environmental obligations,[80] found for

76 *Toto Costruzioni* (n 71) para 160.

77 ibid paras 167–68.

78 This reasoning is also supported by *SD Myers*, where the Tribunal held that a FET breach 'occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective … The determination must also take into account any specific rules of international law that are applicable to the case' (*SD Myers* (n 68) para 263). On the elements of FET, see Rudolph Dolzer and Cristopher Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 130–60 and 178 ff; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 296 ff; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 154 ff.

79 *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 373.

80 ibid paras 488 ff.

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Claimant because the authorities actually departed from the practice they followed in similar cases arbitrarily.[81]

In *Zelena*, the dispute revolved around Serbia's failure to enforce legislation on the handling of hazardous animal by-products in a similar manner to Zelena and its competitors. The Tribunal found for Claimant due to clear proof of discrimination.[82]

In *Mesa* the dispute revolved around alleged breaches of FET stemming from amendments in renewable energy regulations in Canada, reducing the scheme of a feed-in-tariff unreasonably. The Tribunal found for Respondent because Canada followed a 'reasonable' decision-making process, also in light of its environmental obligations, in deciding to change the incentives regime to the detriment of 'green' investors.[83]

In *Unglaube*, the case revolved around the alleged expropriation of two estates employed by investors for an ecotourism activity by Costa Rica, to annex it to a national park. The Claimants argued that, since they always acted in an 'environmental sensitive' way, Costa Rica's measure was, inter alia, unreasonable and thus in breach of the FET. The Tribunal found for Claimants with exclusive regard to the expropriation claim. It was not convinced of any FET breach due to evidentiary failures by the Claimants, with special regard to the alleged Respondent's non-compliance with its environmental obligations.[84] Furthermore, the Tribunal considered the 'environmentally-sensitive' feature of the property in quantifying compensation.[85]

Environmental obligations may also be relevant with regard to investors' 'reasonable' and 'justified' expectations.[86] These are those expectations which

81 ibid para 600.

82 *Zelena NV and Energo-Zelena doo Inđija v Republic of Serbia*, ICSID Case No ARB/14/27. The award is not publicly available. For a brief comment on the few publicly available information of the case, see Jarrod Hepburn, 'Serbia Held Liable at ICSID in Case Alleging Failure to Enforce Environmental Regulations' (*IAReporter*, 10 November 2018) <www.iareporter.com/articles/serbia-held-liable-at-icsid-in-case-alleging-failure-to-enforce-environmental-regulations/> accessed 14 October 2022.

83 *Mesa Power Group LLC v Government of Canada*, PCA Case No 2012-17, Award (24 March 2016) para 672.

84 *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award (16 May 2012) paras 190 and 252–255.

85 ibid para 309.

86 *International Thunderbird Gaming v United States of Mexico*, UNCITRAL, Award (26 January 2006) para 147. On legitimate expectations, see, inter alia, Gian Maria Farnelli, 'Recent Trends in Investment Arbitration Concerning Legitimate Expectations. An Analysis of Recent Renewable Energies Investment Case Law' (2021) 23 ICLR 27.

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stem from 'clear representation' on behalf of the State and a 'prudent' consideration by the investor of all the relevant circumstances.[87]

Since an investor 'is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy)',[88] it may be argued that investors' expectations concerning State policies addressing climate change-related issues are of two kinds. On the one hand, the investor might expect that the State will adopt adaptation measures aimed at reducing the effect of foreseeable adverse climate events. On the other, the investor might expect that the State would promote 'green' investments as a measure geared towards climate change mitigation.[89]

Recent ECT renewable energies' cases have shown that a claimant might argue that its expectations are justified on the basis of the Host State's conduct of being bound by international environmental obligations,[90] such as those stemming from the United Nations Framework Convention on Climate Change and the Paris Agreement.[91]

87 Investment case law on the matter in point is ample. See, inter alia, *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 148; *Gami Investments, Inc v The Government of the United Mexican States*, UNCITRAL Ad hoc arbitration, Award (15 November 2004) para 76; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 130; *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) paras 340 and 351; *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 161 and 257–63; *Total SA v The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) para 145; *Philip Morris* (n 4) para 426; *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No 2014-01, Award (2 May 2018) para 360(1)-(3). See also Attila Tanzi, 'The Relevance of the Foreign Investor's Good Faith', in Gattini, Tanzi and Fontanelli (n 5) 193.

88 *Antaris* (n 87) para 360(13).

89 Literature argues that such trend flows from existing climate change-related international obligation. See Beatens (n 67).

90 Reference may be made to this effect to exhibits submitting by claimants concerning the United Nations Framework Convention on Climate Change (eg *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl. v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018) para 87; *Watkins Holdings Sàrl. and others v Kingdom of Spain*, ICSID Case No ARB/15/44, Award (21 January 2020) para 71; *The PV Investors v Spain*, PCA Case No 2012-14, Final award (28 February 2020) para 591; *Infracapital F1 Sàrl and Infracapital Solar BV v Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (13 September 2021) para 113)

91 On mitigation obligations under the Paris Agreement, see Harald Winkler, 'Mitigation (Article 4)' in Klein (n 12) 141.

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It is however to be noted tribunals in renewable energies cases have been cautious in referring to climate change-related obligations for substantiating legitimate expectations. Reference to the Host State environmental obligations is indeed usually avoided by tribunals in their analysis of a given case. In the rare case in which such reference is made, climate change-related obligations are not deemed sufficient to ground legitimate expectations.

This is exemplified by the *Sevilla Beheer* decision. Here, the Tribunal expressed of being 'sympathetic'[92] with the Claimants' argument that their expectations that the renewable energies incentives regime would not be changed were grounded on 'a wider international and domestic policy of promoting renewable energy'.[93] However, it stressed that 'the fact that a State is bound by international obligations in the field of environmental law and participates in the international debate concerning renewable energy sources does not as such give rise to a "State representation"'.[94]

These elements of arbitral practice arguably point to the fact that investment tribunals do not consider international environmental agreements particularly relevant for purposes of establishing legitimate expectations and prefers to refer to acts of a domestic nature. This appears, *mutatis mutandis*, in line with the arguments according to which provisions of general legislation may not ground legitimate expectations.[95]

3.2 *Environmental Law as an Interpretative Parameter for Construing Standards of Protection*

The second way in which environmental obligations may be relevant in investment arbitration is as normative parameters for systemically construing investment standards. Indeed, as authoritatively held by the ICJ in the *Gabčíkovo-Nagymaros* judgment, environmental issues, as expressed in the concept of sustainable development, 'have to be taken into consideration … not only when States contemplate new activities but also when continuing

92 *Sevilla Beheer BV and others v Spain*, ICSID Case No ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum (11 February 2022) para 861. For a comment on the case, see Lisa Bohmer, '*Sevilla Beheer v. Spain* Tribunal Finds that Claw-Back Provision Violates the Energy Charter Treaty; Tribunal Majority Postpones Decision on Reasonable Return to the Quantum Phase, While Dissenter Sees Broader Treaty Breaches' (*IAReporter* 14 October 2022) <www.iareporter.com/articles/sevilla-beheer-v-spain-tribunal-finds-that-claw-back-provision-violates-the-energy-charter-treaty-tribunal-majority-postpones-decision-on-reasonable-return-to-the-quantum-phase-while-dissenter-sees/> accessed 14 October 2022.

93 *Sevilla Beheer* (n 92) para 860.

94 ibid para 862.

95 CF *Antaris* (n 87) para 360(6); *Philip Morris* (n 4) paras 426–27.

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with activities begun in the past',[96] independently from express references in the treaty. Accordingly, the FPS and FET standards may be construed in an environmental-friendly way both in the interest of the State, and investors.

As to FPS, it is commonly agreed that such standard includes a due diligence obligation concerning the adoption of all reasonable measures to protect the physical integrity of the investor and the investment.[97] In *Biwater*, the Tribunal held that such obligation also includes that the State must guarantee a 'secure physical environment'.[98] Given the ongoing widening of the notion of harm covered by the FPS standard, the literature has argued that natural disasters and hazards are becoming part of the risk covered by this standard.[99]

Accordingly, the failure of a State to adopt adaptation measures, which may reduce damages caused by an adverse climate event threatening foreign investments, may base an FPS claim. The example in this scenario involves an investor whose investment suffers damages from climate-related weather conditions such as hurricanes or flooding, which might have been prevented or at least reduced, were the Host State in compliance with its climate change adaptation obligations. Such reasoning is supported by the *Allard* case.

The dispute revolved around alleged damages suffered by the Claimant stemming from the Barbados' failure to enforce its environmental obligation with regard to wetlands. Such failure would have caused a deterioration of the landscape near the 'eco-touristic' activity of the Claimant, thus damaging its investment.[100]

The Tribunal accepted the Claimant's argument in principle. It reiterated that FPS requires States a due diligence obligation to adopt all 'reasonable' measures to prevent damages to foreign investments. It then added that the 'host State's international obligations may well be relevant' for assessing the reasonableness of its action.[101] In this sense, an investor may well argue that

96 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) [1997] ICJ Rep 7, para 140.

97 See, inter alia, *American Manufacturing & Trading, Inc v Republic of Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997) para 6.05; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) para 84; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 177; *Saluka* (n 4) paras 483–84; *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) para 523.

98 *Biwater Gauff* (*Tanzania*) *Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 729.

99 Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer 2019) 263 ff.

100 *Peter A Allard v The Government of Barbados*, PCA Case No 2012-06, Award (27 June 2016) para 56.

101 ibid para 244.

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the Host State failure to comply with environmental obligations amounts to a breach of FPS insofar as such failure has caused damage to the investment.

The quotation just referred to from *Allard* links the notion of 'reasonableness' of the Host State's measures to its international obligations. This is in line with the trend, which is spreading in domestic climate-change litigations, according to which the 'appropriateness' or 'reasonableness' of State action in exercising their margin of discretion concerning public policy objectives is tested against the background of environmental international policy goals[102] which, on the one hand, arguably constitute 'a global ecological public order';[103] on the other, gives effect to the general due diligence obligation concerning the protection of fundamental human rights.[104]

Such notion of 'reasonableness' may impact FET claims, too, with special regard to the legitimate expectation of a reasonable remuneration, or return, from investment activities. As held by Sir Ian Brownlie, such expectation 'constitute[s] the alter ego of the concept of legitimate expectations' because 'an investment carries the expectation that it will be profitable'.[105] Following

102 See, in this regard, Netherlands Supreme Court, *The State of the Netherlands v Urgenda*, Judgment (20 December 2019) paras 5.2.1–5.5.3, also reviewing the previous Court of Appeal decision. For a comment to the Dutch courts' decisions, see, inter alia, Christoph W Backes and Gerrit A van der Veen, 'Urgenda: The Final Judgment of the Dutch Supreme Court' (2020) 17 J Eu Env & Pl L 307; Olivier De Schutter, 'Changements climatiques et droits humains: l'affaire Urgenda' (2020) 31 Rev Trim Dr Hom 567.

103 Supreme Court of Colombia, 'Future Generations vs. Ministry of Environment and Others', Case No STC4360-2018, Judgment (5 April 2018) 22, para 6 (original version <https://cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/> accessed 14 October 2022; unofficial English translation <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf> accessed 14 October 2022).

104 Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 TEL 37. See also the debate over the *Duarte Agostinho & Ors litigation* (Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (*EJIL: Talk!*, 22 September 2020) <www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 14 October 2022; Paul Clark, Gerry Liston and Ioannis Kalpouzos, 'Climate Change and the European Court of Human Rights: The Portuguese Youth Case' (*EJIL: Talk!*, 6 October 2020) <www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 14 October 2022; Corina Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' (*EJIL: Talk!*, 22 December 2020) <www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> accessed 14 October 2022).

105 *CME Czech Republic BV v The Czech Republic*, UNCITRAL Ad hoc arbitration, Separate Opinion on the Issues at the Quantum Phases of *CME v Czech Republic* by Ian Brownlie (14 March 2003) para 58.

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this authoritative line of reasoning, one may argue that claims involving an expectation of a reasonable rate of return are more easily proved than others in their constitutive elements. The recent case law concerning renewable energies supports this contention.[106]

The above cases concern the alleged Host State responsibility for breaches of the investors' legitimate expectations stemming from an amendment of the incentives to invest in the renewable energy sector. Though reaching different conclusions on the merits, tribunals have acknowledged that the Host State has a duty to guarantee a reasonable return to the investment also in the face of the legitimate exercise of States' regulatory powers aimed at reducing public debt.[107] The *RREEF* tribunal has, in particular, argued that whenever the Host State causes a reduction in the profit of the investment below the reasonable rate, that State would act disproportionately and unreasonably, thus breaching FET irrespective of explicit commitment to that effect.[108]

Those tribunals have commonly linked such expectation to the wording of the domestic legislation, in particular the Spanish one. However, the fact that this line of reasoning was analysed by a tribunal in an earlier ECT case against Hungary,[109] and in a case against Italy, though under the slightly different qualification of 'fair return' or 'fair remuneration',[110] supports the idea that the issue of reasonable return may be employed even in the absence of specific domestic provisions assuring such return.

The main issue concerning similar reasoning is quantifying the 'reasonableness' of the expected return. Such assessment has to be made on a case-by-case basis. The *RREEF* Tribunal position according to which a reasonable return is

106 *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021) para 356; *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020) para 690; *InfraCapital* (n 90) para 687; *PV Investors* (n 90) para 611; *RREEF* (n 90) para 387.

107 ibid (n 90) para 385.

108 ibid (n 90) para 472. To the same effect, *PV Investors* (n 90) para 648; *InfraCapital* (n 90) para 687. See Sondra Faccio, 'The Assessment of the FET Standard Between Legitimate Expectations and Economic Impact in the Italian Renewable Energy Investment Case Law' (2020) 71 QIL Zoom In 3.

109 *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010). For comments, see Michał Krzykowski, Michał Mariański and Jakub Zięty, 'Principle of Reasonable and Legitimate Expectations in International Law as a Premise for Investments in the Energy Sector' (2021) 21 International Environmental Agreements: Politics, Law and Economics 75.

110 *Sun Reserve Luxco Holdings SRL v Italy*, SCC Case No 132/2016, Award (25 March 2020) paras 848 ff.

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'significantly above a mere absence of financial loss'[111] appears sensible. In line with *Allard*,[112] it may also be argued that non-economic factors, such as public policy goals, may be relevant in assessing such reasonableness.[113] Accordingly, the case may be made that the return 'reasonably' expected in this sector would be higher than the one of other sectors given the social, political and economic climate favouring 'green' investments.

4 Evidentiary Hurdles

As shown above, breaches of environmental law are better suited to enter as arguments, rather than claims, in investment arbitration. This means that the party referring to a breach of environmental law will have to use such argument for enhancing the possibility of success of its case by linking that breach to a given standard of protection.

While from an argumentative perspective the use of arguments based on rules other than that of investment law, including environmental-related ones, for enhancing the possibility of success of FET or FPS claims may appear similar, the situation is rather different from a procedural standpoint. Indeed, FET and FPS claims present different hurdles when it comes to proving a case.

According to well-established case law and literature, investment arbitration follows the general principle of law *actori incumbit probatio*, according to which it is the party asserting a fact, or a defence,[114] which bears the burden of proving such fact or defence.[115] On the basis of the above consideration accord-

111 *RREEF* (n 90) para 387. Similarly, *Hydro* (n 106) para 615.

112 See supra nn 100–101.

113 For example, in the Spanish context, the *RREEF* tribunal highlighted that the reasonable return had to 'be assessed keeping in mind the Respondent's concern about the cost of electricity and the competitiveness with other means of production of energy' (*RREEF* (n 90) para 385). Similarly, *PV Investors* (n 90) para 618. See also reference to sustainability as one of the key elements for assessing 'fair return/remuneration' in *Sun Reserve* (n 110) para 847.

114 A defence is 'an issue of law or fact that, if determined in favour of the defendant, will relieve him of liability wholly or in part' (Law and Martin (n 14), entry 'Defence').

115 This is the so-called 'persuasive burden of proof'. The study of this principle falls outside the scope of this article. Suffice to recall the abundant literature on the matter in point, namely Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 61 ff; Markus Benzing, 'Evidentiary Issues' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1374; Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 92 ff; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 302 ff; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study*

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ing to which breaches of environmental obligations may not be submitted as autonomous claims before investment tribunals, this means that the investor submitting an environmental argument would bear a double burden, namely persuading the arbitrators that the Host State has breached its environmental obligation, on the one hand; and that such breach is relevant in assessing a breach of the IIA, on the other.[116]

With regard to potential FET breaches, the case law shows that this could prove highly difficult. Indeed, as aptly summarised by the *Sun Reserve* tribunal, a claimant alleging a breach of FET has to demonstrate that the State action

> [is] manifestly or grossly unfair or unreasonable, [is] arbitrary or discriminatory, constitute[s] a denial of justice in national proceedings in the host State, or that the host State engage[s] in a wilful neglect of duty or a wilful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards.[117]

As shown above when addressing the *Bilcon*, *Mesa*, *Unglaube* and *Zelena* disputes[118] a claimant raising a case on the basis of an alleged breach of FET stemming from lack of compliance with environmental obligations would have to demonstrate the absolute unreasonableness of the State conduct, or a serious breach of its legitimate expectations according to the 'preponderance of evidence' standard.[119] Conversely, the respondent would not be required to produce evidence concerning the reasonableness of its conduct, but only of its factual defences or exceptions to the applicable rule.[120] This obviously makes

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on Evidence Before International Tribunals (Kluwer International 1996) 53 ff; Malcolm N Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015* (online edition, Brill 2017) para 257. On the burden of proof in investment arbitration in particular, see Frederic G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (OUP 2018) 23 ff.

116 The latter point may appear as one of *jura novit curia* rather than burden of proof. However, as aptly highlighted in the literature, in investment arbitration '[m]ost of the work of pleading and proving the applicable law falls to the parties' (Sourgens, Duggal and Laird (n 115) 145). Following such pragmatic perspective with regard to the matter at hand, one may argue that, notwithstanding the applicability of *jura novit curia* in investment arbitration, the parties have also to demonstrate that the relevance of the environmental breach for assessing a breach of IIA.

117 *Sun Reserve* (n 110) para 688.

118 See supra Section 2.1.

119 On this standard, see Amerasinghe (n 115) 241–242; Benzing (n 115) 1371, 1403; Brown (n 115) 100; Kazazi (n 115) 347–50; Sourgens, Duggal and Laird (n 115) 80–86.

120 For an overview of notion of 'exception' and related burden of proof issues, see Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals:*

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the demonstration of an environmental arguments under an FET breach rather difficult, also in light of the fact that tribunals do not give special probative value to the fact that a State is bound by an environmental obligation, as the *Sevilla Beheer* decision demonstrate.[121]

Conversely, evidentiary issues in FPS claims are easier to address for claimants. The due diligence nature of the FPS standard could assist the claimant in proving its case. Indeed, it would be sufficient for the claimant to produce evidence raising strong presumptions with regard to the fact that the alleged breach of the environmental-related obligation caused damage covered by the standard – that is, raising presumptions on the casualty link between the breach of the environmental obligation and the damage.[122] Then, the burden of going forward with the evidence would shift on the other party, to the effect that the respondent would lose the case if it fails to rebut the claimant's evidence raising presumptions.[123]

This shift is well exemplified in the *Siag* case. The dispute arose out of Egypt's alleged expropriation of the Claimants' property of oceanfront land through a series of acts and omissions, including the physical seizure of the property on two occasions.[124] Amongst the other things, a breach of FPS was claimed. The Tribunal expressed that '[a]bsent any evidence to the contrary the Tribunal accepts without reservation Claimants' evidence'.[125] From this evidence, the Tribunal inferred that Egypt was aware of the risk the Claimants' investment was under and that it wilfully failed to take steps to prevent damages,[126] thus finding for Claimants.

Accordingly, environmental arguments may provide more useful elements in an FPS claim. Here, the claimant would have only to demonstrate that he

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Expert Evidence, Burden of Proof and Finality (CUP 2011) 212–21; Michelle T Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9 JIEL 615; Torsten Stirner, *The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings* (Brill 2021) 166–75 and 185–89.

121 See supra nn 92–94.

122 Mantilla Blanco (n 99) 426.

123 On the functioning of the so-called 'shifting principle', see Sourgens, Duggal and Laird (n 115) 57 ff.

124 For a comment on the case, see Luke E Peterson, 'Majority Sides with Claimants in Siag and Vecchi Case, and awards $74.5 Million for Egyptian Seizure of Resort Land' (*IAReporter* 9 June 2009) <www.iareporter.com/articles/majority-sides-with-claimants-in-siag-and-vecchi-case-and-awards-74-5-million-for-egyptian-seizure-of-resort-land/> accessed 14 October 2022.

125 *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) para 446.

126 ibid paras 447–48. See, to the same effect, also *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) paras 84 ff.

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suffered damage to its investment stemming from an alleged breach of environmental obligations. The Claimant would not be required to convincingly demonstrate the breach: providing elements from which the breach and the causality link might be inferred would be sufficient to reverse the burden of evidence. Consequently, it would be up to the State to demonstrate its diligence,[127] that is the 'reasonableness' of its conduct. This means to produce either evidence of the compliance with environmental obligations or concerning the lack of a causality link. This could prove difficult, in particular with regard to activities which *prima facie* appears in contrast with climate change-related policies, such as slowing down the green transition by reducing incentives to renewable energies.

5 Concluding Remarks

The above analysis has shown that climate change-related arguments are gaining space in investment arbitration. Contrary to traditional practice, such arguments have also been used by investors. This appears sensible, given the potential profitability of the 'green transition' activities and the increasing attention of corporations to public concerns.[128]

The case has been made that environmental issues may enter as 'arguments', rather than 'claims', in investment arbitration. This flows from the traditional restrictive approach that investment tribunals follow with regard to their jurisdiction *ratione materiae*, to the effect of declining jurisdiction over claims exclusively based on rules other than those geared towards the protection of foreign investments, even if they form part of the applicable law.

It has thus been argued that environmental obligations may either be used as elements evidencing a breach of the IIA, or as normative parameters for systemic interpretation, with regard both to FET and FPS. However, it has been shown that they might be more useful in an FPS rather than in a FET claim, due to differences in the evidentiary burden between the two standards.

One may wonder whether investors may have an interest, and thus be willing, to play the role of 'environmental guardians' and thus use arguments based on environmental considerations before investment tribunals, rather

127 Mantilla Blanco (n 99) 425.

128 On the development in point, see, inter alia, Davide Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: a Critical Framework for the Future' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013); Ludovica Chiussi Curzi, *General Principles for Business and Human Rights in International Law* (Brill 2021).

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that sticking to more consolidated investment arguments. The answers appear positive under three counts.

First, from a social point of view, adding environmental considerations, and climate change ones in particular, to their claim may help investors in being perceived not only as actors pursuing monetary gain but also as entities addressing public concerns in a utilitarian way. This particularly flows from the fact that it has been shown that investors' arguments in investment arbitration, and tribunals' decisions thereto, influence States' regulatory policies.[129]

Second, from a litigation strategy perspective, these arguments add strings to the bow of investors, who 'no doubt would feel compelled to use any legitimate argument to give meaning to the protections afforded under investment treaties'.[130]

Third, from a procedural standpoint, *amici curiae* may submit petitions to participate in proceedings in the investors' assistance,[131] rather than to that of States, providing them with free-of-costs scientific expertise which might be of assistance in proving their case.

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129 See Tarald Laudal Berge and Axel Berger, 'Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity' (2021) 12 JIDS 1; Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID' (2019) 34 ICSID Rev-FILJ 1.

130 Susan L Karamanian, 'The Place of Human Rights in Investor-State Arbitration' (2013) 17 Lewis & Clark L Rev 423, 432.

131 The protection of the environment is indeed one of the many issues at the basis of *amici curiae* participation in investment arbitration, the other being protection of human rights. See Dimitrij Euler and Markus Gehring, 'Public Interest in Investment Arbitration' in Dimitrij Euler (ed), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (CUP 2015) 7; Wei-Chung Lin, 'Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration' (2017) 19 ICLR 270.

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